Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accounting Standards Under the	)	
Telecommunications Act of 1996	)	CC Docket No. 96-150
	)	
Section 272(d) Biennial Audit Procedures	)	
	)	

OPPOSITION TO VERIZON'S PETITION FOR RECONSIDERATION AND REQUEST FOR STAY

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January 18, 2002

SUMMARY

The FCC, in a thorough and well-reasoned decision, correctly denied Verizon's request for confidential treatment of the PriceWaterhouseCoopers final audit report. In its decision, the Commission opted to scrupulously interpret and implement Congress' unambiguously expressed intent that the results of Section 272 biennial audits be disclosed to the public.

Verizon, once again, chooses to come before this Commission to frivolously seek further delay, rather than to seek vindication of any sincerely-held convictions in federal court as the Commission invited it to do. Verizon makes no attempt to satisfy the Commission's long held standard for reconsideration. Nor does Verizon make more than a mechanical, perfunctory attempt to show that it meets the Commission's standard for a stay. Rather, Verizon's one consistent "policy" justification is nothing more than a veiled threat to obstruct subsequent 272 biennial audits unless its demands are met.

Indeed, for all of the reasons cited by the Commission in its Order, the Commission reached the correct conclusion, and set the correct precedent. Verizon has done nothing subsequent to vindicate any genuine belief that it is legally in the right. Instead, Verizon has come back to this same Commission reciting nothing more than threats, shibboleths, and platitudes in support of the very arguments that were considered and rejected less than one week prior. Verizon is clearly seeking nothing more than delay. The Commission must reject Verizon's transparent attempt to undermine its directives and frustrate implementation of its orders.

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The Competitive Telecommunications Association ("CompTel") opposes Verizon's Petition for Reconsideration and Request for Stay ("Petition"), filed in the above-captioned docket on January 15, 2002, and urges the Commission to deny the Petition immediately. In its Petition, Verizon asks the Commission to reconsider its January 10th Order[1] determining that Verizon's audit results must be made available for public inspection, *in toto*, and unredacted. The Commission's Order was the result of careful deliberation, weighing the alleged harm to Verizon against the Commission's statutory mandate to make this information freely available to the interested public. The Commission concluded, after explaining its previous orders interpreting Section 272, and addressing Verizon's previous arguments, that the Act and the Commission's Rules interpreting the Act mandated public disclosure of the Section 272 audit results. Verizon's Petition, as CompTel will show, is nothing more than another bad faith attempt to frustrate the Commission's duty to implement the Act.

Verizon's Petition is procedurally, and substantively, baseless. Verizon raises no factual issues that it did not have ample time to raise in the preceding 7 months, nor does Verizon even attempt to demonstrate that the Commission's decision contained a material error or omission.[2] Moreover, in choosing to impose further delay on this Commission and interested members of the public, Verizon has defiantly chosen not to take any action which would protect any sincerely held concerns over potential harms it would suffer as the result of the Commission's compliance with the Act.

I. Verizon's Request Has Already Received Greater Consideration Than It Was Due Under The Commission's Rules

Verizon's Petition asks the Commission to reconsider its Order "denying Verizon's request for confidential treatment" of its audit results reported by PriceWaterhouseCoopers on June 11, 2001. While Verizon has made no effort to establish any basis on which it is entitled to reconsideration, a careful re-examination of Verizon's "request for confidential treatment" would confirm that this Commission has already given Verizon more consideration than that to which it is entitled.

Sections 0.459(a) and 0.459(b) of the Commission's Rules set forth the procedures to be followed by a party wishing to receive confidential treatment of information submitted to the Commission. Specifically, these Rules prescribe the minimum notice requirements that a requesting party must satisfy before its request for confidential treatment will be considered. Section 0.459(a) states that "[a] copy of the

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[1] *Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, CC Docket No. 96-150, *Memorandum Opinion and Order*, FCC 02-1 (rel. Jan. 10, 2002) ("Order").

[2] *Regionet Wireless Licensee, LLC*, Nos. 853314-29, 853333-34, DA 01-2906, *Order on Further Reconsideration,* ¶ 8 (rel. Dec. 17, 2001) ("reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after petitioner's last opportunity to present such matters.") (*citation omitted*)

request shall be attached to and shall cover all of the materials to which it applies and all copies of those materials."[3] Similarly, Section 0.459(b) requires that "[e]ach request shall contain a statement of the reasons for withholding the materials from inspection," and which goes on to describe with specificity nine separate points of information that must be included with *each* request for confidential treatment. Section 0.459(c) explains that "[c]asual requests which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered."

Verizon's "request" for confidential treatment made no attempt to comply with either 0.459(a), and only the barest attempt to comply with 0.459(b), as the Commission notes in its Order.[4] Far from attempting to explain with specificity why it was entitled to confidential treatment for each of its claims, Verizon failed to even publicly file its request with the Commission at all, much less on each copy of each document for which it was requesting confidential treatment.[5] Verizon failed to take these steps to protect its information despite the fact that, by Verizon's own admission, at least one month prior to submitting its report, the Commission specifically directed Verizon to "redact any information that it considered confidential and submit a request under section 0.459 of the Commission's rules that this information not be available for public inspection."[6]

The point of this argument is not to criticize Verizon for its arrogant, and/or careless, disregard of Commission Rules, but rather to establish that the procedural nature of Verizon's "request" is that of a "casual request" described in Section 0.459(c). As

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[3] 47 C.F.R. § 0.459(a).
[4] Order, ¶ 15 ("With respect to Verizon's request for confidential treatment, we note that Verizon has not attempted to support its claim of confidentiality for each of the forty pages for which it requested confidential treatment.")
[5] In fact, CompTel had to obtain Verizon's June 11, 2001 letter from Commission staff, because it was no where to be found in the record of this proceeding.
[6] Petition at 3.

such, had the Commission demanded rigorous compliance with its rules, Verizon's casual request would not have ordinarily been entitled to consideration at all. However, Verizon's request did receive consideration—seven months of consideration—which the Commission used to carefully consider, and reject, each of the baseless arguments Verizon repeats in this Petition. Verizon is entitled to no more indulgence by this Commission.

II. Verizon Has Established No Legal Basis To Obtain Reconsideration

A. Verizon Has Pointed to No Legal Error or Omission in the Order

As CompTel noted earlier, denial of a petition for reconsideration is warranted where the Order for which reconsideration is requested contains no material error or omission and the petitioner's arguments have already been considered and rejected.[7] The Commission has considered and rejected each and every argument that Verizon asserts in its Petition.

Verizon's principal argument for reconsideration is that the Commission's Order "sets a bad precedent that will impair the conduct of future audits."[8] This argument is as persuasive as it is novel. Indeed, it would not be too much of an exaggeration to say that every party that is upset, or aggrieved, by a Commission decision feels that the decision is "bad precedent." If the Commission accepts a party's belief that a decision is "bad precedent" as the new legal standard for reconsideration, CompTel requests leave, *nunc pro tunc*, to file its own petitions on several unrelated matters.

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[7] *Joy Public Broadcasting Corporation Radio Station WJTF-FM*, No 99TP016, DA 00-2005, *Memorandum Opinion and Order*, ¶ 2 (rel. September 1, 2000).
[8] *Petition* at 1.

The only legal support that Verizon provides for this argument is to rehash the same arguments that it made in its June 11 Letter, which is to that say despite being told otherwise by Commission staff, Verizon continues to believe that the general audit procedures in Section 220 of the Communications Act control and override specific statutory provisions in Section 272 of the 1996 Act. Verizon further complains that the Commission's interpretation "makes no sense."[9] Regardless of Verizon's ability to comprehend the Commission's analysis, the Commission correctly explained in its Order that "the specific audit and disclosure provisions of [S]ection 272(d) override the more general audit authority of section 220."[10]

More troubling, however, is Verizon's none-too-subtle threat that the Commission's faithful interpretation of Section 272(d)(2) "will impair the conduct of future audits," and will "have a chilling effect on future audits."[11] Verizon strongly implies that, unless the Commission grants its requests, it will, *a-la* Enron and Arthur Anderson, withhold information and/or fail to retain information relative to future Section 272 statutory audits. The Commission should ignore this not-so-implicit threat and remind Verizon that obstruction of justice, and the destruction of documents required to be maintained, are both criminal offenses which the Commission will vigilantly police and refer to the Department of Justice for prosecution.

B. Verizon Has Introduced No New Information

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[9] Petition at 5.

[10] Order, ¶ 9. See also *Edmund v. U.S.*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.") (*internal citations omitted*). CompTel would further note that when Congress has passed sequential acts pertaining to the same subject, to the extent that there is a "repugnancy" between the two, "the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government . . . ." *U.S. v. Tynen*, 78 U.S. 88, 93 (1870).

[11] *Petition* at 5.

Verizon's explanations of why it would be harmed by public disclosure of its audit results are little more than elaborations of the general assertions it made in its June Letter. Indeed, each of Verizon's arguments regarding confidentiality of specific types of data were considered and rejected in the Commission's Order.[12] Nonetheless, CompTel will respond to Verizon's recycled arguments, if only to demonstrate that they are clearly flawed.

Verizon objects to the Commission's decision to require the disclosure of the information in Tables 14a, 14b and 14c concerning the time intervals for processing orders, provisioning of service, and performing repair and maintenance services for the affiliates and nonaffiliates, as customers, for exchange access services.[13] Verizon claims that the data in these tables can be used by Verizon's competitors to help target their own sales and marketing efforts through an evaluation of Verizon's success at marketing interLATA services.

As noted previously, Verizon has introduced no new facts to support its case. Indeed, Verizon simply argues that "the Commission can be sure that Verizon's long distance competitors would object vigorously if Verizon tried to publicize similar information about their purchases of exchange access service precisely because it is confidential and because it would give their competitors insights about their financial status, market plans, growth potential and technical capabilities."[14] Implicit in this statement, however, is the fact that Verizon *already knows* this information about its competitors, because Verizon is their dominant supplier for exchange access. Nonetheless, Verizon, once again, fails to demonstrate how disclosure of this information

[12] Order, ¶¶ 16-18.
[13] Petition, pg. 10.

would cause competitive harm to Verizon. Instead, the company seems to ignore the fact that the principal reason that Congress imposed the 272 burden on it, and not other carriers, was because it did, and can still, discriminate against rivals which depend on it for access to the local exchange. Verizon also ignores the fact that the Commission's *Special Access NPRM*[15] was adopted at the request of competitive carriers, who want the Commission to require Verizon, and other large ILECs, to publicly report their special access performance on an aggregated basis in order to be able to better police anticompetitive discrimination. In other words, not only would CompTel's members NOT object to the implementation of special access performance measures that evaluate their performance relative to Verizon and its affiliates, they are actively pursuing the implementation of such measures.

Verizon also argues that disclosure of monthly charges for joint marketing services will somehow allow Verizon's competitors to "plan counter-strategies and gain a competitive advantage over Verizon in the markets covered by the audit as well as in new markets that Verizon will enter in the future."[16] Once again, Verizon introduces no new facts, and simply rehashes its argument from the June 11 letter. Verizon's characterization of competitor motivation to access this information is shameless: CompTel's members must have access to this information to ensure that Verizon is not illegally subsidizing the marketing efforts of its long distance affiliates to the disadvantage of non-affiliated carriers and in defiance of the FCC's accounting rules, not to plagiarize Verizon's marketing program. Indeed, Verizon's post-271 behavior in New

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[14] Petition for Reconsideration, pgs. 8-9.
[15] *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, released November 19, 2001. ("*Special Access NPRM*")
[16] Petition for Reconsideration, page 9.

York demonstrates that nonaffiliated carriers have cause for concern, as the New York Public Service Commission has already found that Verizon provides preferential treatment in the quality and pricing of the primary interexchange carrier (PIC) change information that it provides to its affiliate.[17]

With regard to Table 12 of the Section 272 Biennial Report, CompTel and its members need this information to determine whether Verizon complied with the FCC's cost allocation standards when it transferred equipment to the long distance affiliate. Verizon's argument that disclosing third-party pricing information will harm its relationship with its vendors is ridiculous. First, these assets were transferred more than two years ago, so the prices are stale. Second, it is unclear from the audit report whether the information in Table 12 concerns truly unaffiliated third-party vendors or some other entity within Verizon's corporate umbrella; as such, it is critical that interested parties have access to this information to determine whether Verizon is trying to evade the Commission's accounting rules through a manipulation of its corporate structure. This concern is amplified given that the auditor had to include price information from third-party vendors in Table 12 because Verizon could not produce any information describing the price the equipment was transferred to the affiliate. Thus, while the information in this Table is unclear, what is clear is that Verizon will not be harmed from disclosure of this information. In short, the public interest in being able to observe Verizon's compliance with the FCC's asset transfer requirements outweighs any concern about a slight pricing advantage from its vendors.

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[17] Cases 00-C-0897, 00-C-0188, 97-C-8425, 92-C-0665, 95-C-0154, 95-C-0650, "Order To Show Cause, Requesting Comments and Closing Cases" (March 23, 2001), at 19 ("Show Cause Order").

III. Equity Disfavors Verizon and It Should Not Be Granted A Stay

Putting aside whether Verizon, through its petition-for-reconsideration-*cum*-stay-request, has, once again, disregarded the Commission's procedural rules in its attempt to protect itself from the operation of the Act,[18][18] Verizon has failed to satisfy any of the elements necessary for the Commission to grant it a stay. Indeed, if Verizon sincerely believed it was entitled to relief, it had ample opportunity to seek a judicial stay as the Commission invited it to do in the Order. Verizon failed to do this, instead seeking to obtain more delay from the Commission.

Regarding the merits of its stay request, Verizon makes only perfunctory assertions of "irreparable competitive harm," and, once again, reiterates its intent to undermine the Section 272 provisions of the Act unless the Commission accedes to its request to, once again, delay the public disclosure of the audit results required in the Act. Further, Verizon imperiously avers that no one will be harmed by further delay, because there has already been a substantial delay in affording the public an opportunity for comment. Finally, Verizon speciously, and shamefully, claims that the public interest will be served by a stay, because "the unprotected disclosure of Verizon's confidential information would have a negative effect on the conduct of this and subsequent audits."[19]

Taking Verizon's assertions in turn, CompTel first notes that "[t]he mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact."[20] Here Verizon has made no attempt to substantiate that it would suffer "severe economic impact," nor could it. The fact is that Verizon knew it

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[18] "Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading wil not be considered by the Commission." 47 C.F.R. § 1.44(e)

[19] Petition at 12.

would have to provide this information, and, in fact, had the Commission rely on its assertion that this information would be made public as an express condition of receiving its grant of 271 authority.[21] Further, as the Commission implies throughout its detailed explanation of the evolution of its 272 rules, Verizon knew well in advance that it would be subject to an audit under Section 272, the results of which would be disclosed to the public. If Verizon had a problem with any of the Commission's audit rules, the time to seek a stay would have been before these rules were implemented. Instead, it appears likely that the audit has discovered exactly what Congress feared might happen—that Verizon abused its dominant position in the local exchange market to the detriment of competitive carriers—and Verizon wants desperately to avoid the consequences of this public disclosure. Verizon's discomfort with the truth does not compel a stay.

Verizon's attempt to satisfy the third prong of the stay criterion is its assertion that "[n]o interested party would be harmed if the Commission granted another extension of time for filing comments," because "[t]he Commission has already postponed the date for comments on the audit report several times" in order to consider Verizon's requests, that are simply reargued in this Petition.[22] This statement is as outrageous as it is fallacious. To suggest that the public, which has a statutory right to the disclosure of the audit information, is not prejudiced by further delay, because they have already suffered 7 months of delay, is the height of sophistry. CompTel has previously explained how competitive carriers will be severely, and immediately, prejudiced without access to this

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[20] *Washington Metro Area Transit Authority v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

[21] *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*, CC Docket No. 99-295 (released December 22, 1999) at ¶ 418 n. 1290 (citing the Declaration of Susan C. Browning filed by Bell Atlantic in support of its Application for the proposition that Bell Atlantic would provide "accurate data regarding actual service intervals" so that unaffiliated carriers can evaluate their service relative to that of the ILEC affiliate.)

information.[23] Competitive carriers have already lost the ability to use the results of this audit to demonstrate, in their comments in the *Special Access NPRM*, that they are suffering discrimination in the provision of special access circuits. Moreover, without access to this information, CompTel members can only suspect, but not demonstrate, that they are suffering discriminatory treatment, and the inability to access this information only favors the party engaging in the discrimination. For this reason, CompTel requests that the Commission formally toll the statute of limitations for recovery of damages relating to special access discrimination in New York back to June 11, 2001 from the date when the Commission releases this information.

Finally, Verizon repeats its previously-mentioned threats to withhold information in subsequent audits as the "public interest" basis for its stay request. This is as meretricious as Verizon's other arguments, and patently ignores the fact that the specific statutory provision for which Verizon seeks a stay of, is specifically written to benefit the public. Thus, the FCC has the relatively easy choice of choosing between Verizon's version of the public interest and Congress' plainly articulated, and clearly mandated, public interest goals. The Commission must adhere to the interpretation mandated by Congress, which is reflected in its Order.

IV. A Protective Order Would Frustrate the Purpose of Section 272(d)(2)

In its Petition, Verizon alternatively requests that the Commission limit access to the audit results through the use of a protective order, so that interested parties may only

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[22] Petition at 12.
[23] *See* Letter of H. Russell Frisby, Jr., President, CompTel to The Honorable Michael K. Powell, CC Docket No. 96-150, pp. 4-5 (dated Jan. 3, 2002).

use the audit results to provide comments to the Commission.[24] Verizon cites as support for this request a letter from AT&T in early August 2001, which states that AT&T, at least at that time, would have been willing to execute a protective order to obtain access to the audit results. However, the fact that one party was willing to make a concession in order to obtain the audit results expeditiously, at a time when the information would have been most relevant, does not vitiate the *public's* right to disclosure of this information pursuant to the statute. As the Commission correctly concluded, "[o]n its face, the plain language of section 272(d)(2) mandates public disclosure of the results of the audit, which are contained in the final audit report."[25]

The Commission's conclusion in the Order should have dissuaded Verizon from attempting to seek any sort of "political compromise" like the protective order it now suggests. As an initial matter, the Commission, as it notes, does not have a tremendous amount of discretion—the unambiguous language of Section 272(d)(2) mandates public disclosure of the audit results—a protective order would necessarily limit the public disclosure of the audit results. A protective order, by its very nature, limits public discourse on the subject of the protective order. Congress manifested no such intention that the rights of the public to comment on the audit results be limited in any way.

To the contrary, demonstrating that "the requested authorization [271 relief] will be carried out in accordance with the requirements of section 272" is a prerequisite for a BOC to obtain approval under Section 271 to provide in-region, interLATA service.[26] It would be anomalous if the same public, invited to comment on 271 applications, could not use the public information of the audit results to comment on an applicant's showing

[24] Petition at 4.
[25] Order, ¶ 5.

that it demonstrate compliance with Section 271(d)(3)(B). An applicant's previous success in meeting the requirements of Section 272 is, indeed, the most probative evidence on that particular legal requirement. Similarly, the results of the Section 272 audit are likely to be a useful tool for the public to monitor ongoing compliance with Section 271.

Further, as discrimination against unaffiliated interexchange carriers is most likely to surface as a result of a biennial audit under Section 272, unaffiliated carriers may only be alerted to violations of Sections 201 and 202 through the public disclosure of these audit results. The limitations of a protective order will, necessarily, deprive aggrieved, unaffiliated carriers of their statutory rights under Section 207 to seek recovery for damages in any district court of the United States.

In sum, a protective order will frustrate and impede some of the principal benefits of Section 272(d), which are to provide interested parties information concerning a BOC's compliance with other performance obligations imposed by Section 272, and to eliminate the BOC's ability to engage in discriminatory behavior by making any such behavior transparent to affected parties.[27] A protective order requirement will also squelch public discourse, and remove an important tool for state commissions, the Department of Justice, and interested parties to determine the validity of subsequent 271 applications by the same BOC.

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[26] 47 U.S.C. § 271(d)(3)(B).

[27] See, *e.g.*, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order* (rel. Dec. 24, 1996) ¶¶ 323, 327.

Conclusion

For the foregoing reasons, CompTel urges the Commission to deny Verizon's Petition for Reconsideration and Request for Stay immediately, and to reject Verizon's alternative plea for the imposition of a protective order on the public disclosure requirements of Section 272(d)(2).

Respectfully submitted,

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