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July 18, 2001

**Ex Parte**

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W. – Portals
Washington, DC 20554

*RE: Application by Verizon New York Inc. for Authorization To Provide In-Region, InterLATA Services in State of Connecticut, Docket No. 01-100*

Dear Ms. Salas:

Enclosed is Verizon's response to comments filed in Public Notice, DA 01-1609.

Sincerely,

Dee May

cc: C. Pabo
D. Attwood
B. Olson
M. Carey
K. Farroba
A. Johns
S. Pie

**Verizon Response to Comments on DSL for Resale Offering**

The various arguments made by commenters with respect to the availability for resale of the DSL services offered by Verizon's separate data affiliate are misplaced and should be rejected.

As an initial matter, the scope of the issue here is exceedingly narrow. The dispute is not whether the DSL services that Verizon's separate data affiliate (known as Verizon Advanced Data Inc., or "VADI") offers to its own customers are available for resale. They are. Indeed, since its creation, the separate data affiliate has offered its DSL services through a federal tariff that imposes no restrictions on their availability for resale. Nor is the dispute whether VADI offers at a wholesale discount the service offerings that arguably qualify as "retail" services under this Commission recently-affirmed rules. It does. Again, in response to the D.C. Circuit's *ASCENT* decision holding that a similar separate data affiliate qualified as a successor of an ILEC and had the same obligations as an ILEC, VADI amended its federal tariff to apply a wholesale discount to those offerings.

Rather, the narrow issue raised here is whether VADI has an obligation to introduce a new retail DSL service that it does not currently offer. Specifically, VADI previously did not, and lawfully could not, provide its own DSL service to end-user customers who obtained their voice service from other carriers. And the issue is whether, in the wake of the *ASCENT* decision, VADI has a legal obligation to develop and introduce a new service under these circumstances solely to make that new offering available for resale. While the Act imposes no such requirement, VADI nonetheless consistently has made clear that it is willing to provide such a service (provided the

difficult technical and operational issues associated with doing so are addressed in a rational manner). And VADI will provide such a service in Connecticut as soon as it receives the necessary legal authority from the Commission to do so. This resolves the issue for present purposes.

Moreover, as a process matter, the section 271 crucible is not the place to address the underlying issue for the first time. That is especially true here, where the very same issue is pending before the Commission in a parallel proceeding on remand from the *ASCENT* decision, where it has not yet been decided. Rather, the issue first should be addressed in a proceeding of general applicability where all affected parties have an opportunity to be heard and the issue can be considered and resolved in a reasoned manner. At a minimum, any such resolution must take into the account the complex technical and operational issues presented by introducing a new service under the circumstances presented here. And, as the Commission has held in closely analogous contexts, it must provide for a rational process to implement any new requirements that might be adopted through industry collaborative proceedings or other business-to-business negotiations. Once the rules are clearly established they can be applied in the section 271 context, rather than vice versa as some parties here might prefer.

In any event, to the extent commenters argue that VADI has a legal obligation to make its DSL service available for resale where another carrier provides voice service on the line, their arguments are misplaced.

### 1. Verizon Has No Legal Obligation To Resell DSL Service at a Wholesale Discount Where It Is Not the Voice Provider on the Line.

Section 251(c)(4) of the Act requires an ILEC to resell at wholesale rates only those "services" that it currently "provides." As a matter of plain statutory language (and common sense) an ILEC is not required to resell services that it does not provide. As the Commission has held, "[t]he 1996 Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers." *Local Competition Order* ¶ 872.

The Commission also has made clear that the only way to "determine the services that an incumbent LEC must provide at wholesale rates," is to "examin[e] that LEC's retail tariff." *Id.* The Commission specifically refused to "prescribe a minimum list of services that are subject to the resale requirement." *Id.* The Commission instead left this list-drawing function in each individual ILEC's hands. Under the Commission's rules, an ILEC must resell any service that it decides to provide on a retail basis.

Applying this very same logic, the Commission refused to adopt rules that would prevent ILECs from withdrawing retail services, even "where resellers are purchasing such services for resale in competition with the incumbent." *Id.* ¶ 968. Indeed, the Commission went so far as to state that its "general presumption that incumbent LEC restrictions are unreasonable *does not apply* to incumbent LEC withdrawal of service." *Id.* (emphasis added). Quite obviously, if an ILEC's decision to withdraw a service may not be presumed an unreasonable restriction on the resale of its service, the decision not to offer such service in the first place cannot be presumed to be an unreasonable restriction.

Against this statutory backdrop, the legal question of whether an ILEC has an obligation to resell DSL services where it is not the voice provider on the line boils down to whether the ILEC itself provides a form of DSL service where it is not the voice provider on the line. Verizon does not provide any such service, nor does Verizon's advanced services affiliate (VADI), which has the same obligations as an ILEC for purposes of section 251(c)'s resale obligation. Both before and since Verizon began providing DSL services exclusively through VADI, it has provided such services exclusively over lines that were also being used by Verizon to provide voice service. Indeed, because VADI provides its own DSL services exclusively by purchasing line sharing from Verizon, (and because line sharing is available only where Verizon is the voice provider), VADI itself has been unable to provide DSL service to customers who receive voice service from other carriers. Likewise, because VADI is limited by the Bell Atlantic/GTE Merger Conditions to using the same line sharing product that is available to other carriers, VADI has had no lawful way to provide its DSL service to these customers. Thus, the only DSL service that VADI has made available in its retail tariff is DSL over Verizon voice lines. That service, therefore, is the only DSL service that Verizon is required to resell.

Although it is undisputed that Verizon and VADI have not offered (and could not offer) DSL service where another carrier provides the voice service, AT&T and ASCENT argue that this somehow constitutes an unreasonable or discriminatory

restriction on the resale of DSL service in violation of section 251(c)(4)(B). AT&T at 4-5; ASCENT at 11-12.[1] Their arguments are misplaced.

First, the fact that VADI does not provide DSL where another carrier provides voice service on the line is a function of the fact that it has to use line sharing to reach those customers, and, consistent with the Commission's prior rulings, line sharing is not available under these circumstances. The Commission's rules establish line-sharing obligations that operate in only one direction: they require ILECs to allow CLECs to provide DSL service on the same line on which the ILEC provides voice service, but do not require ILECs to provide DSL service on the same line on which a CLEC provides voice service. (Put differently, the rules require ILECs to provide only the high frequency portion of the loop as a separate UNE, not the low frequency portion of the loop.) Indeed, the Commission has expressly permitted ILECs to discontinue the provision of DSL service to a customer that switches its voice service from the ILEC to a competing provider.[2] Because Verizon is not required under this well-settled precedent to provide DSL services at retail where it is not the voice provider, it cannot be required to introduce new DSL services in such instances solely to make them available for resale.[3]

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[1] Letter from James Valentino, AT&T, to Magalie Salas, FCC, CC Docket No. 01-100 (July 10, 2001); Opposition of the Association of Communications Enterprises, CC Docket No. 01-100 (May 14, 2001).

[2] *See Line Sharing Order* ¶ 72; *Texas Order* ¶ 330; *Line Splitting Order* ¶ 26.

[3] AT&T argues (at 7) that Verizon shouldn't be permitted to rely on this precedent because those decisions address only an ILEC's line-sharing obligations, not its resale obligations. But the language of those decisions is not so limited and even AT&T's excessively narrow reading of these decisions does not support its point. These decisions uphold an ILEC's right not to provide line sharing where the ILEC is not the voice provider and uphold the ILEC's right not to provide DSL service where it is not the voice provider. Because the Act requires an ILEC to resell only those services that it provides,

Second, as noted above, VADI has not been able to provide DSL service on lines where other carriers provide voice service under the terms of the Bell Atlantic/GTE Merger Conditions. Those conditions require VADI to use the same facilities and services that are available to other carriers.[4] Consistent with the Commission's line-sharing rules, Verizon permits VADI to obtain the high frequency portion of the loop to provide DSL only on those lines where Verizon is the voice provider. As a result, VADI has been unable to provide its own DSL service to customers who receive their voice service from carriers other than Verizon.[5]

Third, AT&T's and ASCENT's argument has no stopping point. Rather, it would permit any limitation an ILEC places on the contours of its retail service to be characterized as an unreasonable restriction on that service. For example, VADI does not provide DSL service to customers with loops that are longer than 15,000 feet. Under AT&T's reasoning, however, any refusal by VADI to permit the resale of its DSL service to customers on such loops could be construed as an unreasonable restriction on the resale of its services, even though VADI is quite clearly under no obligation to provide such services on a retail basis in the first place. Nor can it be argued that VADI has somehow attempted "to avoid the statutory resale obligation by shifting their customers to nonstandard offerings." *Local Competition Order* ¶ 948. To the contrary, VADI's

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the Commission's decisions narrow the list of services that an ILEC is required to resell by narrowing the list of services that an ILEC is required to provide.

[4] *Bell Atlantic/GTE Order* App. D ¶ 4(f).

[5] AT&T argues (at 7-8) that the limitations imposed by the Merger Conditions do not trump Verizon's other legal obligations under the Act. That argument, even if true, is irrelevant here because Verizon has no legal obligation under the Act to resell DSL services where it is not the voice provider.

decision to limit the provision of DSL to DSL over Verizon voice lines is the same decision that, consistent with the Commission's *Line Sharing Order*, other major ILECs have made as well. *See, e.g.*, *Texas Order & 330* ("We reject AT&T's argument that we should deny this application on the basis of SWBT's decision to deny its xDSL service to customers who choose to obtain their voice service from a competitor that is using the UNE-P"); *Kansas/Oklahoma Order* ¶ 187 n.532 ("SWBT's [advanced services] affiliate does not purchase stand-alone unbundled xDSL loops").

Despite all this, AT&T and ASCENT claim that Verizon's decision to provide DSL only over Verizon voice lines is unreasonable because it places CLECs at a competitive disadvantage by limiting their ability to offer the same bundles of service to end users as Verizon. But this policy argument is irrelevant as a legal matter, because the Act and the Commission's rules clearly permit Verizon to resell only those services that it provides itself, and Verizon simply does not provide the services that ASCENT and AT&T claim should be introduced so that they can be resold. Moreover, the argument is wrong as a factual matter, as it simply is not the case that Verizon's policies deny CLECs "the same ability as Verizon to provide both voice and DSL service." CLECs may, for example, engage in line-splitting arrangements where they use a UNE-platform from Verizon to provide voice service in combination with DSL.

AT&T next argues that Verizon's restrictions are unreasonable because they are contrary to Verizon's own economic self-interest, and must therefore be a ploy to suppress competition. Again, this policy argument is both factually wrong and legally irrelevant. The reality is that VADI has not offered to provide DSL service to customers served by other voice providers because it has been unable to do so, either technically or

legally. The issue is not, as AT&T attempts to frame it, whether Verizon would receive the same profits from reselling DSL as it would from providing this service on a retail basis. On the contrary, VADI has consistently made clear that it is willing to develop and introduce such a service provided the technical and operational complexities can be addressed in a rational manner.[6]

AT&T next claims (at 6) that "the sole relevant fact here is that Verizon — whether itself or (officially) through VADI — provides voice service and DSL at retail-to-retail customers." This argument also misses the point. The DSL service that VADI provides unquestionably is, as AT&T concedes, a "separate stand-alone service." AT&T at 3. The real question here is whether that offering is made to all customers (as is the case with Verizon's voice service, for example), or just to a limited subset of those customers. And for all the reasons outlined above, VADI has not and could not provide its own DSL service to carriers who receive their voice service from a carrier other than Verizon.

### 2. The *ASCENT* Decision Has No Bearing on Verizon's Legal Obligation to Resell DSL Service Where it Is Not the Voice Provider on the Line.

The D.C. Circuit's recent decision in *ASCENT* does not in any way enlarge the obligation imposed by section 251(c)(4). That decision merely holds that, where an advanced services affiliate qualifies as a successor or assign of an ILEC, that affiliate is subject to the resale obligations of an ILEC under section 251(c). *ASCENT*, 235 F.3d at

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[6] It is also irrelevant whether, as AT&T alleges (at 5), Verizon would receive a "'double benefit' from resale of DSL to a UNE-P or UNE-L voice provider, because the CLEC is paying the full price for the loop." Verizon is under no legal obligation to provide or to resell DSL service where another carrier is using an unbundled loop or platform to provide the voice service on the line. *See Texas Order* & 330. The profit that

666-68. *ASCENT* does not subject such an affiliate, much less the ILEC itself, to any greater obligations than those that apply to ILECs that provide DSL directly (without creating a separate affiliate). Put another way, after *ASCENT*, the use of a separate advanced services affiliate may provide fewer regulatory benefits to an ILEC, but it obviously does not enlarge the set of substantive regulatory burdens under section 251(c). Thus, because an ILEC that itself provides DSL services only over its own voice lines is not also obligated to provide DSL (and then make it available for resale) where another carrier provides voice service on the line, the creation of a separate data affiliate can not suddenly obligate the ILEC (or its corporate family) to do more.

For all these reasons, AT&T's and ASCENT's repeated claims that Verizon is somehow hiding behind a "formalistic reliance on corporate structure" is wide of the mark. As Verizon repeatedly has acknowledged, in the wake of the *ASCENT* decision, VADI is subject to the very same resale obligations under section 251(c) that apply to any other incumbent. But that provision — whether before or after *ASCENT* — in no way requires VADI or Verizon to resell services that they do not currently provide, such as DSL over voice lines where Verizon is not the voice provider.

Moreover, AT&T is merely attacking its own straw man in characterizing Verizon's argument as hinging on the fact that it provides line sharing with VADI, and that "absent the existence of VADI, Verizon itself would be providing both voice and DSL service — and no line sharing would occur at all." AT&T at 5. As explained above, if Verizon provided DSL itself and did so only where it is the voice provider, it would have no legal obligation to resell DSL service on lines where other carriers provide

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Verizon might conceivably receive from providing such a service therefore is not an issue

the voice service. As noted above, that is precisely what the Commission previously held. *See Texas Order* (holding that ILEC may "deny its xDSL service to customers who choose to obtain their voice service from a competitor"). For the very same reason, AT&T is wrong that Verizon's recent request to eliminate immediately the requirement in the Bell Atlantic/GTE Merger Conditions that Verizon provide advanced services through a separate affiliate somehow undermines its position. Again, neither Verizon nor VADI is obligated to resell DSL where Verizon is not the voice provider, because neither Verizon nor VADI provides such a service on a retail basis. The structural separation between Verizon and VADI does not affect these legal obligations one way or another, and Verizon's request to eliminate that structural separation — which causes unnecessary duplication and expense — is therefore irrelevant.

### 3. Verizon's New "Verizon DSL over Resold Line" Offering Is More Than What the Act Requires.

Although the Act does not impose a legal obligation to provide a DSL service (or make it available for resale) under the circumstances at issue here, VADI nonetheless is introducing a new product in Connecticut — DSL over Resold Lines — which enables a reseller to resell its DSL service on the same line where that reseller is providing the voice service. The ability to offer this new service is, however, contingent upon Verizon receiving a waiver of the Bell Atlantic/GTE Merger conditions. This waiver is needed in order for VADI to obtain a service from Verizon that allows it to provide a DSL service for customers under these circumstances, and to allow VADI and Verizon to access each others systems and data and to otherwise coordinate to provide resold voice and resold

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here.

DSL service on the same line — conduct that arguably is prohibited by the structural separation requirements in the Merger Conditions.[7]

AT&T makes various arguments for why Verizon's new offering is insufficient to satisfy its resale obligations under section 251(c). It first claims that Verizon's illustrative tariff for this offer is too vague, and is subject to unreasonable and discriminatory limitations that are without technical basis. AT&T's claims are beside the point. Because Verizon has no legal obligation to provide DSL service over lines where Verizon is not the voice provider, this new offering is not necessary — or intended — to satisfy any legal obligation.[8] It is purely a voluntary offer. In any event, Verizon's proposal is hardly vague: its illustrative tariff is five pages in length and contains a description of the proposed service, the terms and conditions of the service, the rates regulations of the service, and the recurring and nonrecurring rates and charges for the service.[9]

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[7] AT&T claims that Verizon's waiver request on which Verizon's offer is contingent is too vague to be granted at this time because Verizon does not spell out how it will comply with the requirements of section 272 or why its request is in the public interest. But the Act does not require a showing in the context of a 271 application that VADI (which is not a long distance affiliate) complies with section 272 in the first place, and Verizon has demonstrated at length that those affiliates that do provide long distance will comply. Moreover, Verizon's waiver did specifically address the public interest benefits of granting Verizon's request, which will allow it to introduce a new service that AT&T and other resellers claim they want.

[8] AT&T claims (at 9-10) that Verizon's offer is discriminatory because it is unavailable where CLECs are providing the voice service on the line using a UNE-P or UNE-Loop configuration. As explained above, however, Verizon has no legal obligation to resell DSL under any scenario where it is not the voice provider. Verizon's decision to resell DSL service where CLECs are reselling voice service therefore goes beyond the requirements of the Act, and its decision not to extend such offer even further can in no way be viewed as unreasonable or discriminatory.

[9] AT&T also claims (at 10) that Verizon's offer is potentially discriminatory because it is limited to where VADI provides DSL over a "copper facility," even though VADI could use a combined copper-fiber facility to provide service. No such

Because it has no legitimate, substantive objection to Verizon's new offering, AT&T falls back on erroneous procedural objections. First, AT&T seeks to bar consideration of Verizon's new offering under the so-called "complete when filed" principle. As the Commission has repeatedly held, however, the complete-when-filed rule is hardly an inflexible command. Even when new evidence falls within the scope of the rule, the Commission still has broad authority to "exercise [its] *discretion* in determining whether to accord new factual evidence any weight." Michigan Order ¶ 59 (emphasis added). Moreover, it is especially important to accept late-filed evidence where, as here, such evidence responds to attempts to define a new requirement in a section 271 proceeding, and where the consequence of ignoring such evidence is to deny an application on the basis of failing to satisfy a new requirement that did not exist at the time that application was filed.[10] The Commission has indeed accepted late-filed evidence under such circumstances in the past.[11]

Second, AT&T claims that Verizon's offer is merely a future promise, because Verizon has not demonstrated that it can provision DSL resale service over resold voice lines in a commercially reasonable and nondiscriminatory manner. As an initial manner, AT&T's own arguments merely serve to confirm that introducing a new service offering such as this one raises complex systems and operations issues that are best resolved

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discrimination could occur, however. VADI provides DSL service exclusively over copper facilities in Connecticut, and its tariff limits the DSL service it provides at retail to customers served entirely over copper.

[10] *Cf. Texas Order* ¶ 228 ("For the section 271 process to work, potential BOC applicants must have a reasonable degree of certainty about what they need to do to bring themselves in compliance with the statutory requirements, and they therefore need to be able to rely on our rules for appropriate guidance.").

[11] *See, e.g.*, *Massachusetts Order* ¶ 61; New York Order ¶ 331 & n.1036.

through collaborative or similar proceedings. Moreover, as described above, Verizon's offering here is not one that is needed to come into compliance with the Commission's requirements — Verizon was already is in compliance before this offering — so the Commission's prior statements regarding the reliance on promises of future performance do not apply. In any event, there can be no serious question that Verizon will be able to provision this new service in Connecticut. As neither AT&T nor any other party has ever disputed, Verizon's performance in Connecticut is excellent across the board, including on all areas relating to DSL, line sharing, and resale. And because Verizon's service area in Connecticut is so small, there can be no real dispute that Verizon will be able to handle whatever small volume of demand for this service may develop in the state.[12]

For all these reasons, the Commission should reject AT&T's and ASCENT's arguments regarding the resale of DSL services and grant Verizon's application to provide long distance service in Connecticut.

[12] By comparison, as of the end of April 2001, CLECs had submitted a total of only three line-sharing orders in Connecticut and had obtained fewer than 1,800 resold lines.