CLECs in a just, reasonable and nondiscriminatory manner,[3] and those requirements were made prerequisites to the provision of in-region, interLATA services by the BOCs by their incorporation in the competitive checklist in Section 271.[4]

9. Verizon cannot establish that access to its OSS is nondiscriminatory simply by making a blanket statement to that effect or promising that it will do so. Nor can Verizon rely on the purportedly nondiscriminatory design of its systems and procedures to obviate the need for review of its actual performance, for as the Commission has recognized, "the BOCs' use of nondiscriminatory, automated order processing systems . . . does not guarantee that requests placed via these systems are actually completed within [the same] period of time."[5] Thus, Verizon "must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry."[6] This Commission has found "that the most probative evidence that a BOC is providing nondiscriminatory access is evidence of actual commercial usage [and that] [p]erformance measurements are an especially effective means of providing . . . evidence of the quality and timeliness of the access provided by a BOC to requesting carriers."[7]

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[3] *See* 47 U.S.C. § 251(c)(2), (3) & (4).

[4] *See* 47 U.S.C. § 271(c)(2)(B)(i), (ii) & (xiv).

[5] *First Report and Order, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, CC Docket No. 96-149 (released December 24, 1996), ¶ 243.

[6] Memorandum Opinion and Order, *Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Communications Act of 1996 to Provide In-Region InterLATA Service in Texas*, 15 FCC Rcd. 18354 (2000) ("*Texas 271 Order*"), ¶ 38.

[7] Memorandum Opinion and Order, *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 (1999) ("*New York 271 Order*"), ¶ 53.

10. To prove that nondiscriminatory access is actually being delivered to CLECs, Verizon must demonstrate that it is "provid[ing] access to competing carriers in 'substantially the same time and manner' as it provides to itself."[8] As a consequence "when a retail analogue exists," a BOC must provide access that is equal to . . . the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy and timeliness." *Id.* To make this showing, Verizon must monitor and measure its performance for CLECs and submit that information to the Commission with its application together with "comparative performance information" regarding its performance of the same or analogous functions for its own retail operations.[9]

11. The New Jersey BPU recognized the importance of monitoring Verizon's provision of wholesale service to CLECs when it directed interested parties to propose performance measures and a self-executing remedies plan. On May 25, 2000, Verizon was put on notice that it would be required to report its performance results. In an Order entered on July 13, 2000, the New Jersey BPU adopted Carrier-to-Carrier Guidelines ("C2C Guidelines") that defined the functions that Verizon is required to measure and identified the data that Verizon must collect.[10] The New Jersey BPU also established a schedule for the implementation of all metrics and stated that "the Guidelines, as adopted, are intended to serve as a final set of

[8] *New York 271 Order* ¶ 44.

[9] Memorandum and Order, *Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997) ("*Michigan 271 Order*") ¶ 212 (BOC must provide "comparative performance information" for unbundled network elements as well as resale services to permit meaningful comparisons between its performance for CLECs and its performance for its own retail operations); ¶¶ 139-141.

[10] Order, *In the Matter of the Board's Investigation Regarding the Status of Local Competition in New Jersey*, Docket Nos. TX98010010, TX 95120631 (July 13, 2000).

standards for the measurement of the success of BA-NJ's OSS functions." *Id.* at 7. Under the implementation timetable ordered by the New Jersey BPU, virtually all metrics were to be implemented no later than August 1, 2000. Notwithstanding that Order, Verizon has failed to implement measures in accordance with the C2C Guidelines, unilaterally altered the business rules governing metrics, ignored the timetable set by the New Jersey BPU governing implementation of metrics, and taken the remarkable and ill-founded position that its unilateral exclusion of data from its performance results does not constitute a violation of any New Jersey BPU directive.

A. Verizon Has Not Implemented Measures Improperly In Accordance With New Jersey BPU Directives.

12. The performance data on which Verizon relies are unreliable because Verizon has improperly implemented performance measures. In its Application, Verizon trumpets the number of the performance measurements in the C2C Guidelines.[11] However, the sheer number of performance measurements is meaningless if they do not accurately capture the performance they are purportedly intended to measure. In order to provide meaningful information on the issue of whether nondiscriminatory access is being provided, performance measurements should be defined clearly and implemented properly.[12] Further, performance measurements should not be subject to unilateral redefinition or manipulation by the BOC. Moreover, the performance measures should measure all transactions during the reporting period, include an accurate and complete description of the data used to calculate performance results, describe business rules,

[11] *See, e.g.*, Guerard/Canny/DeVito Decl. ¶ 16.

[12] *Michigan 271 Order* ¶ 212 (noting that the BOC must "ensure that its performance measurements are clearly defined"); ¶ 209 (a BOC cannot rely on performance measurement which are not "clearly explained").

reference all data excluded from calculations, define all relevant terms, set forth the formula for calculating metrics results, and ensure that the measurements are sufficiently disaggregated so that "like-to-like" comparisons can be made. Because Verizon is relying on the C2C Guidelines and its self-reported performance data to establish that it has fully satisfied its Section 271 obligations, Verizon also bears the burden of establishing that its performance data are accurate.[13] Verizon has not satisfied and cannot satisfy this basic test.

13. This Commission has recognized that the timeliness of order status notices such as FOCs is "crucial to the ability of new entrants to compete effectively."[14] The Commission explained that "[t]imely return of a FOC notice is critical because it informs the competing carrier of the status of its order by: (1) confirming that the order has been accepted; and (2) providing the due date for installation of service." *Id.* ¶ 120 (footnote omitted).[15]

14. In its Application, Verizon asserts that it "returns confirmations . . . to the CLECs on a timely basis in New Jersey." McLean/Wierzbicki/Webster Decl. ¶ 75. Verizon also claims that it failed to meet the 95% benchmark only when it erroneously included orders for six lines or more (which have a 72 hour benchmark) in the category of orders with fewer than six lines that have a 24 hour benchmark. As to the latter argument, Verizon seems to suggest that such errors

[13] Memorandum Opinion and Order, *Application by BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in South Carolina*, 13 FCC Rcd. 539 (1997), ¶ 37 ("the BOC applicant retains at all times the ultimate burden of proof that its application is sufficient") (footnote omitted).

[14] Memorandum Opinion and Order, *Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998) ("*Second Louisiana Order*"), ¶ 117.

[15] *See also* Memorandum Opinion and Order, *Joint Application of SBC Communications, Inc. et al. for Provision of In-Region InterLATA Services in Kansas and* Oklahoma, CC Dkt. No. 00-217 (rel. Jan. 22, 2001) ("*Kansas/Oklahoma 271 Order*"), ¶ 137 (recognizing that the timely return of a FOC "is a key consideration for assessing whether competitors are allowed a meaningful opportunity to compete").

are inconsequential since they simply made its reported performance appear worse than it is in reality. *Id.* Verizon's arguments are demonstrably unsound for two reasons. First, because Verizon has failed to implement its ordering measures properly, its order confirmation data in its application are inaccurate and cannot be relied upon to demonstrate its performance in this area. Second, Verizon cannot properly dismiss errors in its performance data — even if such errors cause Verizon's performance to appear worse than its actual performance.

15. In this regard, the order confirmation measures under the C2C Guidelines require Verizon to measure the elapsed time between its receipt of a valid LSR and the issuance of a service order confirmation. Furthermore, according to the C2C Guidelines, Verizon can exclude from its calculations only those "[r]esent confirmations that are resent for reasons *other than BA error.*"[16] In that connection, an ILEC can send multiple and sometimes inaccurate FOCs associated with a unique purchase order number. As a consequence, an ILEC could effectively game the process by sending an inaccurate and useless FOC, issuing an accurate and more meaningful FOC later, and overstating its order confirmation timeliness rates by capturing only the first, inaccurate FOC in its performance results. In apparent recognition of this possibility, the C2C Guidelines require Verizon to capture resent confirmations attributable to Verizon's own errors when calculating order confirmation timeliness. Contrary to the C2C Guidelines, Verizon has failed to capture resent confirmations in accordance with these directives.

16. Verizon has admitted that, since June 2000 "[t]he C2C Guidelines require Verizon to include Local Service Request Confirmations (LSRC) resent due to Verizon's error in the

[16] *See* Metric Business Rules, Guidelines for OR-1 Order Confirmation Timeliness (emphasis added).

Order Confirmation Timeliness (OR-1) metrics."[17] Verizon also has conceded that, from June 2000 through October 2001, it elected not to capture such resent FOCs when calculating its performance results. Stating that it could not "distinguish reasons" for resent confirmations, Verizon simply *notified* the New Jersey BPU that it would only capture the first FOC when measuring its order confirmation timeliness performance. *Id.* Additionally, Verizon reported that it would start complying with the C2C Guidelines in its November 2001 data. *Id.* Verizon's decision to calculate its performance in such a manner contravenes the C2C Guidelines approved by the New Jersey BPU. Moreover, Verizon's exclusion of resent confirmations demonstrates that its order confirmation timeliness results from June 2000 through October 2001 are inaccurate and unreliable.

17. Furthermore, conceding that it erroneously included orders which have a 72 hour benchmark in the same category of orders with a 24 hour benchmark, Verizon attempts to minimize the significance of these errors by noting that they simply caused Verizon's performance to appear worse than its actual performance. McLean/Wierzbicki/Webster Decl. ¶ 75. However, such errors cannot be and should not be brushed aside so easily. As the Department of Justice correctly observed in evaluating BellSouth's Georgia/Louisiana 271 application, a BOC "cannot ignore errors that result in reported performance being worse than actual performance," and "in order to establish effective benchmarks that readily can be used to

[17] Guerard/Canny/DeVito Decl., Att. 1 at 25.

hold an incumbent to an appropriate level of wholesale performance, metrics must neither understate nor overstate actual performance."[18]

B. Verizon's Performance Results Are Incomplete.

18. Verizon's performance data are also incomplete because it has not reported results on its performance in certain areas. Thus, for example, Verizon has failed to provide any data regarding its implementation of line splitting; and Verizon only *started* reporting its performance in implementing line sharing with its November 2001 performance reports.[19] Thus, the current record provides no rational basis upon which any findings can be reached regarding Verizon's performance in these areas.

19. Furthermore, in flagrant disregard of the New Jersey BPU's Order dated July 13, 2000, Verizon has failed to implement OR-6-03 which measures the percentage of accurate LSRCs.[20] As late as December 2000, Verizon stated that this measure was still "under development" even though the New Jersey BPU required its implementation no later than August 2000. In December 2000, Verizon claimed that this metric would be reported by April 2001. This "promise" was not kept. Verizon later admitted that it would not implement this measure until November 2001. Verizon's Response to AT&T Interrogatory 1-67. Verizon's decision to flout the New Jersey BPU's Order illustrates Verizon's willingness to act unilaterally whenever it

[18] Evaluation of the Department of Justice at 43 n.113, *In the Matter of BellSouth Corporation Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Georgia and Louisiana*, CC Dkt. No. 01-277.

[19] *See, e.g.*, Transcript of Hearing before the New Jersey BPU in BPU Docket No. TO-001909054 ("Tr.") (Att. 1) at 107 (Verizon Metrics Panel); *id.* at 110-111; *In the Matter of the Board's Investigation Regarding the Status of Competition in New Jersey*, TX 98 010010, Order Approving Revised Guidelines (November 9, 2001) at 8.

[20] The terms "FOC," the Firm Order Confirmation in the ASR environment, and "LSRC," the Local Service Request Confirmation in the LSR environment are used interchangeably herein.

suits its purposes. Verizon never sought a waiver from the New Jersey BPU, but simply *notified* the New Jersey BPU that it could not implement the measure.[21]

20. Notably, Verizon also has taken the remarkable and misguided position that its failure to implement a measure does not constitute a violation of the C2C Guidelines approved by the New Jersey BPU.[22] In a tortuous rationalization, Verizon claims that a unilateral addition of a new metric would constitute a violation of the C2C Guidelines, while a unilateral *exclusion* of a new metric from its performance results would *not* and does *not* constitute a violation of the C2C Guidelines. *Id.* at 118, 162. The absurdity of Verizon's position is self-evident. The New Jersey BPU's Order adopting the C2C Guidelines did not authorize Verizon to determine unilaterally which metrics it would implement or the timing of such implementation. As a result, Verizon's failure to report any data on measure OR-6-03 necessarily constitutes a violation of the New Jersey BPU's Order. Moreover, in view of Verizon's apparent position that the C2C Guidelines are nothing more than a highly malleable document that it is free to ignore, as well as Verizon's error-ridden reporting processes, no solace can be taken that Verizon will cease these unauthorized exclusions of data after Section 271 entry or that it will correctly calculate its performance results once it starts reporting on any previously-omitted measures.

C. Verizon's Performance Results Contain Irreconcilable Discrepancies.

21. The discrepancies in Verizon's performance results also confirm that Verizon's data are unreliable. The C2C Guidelines include three measurements of flow through:

[21] *See* Tr. 158-159 (conceding that Verizon did not obtain a waiver, but simply "notified the Board either by the letters that [Verizon] filed with [its] carrier-to-carrier reports" or in the issues logs) (Att. 1).

[22] *See id.* at 162.

(1) OR-5-01 (Total Flow-Through) (that measures the percentage of all valid orders received through the electronic ordering interface that are processed through Verizon's systems without manual intervention);

(2) OR-5-02 (Percent Flow-Through - Simple) (that measures the percentage of Basic POTS Services orders that actually flow through); and

(3) OR-5-03 (Percent Flow-Through Achieved) (that measures the percentage of valid orders that are designed to and actually flow-through).

22. The Total Flow-Through measure captures *all* valid orders that are processed without manual intervention, including Complex orders that do not flow through. In stark contrast, the Flow-Through Simple measure captures the flow through rates of basic POTS orders — orders that are designed to and should flow-through Verizon's systems without manual processing. As a matter of simple logic, Verizon's Flow-Through - Simple rate should always be higher than the Total Flow-Through rate. Indeed, this certainly is the case in Verizon's performance results from January 2001 through July 2001.

23. Curiously, however, in Verizon's performance reports covering the period from August 2001 through November 2001, Verizon's Flow-Through Simple rates are *lower* than its Total Flow-Through rates. This would mean that Complex orders (which generally fall out for manual processing and which are included in the calculation of Total Flow Through) not only flowed through, but they also did so at rates higher than those for basic POTS orders. These

discrepancies in Verizon's performance results illustrate that its performance data should be eyed with suspicion.[23]

D. Verizon's Metrics Change Control Notices Show That Its Performance Reporting Process is Plagued with Problems.

24. Verizon's persistent pattern of issuing metrics change control notices reflecting data errors and changes to metrics further supports AT&T arguments regarding the inherent unreliability of Verizon's performance data. These errors show that Verizon's metric report production process is still plagued with start-up problems well over a year after it started generating its New Jersey performance reports.

25. On May 25, 2000, the New Jersey BPU placed Verizon on notice that it must provide the Board and requesting CLECs with monthly performance reports containing accurate and complete information concerning the results of its wholesale performance for the previous month. Under the C2C Guidelines, Verizon is required to provide each requesting CLEC with at least four monthly reports: (1) a copy of the individual CLEC monthly C2C performance report(s); (2) a CLEC aggregate report; (3) Verizon retail report; and (3) Verizon affiliate aggregate report. These reports are due on the 25th day following the reporting month (or the next business day thereafter) and are generally transmitted in one electronic file. Unfortunately, Verizon has never provided a complete, timely monthly report since the Board's Metrics Order.

26. From the start, Verizon's C2C reports have been riddled with so many problems that they cannot reasonably be relied upon to determine Verizon's checklist compliance. The first C2C report covering June performance was due on July 25, 2000, and Verizon provided its

[23] *See* C2C Performance Standards and Reports, OR-5 Percent Flow Through (August, September, October and November).

report to the New Jersey PBU and CLECs on that date. The very next day, Verizon issued a revised report. However, this was not the last revision to the June 2000 report. On August 17, 2000, Verizon filed with the New Jersey PBU further revisions to the June report, purportedly correcting numerous additional errors. Yet this was not the last revision to the June report. On February 28, 2001, Verizon reissued its June 2000 report, this time to correct errors detected by KPMG during its third party test of Verizon's OSS. On July 27, 2001, more than a year after the C2C Guidelines were adopted, Verizon submitted a metrics change control log to the New Jersey PBU and CLECs identifying changes that would impact the June 2000 report. In short, a year after Verizon was required to provide an accurate and complete report for its June 2000 performance, it still had not done so.

27. Unfortunately, this is not an isolated occurrence. Verizon has discovered errors in its performance monitoring processes that have affected scores of metrics or submetrics covering every month since the adoption of the C2C Guidelines.[24] The errors so identified are neither trivial nor insignificant.

28. The errors in Verizon's performance reporting processes which are reflected in its change control notices have impacted a broad range of performance reports. For example, in a metrics change control notice dated September 20, 2001, Verizon admitted that "[t]he sampling error and Z-score results" for a number of UNE special provisioning measures "have been incorrect since June 2000 for NJ Monthly C2C Aggregate Reports." CC NJ 2001-02461-Pro (Att. 3). Such errors cannot be dismissed lightly. Indeed, the Z-score is used to determine

[24] *See* Att. 2 (which includes samples of issues logs in which Verizon identified errors in its data and changes in metrics); Att. 3 (which includes samples of Verizon's change control notices reflecting errors in the data); and Att. 4 (which includes examples of some of the metrics impacted by Verizon's change control notices).

whether there is a statistically significant difference in performance results demonstrating a lack of parity. And such performance failures could trigger penalties under a performance remedy plan.

29. Furthermore, Verizon admitted that, from August 2000 through July 2001, "the Provisioning file used to score installation trouble reports (I codes) contained inconsistent circuit data" that resulted in the "non-scoring of some repeat installation trouble reports (I Codes)" for both retail and resale 2-wire digital products. CC NJ 2001-02329-Pro (Att. 3).

30. In addition, Verizon has admitted that it has excluded categories of orders from its performance data. For example, in a metrics change control notice dated September 17, 2001, Verizon admitted that, it "incorrectly omitted" from the UNE ordering metrics "stand alone directory listings," and that this error affected its June 2000 and July 2001 data. CCN-2001-024204-ORD (Att. 3). In another notice, Verizon revealed that, from June 2000 to October 2001, it excluded data from five of six area codes when calculating its installation trouble report rates for certain digital services under PR-6-01 and PR-6-03.[25] CCNJ 2001-03260-Pro (Att. 3).

31. Similarly, in a metric change control notice dated September 6, 2001, Verizon conceded that a data calculation error impacted numerous ordering metrics for the months of January and March, 2001. CCNJ 2001-01770-Ord (Att. 3). This notice was distributed on September 6, 2001, and Verizon has not issued performance reports correcting all of these errors.[26]

[25] This revelation also underscores the defects in the KPMG metrics replication test that failed to uncover these gaps in Verizon's performance data.

[26] Similarly, Verizon's metrics change control notices reveal that: its November 2001 data failed to capture certain transactions in the "time-out metric calculation"; certain resale provisioning data for September 2001 were

32. These types of errors and omissions in Verizon's data demonstrate that its data are unreliable. Although Verizon's Application heralds the so-called "success" of its Quality Assurance Team that is "responsible for reviewing the reported performance results for accuracy," it is telling that a number of these errors went undetected or remained unresolved for months. Application at 102. Indeed, in some instances, Verizon's Application indicates that it has not completed the Information Technology ("IT") initiatives required to resolve some of these data problems.[27]

33. Notably, corrections to these errors in Verizon's data could have a significant impact on whether Verizon actually met the relevant performance standard. During hearings before the New Jersey BPU, Verizon's own witness stated that she "was not saying they're [the data corrections] not materially significant in the final result." Tr. at 212-213 (Att. 1). In fact, this same witness conceded that corrected performance reports for certain submetrics would have revealed that a "satisfy" was actually a "miss" and a "miss" was actually a "satisfy." *Id.* at 350-351. It should also be noted that, earlier in the hearings, this same witness admitted that the New Jersey BPU and CLECs should "just take it on faith that if [the performance reports] were corrected, Verizon's performance would not be materially different" (*id.* at 214-215):

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impacted by a data calculation error; its August 2001 data incorrectly excluded certain disconnect orders from provisioning data; and certain flow through data in its August 2001 report were inaccurate. CCNJ 2001-00900-Pre; CCNJ 2001-01949-Pre; CCNJ 2001-02102-Pro; CCNJ 2001-02108-Pro; CCNJ 2001-02189-Ord (Att. 1).

[27] *See, e.g.*, Guerard/Canny/DeVito Decl., Att. 1 at 44 (stating that an IT initiative is required that "will prohibit the receipt of duplicate ASRs" that are caused because transactions are processed by multiple representatives, and that this data problem has impacted the ordering metrics since June 2000); *id.* at 45 (stating that an IT initiative is required "to accurately capture the number of lines impacted by an LSR," and that this data problem has impacted ordering metrics since July 2000).

> Q But based on whatever analysis Verizon has done, it has determined not to reissue those reports and take it on faith that any changes and corrections are not material. Is that correct?
>
> A DeVito: Could you repeat your statement.
>
> Q Well, Verizon has not reissued any of these reports for these sub-metrics for those months that were impacted. Is that correct?
>
> A DeVito: That's correct.
>
> Q So you are telling us here today, without any analysis before us, without any new performance report, just take it on faith that if they were corrected, Verizon's performance would not be materially different in the new reports as it was in the incorrect reports. Isn't that correct?
>
> A DeVito: That's correct.

34. Verizon has further compounded its data reporting problems by failing to issue corrected, restated performance reports when errors are detected.[28] Indeed, Verizon believes that it has no obligation to correct previously-issued, erroneous reports (*id.* at 216-217):

> Q Well, if reports are going to be inaccurate at the time of issue, shouldn't there be a policy to go back and correct them?
>
> A Canny: *I don't think that one's necessary.* if a CLEC sees an issue, there's a process, they get raw data files of looking at their own data.
>
> If there's a question, we can certainly address it through the process that we established. I think there's a number of vehicles

[28] With limited exceptions, Verizon has not restated its performance results. Although Verizon provided corrected and restated performance results that purportedly capture the data for the five area codes that were excluded from its previously-issued performance results on installation trouble report rates for certain digital services, it provided such restated data to the New Jersey BPU and AT&T only *after* AT&T complained about this matter in a letter to the New Jersey BPU. Verizon also willingly provided corrected, restated results to correct data problems identified by KPMG during the third party test. And Verizon provided restated results for its June 2000 through October 2000, January 2001 and February 2001 performance reports. Tr. 348-351 (Att. 1). However, Verizon's position is that it "generally" does not restate performance reports containing errors. (*id.* at 348).

> for addressing it. I don't necessarily think that it's necessary to refile a whole report (emphasis added).

35. Verizon's position is nothing short of remarkable. An error in Verizon's performance results could impact the completeness or accuracy of the data placed in the raw data file. Thus, it is nonsensical for Verizon to argue that the CLECs can detect readily any and all errors in Verizon's performance results. Further, it is absurd for Verizon to suggest that it should be relieved of the burden of producing accurate and complete performance reports, and that the CLECs should shoulder the responsibility of unearthing all errors in Verizon's data, including errors that are already known by Verizon. Unless Verizon corrects and restates its performance results, CLECs have no way of knowing what impact, if any, these corrections have on performance results. Critically, there is not even a mechanism in place to determine whether Verizon has corrected the problems and whether the necessary software or hardware changes impact the reporting of other data. Furthermore, by failing to correct and restate its results, Verizon can avoid paying penalties that otherwise might be warranted. Such a result is plainly untenable and highlights the lack of merit in Verizon's claims that the purported self-executing, anti-backsliding regime in New Jersey will detect and sanction discriminatory conduct.

36. Verizon's actions are also troubling because it has admitted that it has no clear policy for correcting reports that were previously issued with errors in them.[29] Significantly, although Verizon has issued metrics change control notices that are littered with admissions reflecting errors in its performance monitoring process, Verizon has not performed a complete quality assurance validation review since October 2000. Tr. at 178, 183 (Att. 1).

[29] Verizon's Response to AT&T Interrogatories, Set 1, No. 48, stating that VNJ "has not established a policy on recomputing monthly reports."

37. The veritable unending stream of change control metrics reflecting errors or changes that impact performance metrics demonstrates that Verizon's performance monitoring processes are not sufficiently reliable to assess accurate performance. Moreover, Verizon should be required to recompute and resubmit CLEC aggregate and CLEC-specific reports that are known to contain errors so that CLECs can analyze Verizon's performance. In addition, if such corrections also reveal that Verizon would have incurred penalties for such performance failures if its data had been calculated correctly in the first instance, Verizon should be required to remit any additional penalties that are due and owing with interest.

III. THE KPMG REPORT DOES NOT SUPPORT VERIZON'S CLAIMS REGARDING DATA ACCURACY.

38. Wrapping itself in the KPMG third-party test, Verizon asserts that the metrics portion of the OSS test confirms the accuracy of the performance data on which it relies. In embellishing this contention, Verizon states "KPMG concluded after military-style testing, that Verizon satisfied each of the 164 test points in the measurement portion of its review." Guerand/Canny/DeVito Decl. ¶ 134. Verizon's arguments cannot withstand analysis. Notwithstanding Verizon's assertions regarding the comprehensiveness of KPMG's third party test, KPMG's metrics evaluation was limited in a number of important respects.[30]

39. The metrics replication component of the test involved largely a simple arithmetic recalculation of performance results, particularly with respect to those parity measures with retail analogues. Importantly, as to those measurements with a parity standard, KPMG's test did not

[30] The Kirchberger/Nurse/Kamal Declaration also explains that, during KPMG's third-party testing of Verizon's OSS, KPMG failed to conduct end-to-end volume testing, and that its test was limited in other important respects that preclude its use as a barometer of the performance of the OSS.

evaluate whether Verizon used the correct retail analogue when calculating its performance results.[31] Indeed, during OSS workshops, KPMG conceded that it did not make and could not make any representations regarding the accuracy or completeness of the retail activities that Verizon chose to report. Furthermore, KPMG admitted that it did not know whether Verizon reported on the same retail analogue for a given service month after month. KPMG never received any comprehensive documentation of the retail service activities that Verizon included or excluded when calculating results for measures with a parity standard. And KPMG conceded that, when it acted as a pseudo CLEC during testing, it did not have "the same tool(s) to test the retail data" that it used "to test the wholesale data." *Id.* at 1023. In fact, KPMG was unaware that Verizon had asserted that it used an inappropriate retail analogue when calculating results for a preordering metric. *Id.* at 1022. Thus, the failure of KPMG to test whether Verizon used the appropriate retail analogue when calculating its results demonstrates that Verizon's assertions regarding the comprehensiveness and probative value of the metrics test cannot be credited.

40. Furthermore, as noted above, Verizon recently admitted that, for 17 months, it failed to include data for 5 of 6 area codes when calculating its performance results on troubles reported within 30 days of installation for certain digital services. Although these defects in Verizon's performance data occurred during the very period that KPMG was conducting its metrics test, KPMG failed to detect these omissions. The fact that KPMG's test failed to uncover these gaps in Verizon's performance data further highlights the paucity of Verizon's assertion that KPMG's metrics test is proof positive that its data are accurate and reliable.

[31] Tr. 1022 (conceding that "it was not a structured element of their test to look at the retail analog that was chosen and compare it to the wholesale standard or metric") (Att. 1); *id.* at 1017 (noting that the Master Test Plan did not include a "test point" of the "appropriateness of the retail analog compared to the wholesale analog").

41. Verizon has provided no credible evidence to support its claim that its data are accurate. Assuring the accuracy of performance data before Section 271 entry is absolutely critical. Accurate data are not only essential to the performance reporting process, but they also serve as the springboard for performance remedies.[32]

IV. THE NEW JERSEY PERFORMANCE INCENTIVE PLAN REMEDIES ARE INSUFFICIENT TO DETER COMPETITIVE BACKSLIDING.

42. As the Commission has recognized, the public interest analysis in Section 271(d)(3)(C) is an independent element of the "statutory checklist" that "requires an independent determination."[33] As part of that analysis, the Commission has recognized that a BOC's performance monitoring and enforcement plan can "constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public interest."[34]

43. The principal purpose of an anti-backsliding plan is to provide sufficient monetary incentives for a BOC to continue providing CLECs the nondiscriminatory support that is required after Section 271 approval. After a BOC is authorized under Section 271 to provide long distance services, it will no longer have the powerful business incentives provided by the lure of Section 271 approval to provide nondiscriminatory support for CLECs. Indeed, after Section 271 approval, the BOC will have powerful incentives to exploit its position as the supplier of

[32] The Kirchberger/Nurse/Kamal Declaration also explains that, even Verizon's performance data taken at face value show that: unreasonably high levels of CLEC orders are rejected and are subjected to manual processing; Verizon fails to provision timely billing completion notices; Verizon has not met parity standards with respect to billing accuracy; and Verizon has failed to provision loops in a nondiscriminatory manner.

[33] *New York 271 Order* ¶ 423.

[34] *New York 271 Order* ¶ 429.

facilities and services essential to competitors to drive those competitors out of both the local and long distance markets.

44. As a consequence, it is necessary to counterbalance the BOC's very real, anticompetitive business incentives with the prompt application of monetary consequences based on an anti-backsliding plan that will promptly detect and deter such behavior. In order to offset the anticompetitive incentives that are inherent in the BOC's position, an anti-backsliding plan must have sufficient and definite consequences to preclude the BOC from rationally concluding that it stands more to gain by discriminating and paying the consequences under the remedy plan, than by competing fairly on a level playing field.

45. As the Commission explained in its *Michigan 271 Order*, to provide the most effective possible deterrent against discriminatory performance after a Section 271 application is granted, an anti-backsliding plan should include "appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards."[35] To meet this standard, an anti-backsliding plan must have sufficient and immediate monetary consequences to dissuade the BOC from exercising its natural incentives to leverage its monopoly power in the local market, together with its position as the primary supplier of wholesale inputs to CLECs, to harm competition in both the local and long distance markets. In that connection, the Commission has emphasized the importance of remedial measures that are "automatically triggered" by noncompliant conduct:[36]

> [A]s part of our public interest inquiry, we would want to inquire whether the BOC has agreed to private an *self-executing*

[35] *Michigan 271 Order* ¶ 394. *See also Second BellSouth Louisiana Order* ¶ 364.

[36] *Michigan 271 Order* ¶ 394.

> *enforcement mechanisms* that are automatically triggered by noncompliance with the applicable performance standard without resorting to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent.

46. In its New *York 271 Order*, the Commission identified the following key elements in a performance monitoring and enforcement plan that would support a showing "that markets will remain open after grant of the application:"[37]

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards
- clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
- reasonable assurances that the reported data is accurate.[38]

47. In its Application, Verizon asserts that the New Jersey PIP satisfies all of the key criteria identified by this Commission in its *New York 271 Order*. Application at 103. Verizon's assertion is meritless.

A. Reliance on the PIP is Premature.

48. As a preliminary matter, Verizon's reliance on the PIP to support its application is premature. Although the New Jersey BPU, during an October 12, 2001 meeting, voiced its

[37] *New York 271 Order* ¶ 435.

[38] *Id.* ¶ 433.

general approval of the performance remedy plan proposed by the New Jersey BPU Staff, it has not issued a final written order. *See* Guerard/Canny/DeVito Decl. ¶ 152. The precise contours of the provisions that will be included in the final written order of the New Jersey BPU remain unclear. For example, during the NJ BPU Board meeting held on October 12, 2001, Commissioner Murphy observed that sanctions beyond the incentive credits in the New Jersey BPU staff's proposal may be required for persistent performance failures that could damage the reputation of the CLEC and result in the loss of customers. In response, the New Jersey BPU Staff stated that it would "incorporate into the order" provisions addressing this concern. Minutes of New Jersey BPU Board Meeting, October 12, 2001 at 12. A Commissioner also urged the New Jersey BPU Staff to make recommendations regarding the levels of harm that might warrant remedial relief over and above incentive credits. *Id.* Thus, there remains uncertainty concerning the remedial provisions that the NJ BPU will approve in its final written order.

49. At this juncture, because the New Jersey BPU has not issued a written order, there is no final order as to which a motion for reconsideration or any appeal could be sought. The mere fact that Verizon extols the virtues of the proposed New Jersey PIP for purposes of its Section 271 application does not foreclose the possibility that Verizon could appeal the final written order of the New Jersey BPU once it is finally issued. Notably, in Pennsylvania, Verizon appealed the Order of the Pennsylvania Public Utilities Commission ("PA PUC") approving the Pennsylvania Performance Assurance Remedy Plan ("PAPAP"), arguing that the PA PUC lacked the requisite authority under Pennsylvania law to require Verizon to pay penalties to CLECs for

failing to meet performance standards.[39] And, significantly, Verizon challenged the authority of the PA PUC to impose any remedies, while simultaneously arguing that the PAPAP constituted probative evidence that it would comply with the checklist after Section 271 relief. Recognizing the incongruity of Verizon's positions, the PA PUC, as a condition of Section 271 approval, required Verizon to withdraw its appeal. Verizon subsequently withdrew its appeal without prejudice.

50. Because Verizon withdrew its appeal without prejudice, AT&T and other commentors argued that Verizon could not properly rely on the remedy plan because it was free to resurrect its legal challenge of the PA PUC's authority at any time. In concluding that the PAPAP provided sufficient incentives to foster post-entry statutory compliance, the Commission gave considerable weight to the PA PUC's observations that it "was satisfied by Verizon's withdrawal of its previous lawsuit challenging the Pennsylvania Commission's authority to influence a PAP," as well as the PA PUC's stated belief that "Verizon is not likely to maintain a claim, in a subsequent litigation after Section 271 approval is obtained . . . ." *Pennsylvania 271 Order* ¶ 132 & n.454.

51. The current status of the development of the New Jersey PIP is markedly different from that of the PAPAP at the time of Section 271 approval. In New Jersey, no written order has been issued approving the PIP. The CLECs and this Commission remain in the dark regarding precisely what provisions will be included in any final written order. Once any final written order is issued, any interested party, including Verizon, could seek modification of or appeal

[39] *Verizon Pennsylvania Inc. v. Pa PUC*, Petition for Review, 1902 C.D. 2000, Commonwealth Court of Pennsylvania.

from the final order. Verizon could challenge, as it has before, the very authority of the State regulatory body to impose any self-executing remedies. And, of course, it remains unclear whether the appellate process will yield substantial modifications to or the entire jettisoning of the proposed PIP. Against this backdrop, by relying on the New Jersey BPU Staff's proposed PIP before the issuance of a final order, Verizon is putting the proverbial cart before the horse.

52. Even assuming *arguendo* that Verizon can properly rely on the proposed New Jersey PIP to support its application, the plan contains fundamental structural flaws that preclude it from providing any meaningful protection against discriminatory conduct by Verizon. These flaws include: (1) excessive reliance on "per-unit" incentive credits; (2) a statistical methodology that is biased in Verizon's favor; (3) provisions that fail properly to correlate remedies to the severity of the harm; and (4) waiver and exception provisions that create a rebuttable presumption that Verizon's failure to comply with the performance standards is appropriate, absolve Verizon of meeting parity standards, and have the potential to ensnare CLECs in protracted litigation that makes a mockery of the self-executing enforcement scheme that this Commission has envisioned.

B. The Transaction-Based PIP Will Yield Meager Penalties.

53. Unlike the New York performance remedy plan which is a measurement-based plan, the remedies under the proposed New Jersey PIP accrue primarily on a "per unit" or transaction basis. The "per unit" or transaction approach under the New Jersey PIP permits Verizon to avoid experiencing significant financial consequences for plainly discriminatory conduct. During the nascent stages of competition, it is unlikely that a CLEC will generate large volumes of orders. As a consequence, the transaction-based New Jersey PIP will generate modest, if not *de minimis*, levels of incentive credits. Moreover, the proposed New Jersey PIP has the perverse effect of placing CLECs in a Catch-22. To compete effectively within the marketplace and acquire significant market share, CLECs must obtain nondiscriminatory support from Verizon. However, under the proposed New Jersey PIP, Verizon can impede competitive entry and pay meager penalties based upon the paltry volumes of CLEC transactions resulting from Verizon's own anticompetitive conduct.

54. Currently, Verizon does not permit CLECs to have a full and fair opportunity to compete. As a result, CLEC transaction volumes are miniscule. Because Verizon's incentive credits are primarily driven by the number of CLECs with activity in an area and the duration and volume of units in an area, the New Jersey PIP creates powerful incentives for Verizon to engage in anticompetitive conduct that will thwart competition and keep transaction volumes at low levels. Thus, for example, if Verizon provided poor performance to the DLECs and Northpoint exited the market, VNJ's remedy payments under the New Jersey PIP would be reduced. If Rhythms declared bankruptcy and ceased operations, Verizon's financial exposure under the PIP

would be reduced further. Rather than providing a strong incentive that compels Verizon's compliance with its statutory obligations, the PIP has the opposite effect.

55. This conclusion is confirmed by examining penalties assessed under OR-5-03, which measures the flow through rate of orders that are designed to flow through various systems without manual intervention. If a CLEC generated 5,000 flow-through orders in a month but Verizon only handled 80% of them electronically, rather than the required 95%, Verizon would incur penalties of approximately $56,000 for that month.[40] Using this example, 1000 CLEC orders would have been manually processed. If, as a result of problems with the manual processing, only 250 of those 1000 customers chose to remain with Verizon, Verizon could expect to retain at least $54,000 in annual local service revenue from those customers. Verizon, of course, could also receive toll revenues from those customers. Meanwhile, the CLEC would have suffered both a loss in revenue and damage to its reputation. The attached worksheet to this declaration details this analysis. *See* Att. 5.

56. In contrast, the OR-5-03 measure in New York is an enforceable performance standard that is subject to more meaningful remedies. Recognizing the importance of this measurement, the New York Public Service Commission established a special provision in the New York performance assurance plan that requires Verizon to pay $2.5 million for each quarter, or $10 million annually, if it fails to meet the achieved flow-through rate or the total flow through rate, the latter of which is not included in the New Jersey PIP.[41] In marked contrast, the

[40] This is based on the per unit amounts in the proposed PIP.

[41] Similarly, the Massachusetts performance remedy plan places over $5 million at risk under the flow through special provision. Under the Massachusetts plan, "Verizon must achieve 80 percent total flow-through and 95 percent achieved flow-through for UNE orders." *Massachusetts 271 Order* ¶ 83 n. 257. The New Jersey PIP is