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October 16, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B-204
Washington, DC 20554

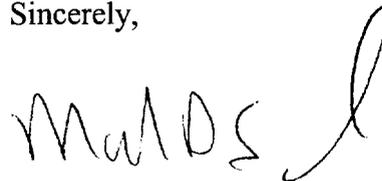
Re: Application by Verizon New England Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Massachusetts, CC Docket No. 00-176

Dear Ms. Salas:

Enclosed herewith are the comments of WorldCom, Inc. on the above-captioned 271 application of Verizon-Massachusetts.

Pursuant to this Commission's order, WorldCom is filing a confidential portion of its submission and a redacted version of its entire submission. Inquiries regarding access to the confidential information by other participants in this proceeding (subject to the terms of the applicable protective order) should be addressed to: Elena Broder-Feldman, Jenner & Block, 601 13th Street, NW, Suite 1200, Washington, DC 20005, (202) 637-6310.

Sincerely,



Mark D. Schneider

Enclosure

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OCT 16 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Application by Verizon New England Inc.)
Bell Atlantic Communications, Inc.)
(d/b/a Verizon Long Distance), NYNEX)
Long Distance Company (d/b/a Verizon)
Enterprise Solutions), and Verizon Global)
Networks Inc., for Authorization to Provide)
In-Region, InterLATA Services in Massachusetts)
_____)

CC Docket No. 00-176

**COMMENTS OF WORLDCOM, INC. ON THE
APPLICATION BY VERIZON FOR AUTHORIZATION TO PROVIDE
IN-REGION, INTERLATA SERVICES IN MASSACHUSETTS**

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October 16, 2000

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F	Order, Massachusetts D.T.E. 98-57-Phase III, Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000 (DTE issued Sept. 28, 2000)
G	Sept. 27, 1999, letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, to Nancy E. Lubamersky, U S West

TABLE OF CITATION FORMS

FCC Orders	
<u>First Report and Order</u>	<u>In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996</u> , CC Docket Nos. 96-98 & 95-185, First Report and Order, 11 F.C.C.R. 15499 (1996).
<u>LA I Order</u>	<u>In re Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana</u> , CC Docket No. 97-231, Memorandum Opinion and Order, 13 F.C.C.R. 6245 (1998).
<u>LA II Order</u>	<u>In re Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long-distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana</u> , CC Docket No. 98-121, Memorandum Opinion and Order, 13 F.C.C.R. 20599 (1998).
<u>MI Order</u>	<u>In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan</u> , CC Docket No. 97-137, Memorandum Opinion and Order, 12 F.C.C.R. 20543 (1997).
<u>NY Order</u>	<u>In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York</u> , CC Docket No. 99-295, Memorandum Opinion and Order, 15 F.C.C.R.3953 (1999), <u>aff'd</u> , <u>AT&T Corp. v. FCC</u> , 220 F.3d 607 (D.C. Cir. 2000).
<u>OK Order</u>	<u>In re Application of SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma</u> , CC Docket No. 97-121, Memorandum Opinion and Order, 12 F.C.C.R. 8685 (1997)
<u>Represcription Order</u>	<u>In re Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers</u> , CC Docket No. 89-624, Order, 5 F.C.C.R. 7507 (1999).
<u>SC Order</u>	<u>In re Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina</u> , CC Docket No. 97-208, Memorandum Opinion and Order, 13 F.C.C.R. 539 (1997), <u>review denied</u> , <u>BellSouth Corp. v. FCC</u> , 162 F.3d 678 (D.C. Cir. 1998)

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<u>USF Tenth Report and Order</u>	<u>In re Federal-State Joint Board on Universal Service</u> , CC Docket No. 96-45, Tenth Report and Order, 14 F.C.C.R. 20156 (1999)
Declarations and Affidavits	
Breen Decl.	Joint Declaration of Maura C. Breen on Behalf of Verizon (Verizon Tab 5)
Browning Decl.	Joint Declaration of Susan C. Browning on Behalf of Verizon (Verizon Tab 4)
Bryant Decl.	Declaration of Mark T. Bryant on Behalf of WorldCom (Tab B hereto)
Guerard and Canny Decl.	Joint Declaration of Elaine M. Guerard and Julie A. Canny on Behalf of Verizon (Verizon Tab 3)
Kelley Decl.	Declaration of Dan Kelley on Behalf of WorldCom, Inc. (Tab E hereto)
Kinard Decl.	Declaration of Karen A. Kinard on Behalf of WorldCom (Tab C hereto)
LaCouture and Ruesterholz Decl.	Joint Declaration of Paul A. LaCouture and Virginia P. Ruesterholz on Behalf of Verizon (Verizon Tab 1)
Kwapniewski Decl.	Joint Declaration of Patty Kwapniewski and Sherry Lichtenberg on Behalf of WorldCom Inc. (Tab D hereto)
McLean and Wierzicki Decl.	Joint Declaration of Kathleen McLean and Raymond Wierzicki on Behalf of Verizon (Verizon Tab 2)
Mudge Decl.	Declaration of W. Robert Mudge on Behalf of Verizon (Verizon Tab 7)
Proferes Decl.	Joint Declaration of Patricia Proferes, John Nolan, Paul Bobeczko, and Thomas Graham on Behalf of WorldCom Inc. (Tab A hereto)
Taylor Decl.	Declaration of William E. Taylor on Behalf of Verizon (Verizon Tab 6)
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<u>DOJ Okla. Eval.</u>	Evaluation of the United States Dept. of Justice, <u>In re Application of SBC Communications, Inc., et al. to Provide In-Region, InterLATA Services in the State of Oklahoma</u> , CC Docket No. 97-121 (filed May 21, 1997)

Other Record Materials	
DTE 7/27/00 Letter	DTE's Letter Denying AT&T's Petition to Requesting the Review and Reduction of UNE Recurring Charges (VZ-MA App. B, Tab 481)
<u>Massachusetts DSL Order</u>	Order, Massachusetts D.T.E. 98-57-Phase III, Investigation by the Department on its own motion as to the propriety of rates and charges set forth in M.D.T.E. No. 17, filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000 (DTE Sept. 28, 2000)
<u>Order Instituting New Proceeding</u>	<u>In re Joint Complaint of AT&T Communications of New York Inc., et al.</u> , Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding, Case 95-C-0657 <u>et al.</u> (NYPSC Sept. 30, 1998) (VZ-MA App. B, Tab 455, Exh. F)
<u>Phase 4 Order</u>	<u>Consolidated Petitions of New England Telephone and Telegraph Co.</u> , Phase 4 Order, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (DTE Dec. 4, 1996) (VZ-MA App. H, Tab 162)
<u>Phase 4-A Order</u>	<u>Consolidated Petitions of New England Telephone and Telegraph Co.</u> , Phase 4-A Order, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (DTE Feb. 5, 1997) (Byrant Decl., Att. 2)
Sayer Decl.	Declaration of Nancy Sayer, <u>In re NYNEX Corp. And Bell Atlantic Corp., Application for Consent to Transfer Control</u> , Tracking No. 960205, 960221 (FCC filed Oct. 22, 1996) (Bryant Decl., Att. 3).

INTRODUCTION AND EXECUTIVE SUMMARY

Verizon Massachusetts' application should be denied because its unbundled network element pricing is not cost-based and does not support effective competition. That one critical failure infects multiple aspects of this application. Most of all, Verizon has failed to meet checklist item two, 47 U.S.C. § 271(c)(2)(B)(ii), which imposes on Verizon the burden of proving that it has made available unbundled network elements at just, reasonable and non-discriminatory prices based on the costs of the elements. Verizon's eleventh-hour decision to abandon its prices rather than defend them shows that even Verizon understands that the rates upon which it must rely are indefensible. In addition, the absence of competition due to uneconomic UNE pricing contributes to Verizon's failure to meet its burden of proving working OSS, access to DSL-compatible elements, and adequate performance standards and penalties. Finally, because defective pricing erects an impassable barrier to entry into the local residential market, the Commission should conclude that a grant of this application is contrary to the public interest, as well as a violation of the checklist.

At its most basic level, local residential competition requires that competitors have the technical ability to interconnect with and share the multi-billion dollar local telephone infrastructure, and that they be able to do so at a price that allows them profitably to offer consumers competitive services. The 1996 Act is designed to accomplish these twin goals: its central provisions open the incumbents' networks and mandate that the FCC oversee a federal wholesale price structure that is reasonable and includes non-discriminatory and cost-based pricing. In section 271 Congress also created an incentive: if the BOCs open their networks

with cost-based competitive prices and satisfy the other elements of the checklist, they can participate in their in-region long-distance markets.

In early section 271 applications, several BOCs attempted to win entry into their long-distance markets before they had truly opened their local markets. In part because the FCC's pricing authority was subject to legal challenge, the decisive issues facing the FCC and state commissions in these early applications usually concerned whether the BOC networks were open as a technical matter. In landmark decisions by the Michigan Public Service Commission and the FCC in 1997, bolstered by subsequent FCC decisions in South Carolina and Louisiana, regulators made clear that paper promises to comply with the Act's market-opening provisions would not be enough, and that the BOCs had to prove, with solid empirical data, that they actually provide the same network access to competing carriers that they provide to themselves.

The results of these decisions are now plain to see. The Bell Companies who want access to their long-distance markets are increasingly willing to undertake the necessary technical work to open their local networks to get that access. After the Ameritech and BellSouth decisions, the Bell Companies literally went back to the drawing board, participating with experts like KPMG to create and test operations support systems that actually do support the activities necessary to share network facilities. The applications since these seminal early section 271 decisions have seen the development of important particulars of working OSS. And while the BOCs have not yet completed the necessary work to implement commercially ready OSS, all parties now understand and accept that true working OSS is an achievable goal and a baseline prerequisite for section 271 approval.

The lesson of this recent history should not be forgotten. Without regulators mandating that competitors have fair and workable access to BOC networks, there would be little prospect

of local residential competition today. Without federal support, state regulators that wanted to open their markets would have been on their own, the bar would have been set so low that applicants would have had only to go through the motions of checklist compliance to prevail, and the failure of local competition would have been chalked up to unrealistic Congressional expectations and renewed assertions of a “natural monopoly” in local telephony.

But even perfect OSS is useless if the network’s lines and switches cost too much to lease. So today the Commission stands at another crossroads, and the issue is pricing. Just as in 1997, the BOCs hope that the Commission lacks the will to insist that the Act really means what it says, that “reasonable” wholesale prices must be “based on cost.” And just as in 1997, the stakes for local residential competition are enormous. If wholesale prices that are indefensible (and, indeed, are undefended) are found to be “good enough,” the Bell companies will redouble their efforts to resist cost-based pricing, and the effort to open the local markets will be set back immeasurably.

The Commission has fought hard to vindicate its authority to insist on local wholesale pricing that works because it is cost-based. Now is the time for the Commission to stand by its judgment that pricing must be right – not perfect, but within a range that fairly derives from the Commission’s cost-based pricing principles – before section 271 authority is granted. Verizon’s last-minute stunt of substituting one set of unacceptable rates for another as a way to preempt any rational analysis of its pricing should not be tolerated. As we show in what follows, based on the facts Verizon presents on this record, its application must be denied. And while no detailed analysis of its tariff filing of October 13th is either possible or relevant to this proceeding, it is worth noting that its “new” rates are not supported by any cost studies on the record, and appear

to lead to the same competitive dead-end that has left most Massachusetts households without a choice of local telephone providers.

Our Comments are organized in the following manner:

First, WorldCom sets forth the relevant legal standard, which requires the Commission alone to find compliance with the competitive checklist, including the requirement that prices for network elements be “just, reasonable” and “based on . . . cost.” 47 U.S.C. § 251(c)(2); *id.* § 252(d)(1). It is equally clear that the burden of proof is on Verizon to develop a record that proves checklist compliance. While the standard is not perfection, the prices must be good enough so that the Commission is comfortable that the prices fairly derive from the forward-looking costs of the elements taking into account the particular conditions present in each state.

WorldCom then shows that Verizon has failed to carry its burden of proving that its network element prices are cost-based and reasonable. WorldCom focuses particularly on the price of unbundled local switching, though it also describes Verizon’s failure of proof on other element prices, including transport and loops.

As to switching, WorldCom shows first that there is a complete failure of proof on Verizon’s part. Verizon does not even address most criticisms that have been leveled at its rates. And its cost study, which it submitted but does not defend, is equally unrevealing. Critical figures relating to the switching costs are explained only on the ground that they have been spit out of a proprietary model that is not made part of the record. Of course, if Verizon intends to rely on its Friday the 13th switching prices, despite its gross violation of the Commission’s “complete when filed” rule, there is no record at all for the Commission to evaluate.

Next, we show that to the extent figures can be evaluated at all, many are grossly inflated. Thus, while switches are purchased at large discounts from switch vendors, Verizon set the

switching rates as if it never received these discounts. And while it may cost as much as 10% of the cost of the switch to have the switch installed, Verizon makes the ludicrous assumption that it pays well over half as much to install a switch as to purchase it in the first place. And to further jack up its switch price, Verizon makes the indefensible assumption that every single building it owns is built solely to house switches, so that literally its entire building plant's costs are larded into its switch price. These and other errors have a compounding effect: the rates generated by Verizon's compliance cost study (which was adopted virtually in its entirety by the Massachusetts Department of Transportation and Energy ("DTE") from Verizon's initial study), bears no relation whatsoever to Verizon's real costs in purchasing switches, never mind to the forward-looking cost of reproducing its switch plant.

Nor is there room to doubt that the results here are deeply flawed. Verizon's cost model values the switch plant as worth between \$2 and \$3 billion. But the FCC's own TELRIC model values that same switch plant at only \$500 million, and Verizon reports its embedded switching costs as having a book value of only \$600 million. Thus, on the generous assumption that Verizon's embedded costs are themselves not grossly inflated, Verizon's switching rates ought to be reduced by some 77%. The same point is made by comparing Massachusetts' switching rates to those of other states. Such a comparison similarly shows that Massachusetts' rates are three to four times higher than rates in other states. These are not cost-based rates. They are at least four times cost-based rates.

While Verizon's switching rates are the most egregious example of non-cost-based rates, WorldCom also explains how transport and loop rates are not cost-based and need to be recalculated.

Next WorldCom shows that it and others have repeatedly called on the Massachusetts DTE to correct these rates, and that the DTE has consistently declined to do so. Given the magnitude of the errors and the DTE's track record, this is not a case in which the market is open now and the FCC can rely on the DTE promptly to make the necessary corrections to the rates after this application is granted.

Nor is Massachusetts the least bit like New York, where the state commission has aggressively challenged Verizon's cost proposals and insisted that rates based on cost models with serious defects be promptly corrected. As this Commission frequently has stressed, such differences are critical, for checklist compliance is a contextual inquiry, and the FCC must "look at each application on a case-by-case basis and consider the totality of the circumstances" to see if the checklist is satisfied. TX Order ¶ 46. To state the obvious, rates that satisfy TELRIC and the checklist in New York for any number of reasons may well be inadequate in Massachusetts. As the D.C. Circuit Court of Appeals warned in approving the FCC's judgment that New York's switching rates satisfied TELRIC under the circumstances present in New York, "application of TELRIC principles may result in different rates in different states." AT&T Corp. v. FCC, 220 F.3d 607, 615 (D.C. Cir. 2000).

It should come as no surprise that rates this flawed have devastating competitive consequences. WorldCom shows that reliance on Verizon's rates creates a competition-killing price squeeze. For the average consumer, Verizon's UNE-P wholesale rates are actually higher than its retail rates. A competitor offering retail service for the same price as Verizon, relying on a combination of elements leased from Verizon at its extortionate rates, would find itself almost \$11 in the hole for each customer each month, even before it started to pay its own internal costs of providing service, never mind thinking about a profit. Nor is the picture any different if a

CLEC were to take advantage of somewhat lower switching usage rates negotiated by Z-Tel. Application of that rate only reduces the price squeeze to a \$4 per customer loss each month, without considering CLEC costs.

In this regard, Verizon's cynical tariff filing this Friday the 13th is too little and too late. Too late because it is not and cannot become part of the record of this case, and therefore cannot properly play any role in the Commission's consideration of this application. Too little because a preliminary analysis suggests that these newest rates still substantially exceed Verizon's costs and still do not allow for competitive entry using UNE-P. While no definitive analysis is possible on such short notice, the new rates appear to be useless, as are the rates they replace.

Next, WorldCom demonstrates that there are a host of potential problems with OSS, performance measurements and Verizon's DSL offering whose full competitive impact cannot be fairly assessed on this record. In these ways as well, Verizon has failed to carry its burden of proving that it has fully implemented the competitive checklist.

WorldCom finally shows that when leased elements are priced out of reach, it is not in the public interest to allow Verizon into the long-distance market. To do so would be to remove Verizon's only incentive to lower its wholesale rates, and so would be to consign the majority of residential customers in Massachusetts to Verizon's monopoly local service. Whatever the marginal benefit to consumers of having another competitor join the already competitive long-distance market is far outweighed by the loss of any prospect of competition in the local markets for the majority of residents of the state, as well as the hard to long-distance competition posed by Verizon's continuing local monopoly.

For all of these reasons, this application should be denied.

**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Application by Verizon New England Inc.)	
Bell Atlantic Communications, Inc.)	
(d/b/a Verizon Long Distance), NYNEX)	CC Docket No. 00-176
Long Distance Company (d/b/a Verizon)	
Enterprise Solutions), and Verizon Global)	
Networks Inc., for Authorization to Provide)	
In-Region, InterLATA Services in Massachusetts)	
_____)	

**COMMENTS OF WORLDCOM, INC. ON THE
APPLICATION BY VERIZON FOR AUTHORIZATION TO PROVIDE
IN-REGION, INTERLATA SERVICES IN MASSACHUSETTS**

Verizon seeks permission to enter the in-region long-distance market in Massachusetts when it has erected an impassible barrier to entry in its local market. It has priced unbundled network elements at non-cost-based rates so high that competitors cannot as a practical matter use unbundled network elements (“UNEs”), and in particular the unbundled network element platform (“UNE-P”), to provide broad-based service to residential customers in the state. Because of this barrier to entry, Verizon cannot point to solid commercial evidence that its OSS works. To make matters worse, it also has declined to report performance measurements that would capture critical aspects of this evidence for the few residential orders it does handle. Nor does Verizon provide nondiscriminatory access to the elements of its network necessary to provide advanced services. For these reasons, it has failed to carry its burden of showing that it has met the requirements of the competitive checklist, or that long-distance entry would be in the public interest.

I. VERIZON HAS NOT MET ITS BURDEN OF PROVING THAT IT HAS SATISFIED THE CHECKLIST'S PRICING REQUIREMENTS.

A. Legal Framework

Verizon's burden here is to prove that it has "fully implemented" the requirement of the second checklist item that it provide access to unbundled network elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."^{1/} Section 251(c)(3) in turn specifies that network element rates be "just, reasonable and nondiscriminatory" and in compliance with section 252's requirement that rates be cost-based and non-discriminatory.

The FCC has "emphasize[d] that it is [its] role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met." MI Order ¶ 30. While the Commission must consult with the state commissions to verify compliance with all checklist items (section 271(d)(2)(B)), it is not required by statute to give the state's evaluation any particular weight. Thus it has made clear that it "has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record." MI Order ¶ 30.^{2/} The D.C. Circuit, charged with reviewing the FCC's section 271 judgments, reached the same conclusion, holding that "the statute does not require the FCC to give the State commissions' views any particular weight. . . . Congress has clearly charged the

^{1/} Section 271(c)(2)(B)(ii) of the 1996 Act. See NY Order ¶ 44; MI Order ¶ 105; LA II Order ¶ 50 (noncompliance with a single checklist item sufficient to deny application). A table of citation abbreviations and corresponding full citations is provided above, following the Table of Contents.

^{2/} See, e.g., TX Order ¶ 11 ("the Commission has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission's verification"). This is in direct contrast to the Commission's responsibility to give the Attorney General's evaluation "substantial weight." 47 U.S.C. § 271(d)(2)(A).

FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authorization." SBC Communications, Inc. v. FCC, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

In considering what weight to give to state commission evaluations, the FCC has pointed out that it is willing to give credence to state commission resolution of factual disputes where the state has "conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist." NY Order ¶ 51. The FCC also has indicated it is more willing to accept state benchmarks "if the state commission has made these determinations in [a] rigorous collaborative proceeding," though it retains the right to "reach a different conclusion where justified." Id. ¶ 56. Specifically addressing challenges to state-set UNE rates, the Commission has found it relevant that the state "engaged in extensive fact-finding in its rate case" and did not simply rubber-stamp ILEC-proposed rates. Id. ¶ 246 (accepting PUC-set rates in part because state scrutinized and then rejected BOC rates and adopted prices close to those proposed by CLECs).

A state's evaluation of pricing is not entitled to any different weight than its evaluation of any other checklist element. To the contrary, consistent with its statutory mandate, the Commission has made it clear that it alone must decide whether the BOC has satisfied the pricing requirements of the checklist. It specifically rejected the contrary view urged by the BOCs that it "confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions," and the FCC's view was definitively upheld by the United States Supreme Court.^{3/}

^{3/} See Iowa Utils. Bd. v. FCC, 135 F.3d 535, 543 (8th Cir. 1998) (rejecting the FCC's view of its authority), rev'd, 525 U.S. 1133 (1999).

The Commission thus concluded that the “Act vests in the Commission the exclusive responsibility for determining whether a BOC has in fact complied with the competitive checklist. In so doing, we must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination and resale in accordance with the pricing requirements set forth in section 252(d), and, therefore, whether the BOC has fully implemented the competitive checklist.” MI Order ¶ 282. See also, e.g., SC Order ¶ 210 (expressing “concern” with the South Carolina Commission’s approval of rates alleged not to be cost-based). Of course to meet its burden of proving such compliance, the BOC must put on the record the particulars of the rate case that support the rates upon which it relies. NY Order ¶ 241.

Moreover, in deciding what weight to place on the state’s view that pricing is cost-based, the Commission also has taken pains to caution that the label the state attached to its pricing methodology is irrelevant. For states that merely pay lip service to TELRIC principles, prices do not avoid scrutiny by being labeling “TELRIC”:

We emphasize, however, that it is not the label that is critical in making our assessment of checklist compliance, but rather what is important is that the prices reflect TELRIC principles and result in fact in reasonable, procompetitive prices. . . . [Of course] TELRIC principles will not generate the same price in every state; indeed it will not even generate the same formula for pricing in every state. But such principles are fair and procompetitive and should create even opportunities for entry in every state, while permitting, indeed obliging, each state commission to determine prices on its own. In order for us to conduct our review, we expect a BOC to include in its application detailed information concerning how unbundled network element prices were derived.

MI Order ¶¶ 290-291.

That is not to say that the FCC is required to undertake its own cost study in the 90 days it has to review an application, or that any small error identified in the BOC study means that the prices are not cost-based. Rather, the Commission has made clear that it will reject an application “if basic TELRIC principles are violated or the state commission makes clear errors

in factual findings on matter so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.” NY Order ¶¶ 244, 246.

The legal requirement of independent decisionmaking by the FCC on pricing issues is well grounded in sound public policy. “Because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit efficient entry. Moreover, allowing a BOC into the in-region interLATA market in one of its states when that BOC is charging noncompetitive prices for interconnection or unbundled network elements in that state could give that BOC an unfair advantage in the provision of long distance or bundled services.” MI Order ¶ 287 (emphasis added). For that reason the Commission also made clear that competitive pricing is “a relevant concern in [its] public interest inquiry under section 271(d)(3)(C).” Id. See Point III, infra.

B. Verizon’s Unbundled Network Element Pricing Is Neither Reasonable Nor Cost-Based, And Therefore Fails To Meet The Checklist Requirements.

Remarkably, Verizon has almost nothing to say about its network element pricing. Its application does not argue that the rates satisfy the checklist, and its brief “public interest” discussion of pricing is notable mostly for what it does not discuss. Verizon’s only declarant to address the issue is content briefly to recite the chronology of the state’s cost proceeding and the state’s justifications for refusing to consider mounting evidence that its rates were not cost-based. See Mudge Decl.

As previously indicated, the Commission has specifically required each applicant “to include in its application detailed information concerning how unbundled network element prices were derived.” MI Order ¶ 291. This is especially critical when pricing was a central disputed

issue before the state: “[A] BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue. Through state proceedings, BOCs should be able reasonably to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.” TX Order ¶ 37.

Pricing, and in particular the pricing of unbundled local switching, was perhaps the central focus of the recently concluded section 271 proceedings in Massachusetts. WorldCom and AT&T offered concrete evidence that the switching rates were not cost-based, pointing out flaws in, among other things, the switching discount, the cost of capital, the installation factor, the utilization rates, and miscalculation of the off-peak factor.^{4/} But, apart from a passing reference to the fact that the DTE rejected CLEC arguments about the switching discount, Verizon makes no mention of a single one of these critical issues anywhere in its application.

In an extraordinary act of contempt for the Commission and its rules, rather than attempt to defend the rates on which it based its application, Verizon instead has decided to change them altogether the business day before interested parties must submit comments, assuring that no one has the opportunity to respond adequately to the new rates at this time. The Commission’s response to this distraction must be to decide the case on the record presented to it when the application was filed. Indeed, it has no other choice.

To begin, such a response is compelled by the Commission’s “complete when filed” rule that governs this application, which forbids an applicant “at any time during the pendency of its application, [to] supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application.” TX Order

^{4/} See Joint Declaration of Dr. August Ankum and Vijetha Huffman On Behalf of WorldCom, Inc., DTE 99-271 (DTE filed July 18, 2000) (VZ-MA App. B, Tab 455).

¶ 35. The very point of the rule is “to prevent applicants from presenting part of their initial prima facie showing for the first time in reply comments.” Id. Of course, that is exactly what Verizon intends to do by changing its rates now. Thus, Verizon apparently intends to rely on the prima facie showing it made in its New York section 271 application to defend its rates here. As we show in what follows, such reliance is unjustified, but for present purposes it is enough to note that Verizon would deny commenters sufficient opportunity to rebut that case, the very situation the “complete when filed” rule is designed to prevent.

If Verizon wants new rates to be considered as satisfying its checklist obligation, its only choice is to withdraw and refile its application, and to produce the record evidence upon which it seeks to rely in showing that the new rates are TELRIC-compliant. Any other process would be sheer lawlessness.

Moreover, even if Verizon sought to amend the record to include these new rates, and even if the Commission were for some reason inclined to consider the new rates, the record would be grossly inadequate to prove Verizon’s prima facie case that these rates are cost-based. The rates, we are told, are “the same” as New York rates. But none of “the extensive records of the New York Commission’s network element rate case” that the Commission ruled were needed to carry Bell Atlantic’s burden of proof in New York are on this record. See NY Order ¶ 241.

Nor is this some mere technical quibble. The missing record evidence is critical to resolving the question whether the record that supported a prima facie case in New York is adequate to support a prima facie case in Massachusetts. There is good reason to believe that it is not. The New York Commission considered what it acknowledged to be a defective switching rate that it ordered to be reconsidered, but reviewing a whole range of New York-specific factors “asserted that it ‘appropriately exercised its power to take account of conditions in New York’

when it determined switching costs pursuant to TELRIC.” Id. ¶ 245 (quoting New York Commission Reply at 46).

Such a modulated and state-specific judgment cannot be imported wholesale into another state. Specifically, there is no record pursuant to which the FCC could “take account” of differences in “conditions” in New York and Massachusetts that might lead the FCC to reach a reasoned conclusion about application of New York rates in Massachusetts. Among other things, there is no way on this record for the FCC to conclude that in Massachusetts, as in New York, “the switching prices at issue here . . . provid[e] ample margin to competitors even at their present level,”^{5/} one of the many factors that led the New York Commission to leave flawed rates in place temporarily in New York, and one of the many factors the FCC considered when it approved those rates in the context of Bell Atlantic New York’s section 271 application.

Because checklist compliance is by its nature such a contextual inquiry, the Commission has made clear that “each state commission” is “indeed obligat[ed]” to “determine prices on its own.” MI Order ¶ 291. Importing one component of a New York rate package into a suite of Massachusetts rates without saying a word about why this substitution satisfies TELRIC principles in Massachusetts obviously will not do. That these New York rates may not satisfy Verizon’s checklist pricing obligations in Massachusetts is suggested by a cluster of factors, including serious uncorrected problems in the rates for a variety of UNEs in Massachusetts, the DTE’s lack of commitment to correct these problems on an urgent basis, and the failure of

^{5/} In re Joint Complaint of AT&T Communications of New York Inc. et al., Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding, Case 95-C-0657 et al. at 12 (NYPSC Sept. 30, 1998) (“Order Instituting New Proceeding”) (VZ-MA App. B, Tab 455, Exh. F).