

272.” New York Order ¶ 403; Massachusetts Order ¶ 227; Connecticut Order ¶ 73;

Pennsylvania Order ¶ 124. That finding applies equally here.

A. Verizon’s Separate Affiliates Comply Fully with the Structural and Transactional Requirements of Section 272(b).

Verizon’s 272 Affiliates are operated as independent carriers and conduct business with Verizon (and all of its other local BOC affiliates) on an arm’s-length basis. Accordingly, the 272 Affiliates comply with the five requirements of section 272(b): First, the 272 Affiliates will operate independently as required by section 272(b)(1); second, the 272 Affiliates will maintain separate books, records, and accounts; third, the 272 Affiliates will have separate officers, directors, and employees; fourth, the 272 Affiliates will not obtain credit under any arrangement that would permit a creditor to have recourse to the assets of Verizon; finally, Verizon will use the same practices to ensure that transactions between it and the 272 Affiliates will be conducted on an arm’s-length basis, reduced to writing, and available for public inspection. See Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 17 (App. K, Tab 1); New York Order ¶¶ 406, 408-414.⁶²

B. Verizon Will Comply with the Nondiscrimination Safeguards of Section 272(c).

The Commission’s finding in New York, Massachusetts, Connecticut, and Pennsylvania that Verizon “will comply with section 272(c)(1)” applies equally to Vermont. See New York Order ¶ 417; Massachusetts Order ¶ 228; Connecticut Order ¶ 73; Pennsylvania Order ¶ 124.

⁶² As explained below, Verizon also meets the requirements of section 272(c). See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 17539, ¶ 170 (1996). Certain accounting and record-keeping services for each of Verizon’s 272 Affiliates are performed by other affiliated centralized services companies that are not separated under section 272. See Browning VT Decl. ¶ 6; see also Browning PA Decl. ¶ 17e. The Commission has made clear, however, that such shared-service arrangements are permitted. See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶¶ 168, 178-186 (1996).

Specifically, as in New York, Massachusetts, Connecticut, and Pennsylvania, Verizon will not discriminate between the 272 Affiliates and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. See Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 20.

For the same reason, the Commission's finding that Verizon has "demonstrate[d] that its BOCs account for all transactions with its section 272 affiliates in accordance with the accounting principles designated or approved by the Commission" also applies to Vermont. New York Order ¶ 415. As in New York, Massachusetts, Connecticut, and Pennsylvania, Verizon will account for any transactions with the 272 Affiliates as required by section 272(c)(2) and will fully comply with the Commission's cost allocation and affiliate transaction rules. See Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 27.

C. Verizon Will Comply with the Audit Requirements of Section 272(d).

Verizon also "will comply with section 272(d), which requires an independent audit of a BOC's compliance with section 272 after receiving interLATA authorization." New York Order ¶ 416; Massachusetts Order ¶ 228; Connecticut Order ¶ 73 & n.187; Pennsylvania Order ¶ 124 & n.430. As in New York, Massachusetts, Connecticut, and Pennsylvania, Verizon has mechanisms in place for retaining independent auditors and making records available to verify compliance with the Commission's rules in order to comply with section 272(d). See Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 34.

D. Verizon Will Fulfill All Requests in Accordance with Section 272(e).

Verizon will not discriminate in favor of its 272 Affiliates with respect to requests for telephone exchange and exchange access services. See New York Order ¶ 418; Massachusetts Order ¶ 229; Connecticut Order ¶ 73; Pennsylvania Order ¶ 124. First, Verizon will fulfill requests for telephone exchange and exchange access services from unaffiliated entities within

the same time period in which Verizon fulfills such requests for its own retail operations. See 47 U.S.C. § 272(e)(1); Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 21. *Second*, Verizon will not provide any facilities, services, or information concerning the provision of exchange access to its 272 Affiliates unless such facilities, services, or information are made available to other providers of interLATA service on the same terms and conditions. See 47 U.S.C. § 272(e)(2); Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 22. *Third*, Verizon will charge its 272 Affiliates or impute to itself (if using access for the provision of permitted interLATA services of its own) an amount for telephone exchange and exchange access services that is no less than the amount charged to unaffiliated interexchange carriers for such service. See 47 U.S.C. § 272(e)(3); Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 23. *Fourth*, Verizon will provide interLATA or intraLATA facilities or services to the 272 Affiliates only if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions. See 47 U.S.C. § 272(e)(4); Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 24.

E. Verizon and Its Affiliates Will Comply with the Joint Marketing Provisions of Section 272(g).

As in New York, Massachusetts, Connecticut, and Pennsylvania, Verizon will comply with the requirements of section 272(g) in Vermont. See New York Order ¶¶ 419, 421; Massachusetts Order ¶ 228; Connecticut Order ¶ 73; Pennsylvania Order ¶ 124. Specifically, Verizon's 272 Affiliates will not market or sell local exchange service provided by Verizon except to the extent that Verizon permits non-affiliated long distance carriers to do the same. See Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 26. Moreover, Verizon will not market or sell interLATA service provided by its 272 Affiliates in an in-region state until Verizon has received authorization to provide such service in that state. See Browning PA Decl. ¶ 25.

Verizon plans to market its services jointly with those of its 272 Affiliates, as permitted by section 272(g)(3), see New York Order ¶ 419; AT&T Corp., 220 F.3d at 632, and to permit the sharing of Customer Proprietary Network Information (“CPNI”) with its 272 Affiliates in accordance with 47 U.S.C. § 222 and the Commission’s holdings that CPNI is not subject to section 272(c). See Browning VT Decl. ¶ 6; Browning PA Decl. ¶ 20m.⁶³

F. Verizon’s Compliance Program Will Ensure Satisfaction of Its Obligations Under Section 272.

Finally, the Commission found that Verizon had “demonstrate[d] that each affiliate has implemented internal control mechanisms to prevent, as well as detect and correct, any noncompliance with section 272.” New York Order ¶ 405; see Massachusetts Order ¶ 228; Connecticut Order ¶ 73; Pennsylvania Order ¶ 124. Verizon will continue its compliance efforts, which are designed to ensure compliance with the requirements of section 272. See Browning VT Decl. ¶ 6; Browning PA Decl. ¶¶ 38-40. For example, Verizon has established an Affiliate Transactions Compliance Office (“ATCO”), which centralizes the corporation’s compliance efforts, reviews affiliate transactions, maintains Verizon’s Affiliate Transactions Policy, and conducts employee training on section 272 compliance. See Browning VT Decl. ¶ 6; Browning PA Decl. ¶¶ 39-41.

⁶³ See also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (“CPNI Order”); Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999) (“CPNI Reconsideration Order”); see also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, Clarification Order and Second Further Notice of Proposed Rulemaking, 16 FCC Rcd 16506, ¶ 25 (2001) (“our finding . . . that the term ‘information’ in Section 272(c)(1) does not include CPNI remains intact,” because Tenth Circuit vacated the CPNI Order on other grounds).

IV. APPROVING VERIZON'S APPLICATION IS IN THE PUBLIC INTEREST.

The Commission has held that “compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest.” New York Order ¶ 422; see also Arkansas/Missouri Order ¶ 126 n.400 (stating that, where the competitive checklist is satisfied, “barriers to local entry in the local exchange markets . . . have been removed”). As described above, there is no question that the checklist is satisfied in Vermont. In addition, the Commission has explained that it “may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest.” New York Order ¶ 423. No such unusual circumstances exist here; to the contrary, the evidence is overwhelming that Verizon's entry into long distance in Vermont is in the public interest.

First, the local market in Vermont is unquestionably open and there is significant local competition. And, as Verizon's experiences in New York, Massachusetts, and Pennsylvania unambiguously demonstrate, Verizon's entry into the long distance market in Vermont will further promote local competition there.

Second, mechanisms are in place to ensure that the local market will remain open after Verizon's entry. The Vermont PSB has established TELRIC rates for unbundled network elements; Verizon reports its performance in Vermont under substantially the same performance standards that are in effect in Verizon's 271-approved States; and Verizon has a comprehensive performance assurance plan in effect that places an unlimited amount of bill credits at risk.

Finally, Verizon's entry will greatly enhance long distance competition. Verizon's provision of long distance service in New York, Massachusetts, and Pennsylvania provides empirical proof that Bell company entry into long distance leads to lower prices for long distance service.

A. Local Markets in Vermont Are Open, and Verizon's Entry Will Increase Local Competition Further Still.

Local markets in Vermont are unquestionably open to competition.⁶⁴ Throughout Vermont there is competition from all types of competitors using all three entry paths provided under the Act. See Brown Decl. Att. 1 ¶¶ 4-6; Brief Att. A, Exs. 1-2.

Moreover, this competition is all the more impressive because Vermont *is the most rural state in the entire country*, with more than two-thirds of its population living in rural areas according to U.S. Census data. See Brief Att A, Ex. 4.⁶⁵ Vermont's largest town, Burlington, has a mere 39,000 inhabitants.⁶⁶ Besides Burlington, there are no other towns whose population exceeds 20,000, and only five towns whose population exceeds 15,000 (Essex, pop. 19,000, Rutland, pop. 17,000, Colchester, pop. 17,000, South Burlington, pop. 16,000, and Bennington, pop. 16,000).⁶⁷ Only 18 percent of Vermont's population lives in its five largest towns, which is the lowest ratio among the 15 least populous states in the country. See Brief Att. A, Ex. 3.

⁶⁴ Verizon disagrees as a legal matter that the Commission may conduct any analysis of local competition in its public-interest inquiry. Under the terms of the Act, the public-interest inquiry should focus on the market to be entered: the long distance market. The statute requires that "the requested authorization" be consistent with the public interest. 47 U.S.C. § 271(d)(3)(C). The "requested authorization" is to provide in-region, interLATA services. See id. § 271(b)(1). Therefore, the statute's public-interest focus is clearly on the long distance market, not the local market. This reading finds strong support in section 271(c)(2)(B), which sets forth an intricate competitive checklist, and section 271(d)(4), which states that "[t]he Commission may not . . . extend the terms used in the competitive checklist." It is implausible that Congress would have spent countless hours honing the checklist and would also have enjoined the Commission from improving or expanding upon it, but somehow would also have authorized the Commission to add further local competition-related requirements in the context of its public-interest review.

⁶⁵ See U.S. Census Bureau, Urban and Rural Population: 1900 to 1990 (rel. Oct. 1995), at <http://www.census.gov/population/censusdata/urpop0090.txt>.

⁶⁶ See U.S. Census Bureau, Census 2000 Redistricting Data, at <http://factfinder.census.gov>.

⁶⁷ See id.

The highly rural make-up of Vermont is significant, of course, because — as the Commission has recognized — “there may not be significant competition in many high-cost, rural areas.”⁶⁸ Rather, local competition — particularly facilities-based competition — typically focuses first “on larger business customers in large cities.”⁶⁹ Other regulators, analysts, and even the long distance incumbents have likewise recognized that rural areas are unlikely to attract large amounts of local competition.⁷⁰ The fact that Vermont is the most rural state in the country, and that it lacks even a single major city, means that it is inherently less likely than

⁶⁸ Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, FCC 01-304, ¶ 6 (rel. Nov. 8, 2001); see also Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, ¶ 324 (1997) (“[I]t is unlikely that there will be competition in a significant number of rural, insular, or high cost areas in the near future.”).

⁶⁹ UNE Remand Order ¶ 291 n.573; see also FCC, Biennial Regulatory Review 2000 – Staff Report, App. IV, Pt. 54, 15 FCC Rcd 21089, 21266 (2000) (“Competition for business customers in metropolitan areas has, in general, developed more rapidly than competition for residential customers or customers in rural areas.”); Ind. Anal. Div., FCC, Local Competition at 2 (Dec. 1998) (“Facilities-based CLECs appear to have concentrated in more urbanized areas.”).

⁷⁰ See, e.g., Burns Lifts Hold On DOJ Antitrust Nomination, Communications Today, June 13, 1997 (quoting then-acting chief of the DOJ’s Antitrust Division, Joel I. Klein: “in certain (most likely rural) markets, it is possible that . . . entry will not be forthcoming in the foreseeable future”); Section 254 Universal Service Joint Board Before the Senate Committee on Commerce, Science, and Transportation on the Implementation of the Telecommunications Act of 1996, 104th Cong. (1996) (Prepared Testimony of Martha S. Hogerty, Missouri Public Counsel Member, Before the Senate Committee on Commerce, Science and Transportation on the Implementation of the Telecommunications Act of 1996, June 18, 1996) (“competition . . . may never develop in certain remote, rural, low-density areas.”); Cynthia Flash, Communications Cafeteria; Analysts Brace for ‘Wild’ Time As Telecommunications Deregulation Generates Choices That Can Boggles the Minds of Consumers, News Trib., Jan. 5, 1997, at F-1 (“[r]ural [areas] will not see competition at a local level”); Opposition of Competitive Telecommunications Association at 7-8, United States v. Western Elec. Co., No. 82-0192 (filed Nov. 16, 1994) (“it is far from clear that substantial local competition will develop for rural or suburban customers”); Peter Heerwagen, Expect More Local Phone Providers, Quad-State Bus. J., Jan. 1997, at 14 (quoting regional manager for Sprint as saying that “rural areas will be less likely to see competition”); Christopher Conte, Reaching for the Phone, Governing Mag., July 1995, at 32 (quoting official of a rural-development agency: “[c]ompetition is not going to come to rural America until the bitter end, if ever.”).

other more urban states to attract competitive local carriers. And the fact that this is not what has occurred, further demonstrates that Verizon's local markets are open.

First, competitors in Vermont are using all three entry paths. As of November 2001, competitors in Vermont already served a conservatively estimated 21,500 lines. See Brown Decl. Att. 1 at Table 1. Most of these competitive lines are business lines, about one-fifth of which are serving being served either wholly or partially over facilities CLECs have deployed themselves (including in all cases their own local switches). See id. Competitors are serving approximately 15,600 business lines through resale, and approximately 730 business lines through unbundled network element platforms. See id. Competitors also are serving approximately 690 residential lines in Vermont. See id. Competitors appear to be serving approximately 290 residential lines either wholly or partially over facilities they deployed themselves (including in all cases their own local switches), approximately 60 residential lines through unbundled network element platforms, and approximately 340 residential lines through resale. See id.

Second, competition in Vermont comes in all shapes and sizes and is being provided throughout the state. Vermont has attracted competition from a wide variety of CLECs, including some of the biggest CLECs in the country (AT&T and Adelphia Business Solutions), many smaller ones (e.g., SoVerNet and Lightship Telecom), and various resellers (e.g., CTC and Lightyear). See id. Att. 1 ¶¶ 22-32. There are at least four competitors providing facilities-based service to business customers in Vermont. See id. Att. 1 ¶¶ 25, 28-29, 32. In addition, there is at least one competitor providing service to business customers through UNE platforms, and at least two competitors that provide platform-based service to residential customers. See id. Att. 1 ¶¶ 30-31. There also are at least nine resellers in Vermont, including at least three carriers

reselling service to residential customers. See id. Att. 1 ¶ 22 & Ex. B. Competitors are reselling service in all of Verizon's wire centers in Vermont. See id. Att. 1 ¶ 22. Likewise, competitors have obtained collocation across Vermont, including in Burlington, Bennington, Brattleboro, Montpelier, Rutland, and White River Junction. See id. Att. 1 ¶ 10. Adelphia's website lists as its local service area "[a]ll of Vermont."⁷¹

Third, as actual experience in states with section 271 approval unequivocally proves, granting Verizon long distance relief will prompt still further local competition. Verizon's entry into the long distance market in Vermont will lead to an increase in local competition in the state, just as it has done in other states where section 271 relief has been granted. As the Commission's own Local Telephone Competition report confirms, "[s]tates with long distance approval show [the] greatest competitive activity."⁷² In fact, "CLEC market share in New York and Texas . . . are over 135% and 45% higher than the national average, respectively."⁷³

This is hardly surprising: a Bell company's imminent or actual entry into the long distance market is the catalyst that finally forces long distance incumbents to enter local markets for mass-market customers.⁷⁴ New York was the first state in which a Bell company received long distance relief, and it was the first state in which AT&T, WorldCom, and Sprint began

⁷¹ Adelphia Business Solutions, Local Markets Served: Vermont, at <http://www.adelphia-abs.com/html/local/verm.htm>.

⁷² FCC News Release, Federal Communications Commission Releases Latest Data on Local Telephone Competition (May 21, 2001).

⁷³ Id.; see also Jerry A. Hausman, Effect of BOC Entry into InterLATA and IntraLATA Service in New York and Texas, at http://www.iacompetition.org/html/full_hausman.html ("BOC entry led to a large and statistically significant effect on CLEC shares for local residential service in New York and Texas").

⁷⁴ As one independent analyst recently has noted, "[w]e also believe that IXCs are using UNE-P primarily to protect long distance revenues, so the decision to use UNE-P is based primarily on where the RBOCs have gained LD entry rather than on the profitability of providing local service itself." Bruce Roberts, Dresdner Kleinwort Wasserstein, Verizon UNE Regulation Under Review, NJ PUC to Rule on VZ LD at 5 (Jan. 8, 2002).

extensively serving mass-market customers. Texas was the second state in which a Bell company received long distance relief, and it was the second state in which the long distance incumbents began extensively serving mass-market customers. And in both New York and Texas, the long distance incumbents responded to impending BOC entry by rolling out new, lower-priced bundles of local and long distance services that typically are marketed uniquely to customers in those states.

The long distance incumbents have made significant headway in marketing these bundles. In New York, for example, WorldCom has nearly 440,000 mass-market customers, and AT&T — which began providing service about six months after WorldCom — has more than 750,000 mass-market customers.⁷⁵ And more than 70 percent of the net growth in CLEC lines in New York in 2000 resulted from CLECs serving increasing numbers of residential customers.⁷⁶ These mass-market customers are in addition to the literally hundreds of thousands of additional business lines served by AT&T and WorldCom over their own facilities.

Verizon's entry in New York has not only sparked increased competition from the long distance incumbents, but also has sparked added local competition across the board. In the 23 months since Verizon's entry in New York, the number of local lines served by competitors there has increased by more than 130 percent, including a more than 345-percent increase in UNE-Platform lines and a more than 80-percent increase in facilities-based lines. See Brief Att. A, Ex. 5. There also has been a more than 340-percent increase in stand-alone loops and a more than 100-percent increase in interconnection trunks. See id. Similarly, in the first seven months since Verizon's entry in Massachusetts, CLECs added nearly 23,000 lines per month in that

⁷⁵ See New York PSC, Analysis of Local Exchange Competition in New York State at 17 (2001).

⁷⁶ See id. at 3-4.

state. See id. Ex. 6. And, in Pennsylvania, CLECs have added more than 25,000 lines per month since the Pennsylvania PUC endorsed Verizon's section 271 application in June 2001. See id. Ex. 7.

B. Local Markets in Vermont Will Remain Open After Verizon Obtains Section 271 Approval.

Even apart from the marketplace realities demonstrating that the local market not only is open, but irreversibly so, there simply is no realistic risk that Verizon could close the local market or deter further entry. For one thing, Verizon's compliance has been, and will continue to be, closely scrutinized by both competitors and state and federal regulators. For another thing, Verizon is subject to comprehensive performance reporting and performance assurance plans that put a substantial amount of remedy payments at risk annually.

1. The Regulatory Framework in Vermont Strongly Favors Competition.

As in Verizon's 271-approved states, the process of opening local markets began in Vermont even before the Act was enacted, and has continued since.

Most significant here, the Vermont Public Service Board has conducted extensive proceedings to evaluate Verizon's compliance with the competitive checklist. In fact, about six months ago, in August 2001, the PSB opened a docket specifically devoted to evaluating Verizon's compliance with the checklist: Docket No. 6533. See App. C. Since that time, the PSB has intensively analyzed every aspect of Verizon's checklist compliance down to the most minute detail, all with constant input from competing carriers. The formal record in Docket No. 6533 includes submissions totaling thousands of pages from Verizon and five other principal parties. Verizon also has responded to more than 265 interrogatory requests, questions, and data requests from the PSB staff and CLECs. There have been five days of hearings, filling more than 1,000 pages of transcript. See App. C, Tabs 9-12, 15. This process only recently concluded

with hearings involving all interested parties, and the Vermont PSB has indicated that, based on this exhaustive record, it “will recommend that the Federal Communications Commission approve Verizon VT’s Section 271 Application.” Vermont PSB Approval Letter at 8.

Of course, the PSB’s efforts have not been limited to its section 271 proceeding. Before it established a proceeding to evaluate Verizon’s compliance with the checklist, the Vermont PSB conducted additional proceedings to foster local competition and to implement the requirements of the 1996 Act. In particular, the PSB has conducted an “active review and modification of [Verizon’s] proposed unbundled network element prices” and has demonstrated its “commitment to TELRIC-based rates.” New York Order ¶ 238; Massachusetts Order ¶ 27. And, as demonstrated below, the outcome of the PSB’s pricing proceedings is entirely consistent with the Act and Commission precedent.

a. The Vermont PSB Established TELRIC Rates for UNEs in Docket No. 5713

In July 1997, Verizon filed cost studies with the Vermont PSB, and shortly thereafter Verizon and several other parties filed written testimony regarding those cost studies. See McCarren/Garzillo/Anglin Decl. ¶¶ 14-15. Between December 1997 and April 1998, the PSB conducted 12 days of technical hearings regarding Verizon’s costs studies, including both its recurring and nonrecurring costs. See id. ¶ 15. At the close of those hearings, the parties briefed all cost-related issues. See id. ¶ 16.

On February 4, 2000, the PSB issued an order formally adopting the TELRIC methodology for establishing UNE rates. See id. ¶ 17; Investigation into New England Telephone and Telegraph Company’s (NET’s) Tariff Filing re: Open Network Architecture, Including the Unbundling of NET’s Network, Expanded Interconnection, and Intelligent Networks in re: Phase II, Module 2 – Cost Studies, Order, Docket No. 5713 (VT PSB Feb. 4,

2000) (“February 4 Order”) (App. E, Tab 7). The February 4 Order adopted Verizon’s cost studies for recurring costs, but required Verizon to modify various inputs and to rerun its study using those inputs. See McCarren/Garzillo/Anglin Decl. ¶ 17; February 4 Order at 99-102, 114. With respect to nonrecurring costs, the February 4 Order adopted a model proposed by AT&T, and ordered Verizon to run a study using AT&T’s model along with certain Board-specified inputs. See McCarren/Garzillo/Anglin Decl. ¶ 17; February 4 Order at 106-09, 114. Finally, the PSB required Verizon to modify its rates “based on the outputs of its revised recurring and non-recurring cost studies.” February 4 Order at 114.

Between April and July 2000, Verizon submitted revised cost studies and SGAT pages for its recurring and non-recurring UNE rates, including those elements established in this Commission’s UNE Remand Order. See McCarren/Garzillo/Anglin Decl. ¶¶ 18-20. On August 23, 2000, the PSB formally approved Verizon’s rates, and closed its lengthy investigation. See id. ¶ 21; August 23 Order at 2.⁷⁷

b. The Vermont Rates for Unbundled Network Elements Are Within the Range That a Reasonable Application of TELRIC Would Produce.

As described above, the Vermont PSB has found that Verizon’s wholesale rates comply fully with the Act and the Commission’s rules. Under the Commission’s well-settled precedent, that should be the end of the inquiry. The Commission “will not conduct a *de novo* review of a state’s pricing determinations and will reject an application only if ‘basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial

⁷⁷ In October 2000, the PSB issued an order in a separate docket, Docket No. 6318, requiring Verizon to deaverage the rates for unbundled loops. See McCarren/Garzillo/Anglin Decl. ¶ 22; Investigation of Geographically Deaveraged Unbundled Network Prices, Order re: Geographic Deaveraging of Unbundled Network Elements, Docket No. 6318 (VT PSB Oct. 12, 2000) (App. H, Tab 2). In accordance with this order, Verizon submitted a compliance filing on December 11, 2000. See McCarren/Garzillo/Anglin Decl. ¶ 22. The new loop rates took effect on February 11, 2001. See id.

that the end result falls outside the range that the reasonable application of TELRIC principles would produce.” Kansas/Oklahoma Order ¶ 59 (quoting New York Order ¶ 244). The evidence here demonstrates that neither of these two conditions is present here.

First, as described above, the Vermont PSB applied TELRIC principles in establishing Verizon’s rates. With respect to the assumptions regarding each of the inputs used to establish Verizon’s rates, the PSB conducted an extensive investigation, and applied principles that are consistent with what this Commission has found TELRIC-compliant in the past. See McCarren/Garzillo/Anglin Decl. ¶¶ 32-41.

Second, the Commission has held that, in making a determination about whether rates in a particular state comply with TELRIC, it “may, in appropriate circumstances, consider rates that we have found to be based on TELRIC principles” in the context of previous section 271 applications. Kansas/Oklahoma Order ¶ 82. In particular, the Commission will look at whether the rates in the state under review are comparable to those in a state that previously was approved, especially where the two states being compared “are adjoining states,” *id.*, and have comparable cost structures, *id.* ¶¶ 83-84. Where a Bell company demonstrates that “the percentage difference between the applicant state’s rates and the benchmark state’s rates does not exceed the percentage difference between the applicant state’s costs and the benchmark state’s costs, as predicted by the USF cost model, *then we will find that the applicant has met its burden to show that its rates are TELRIC compliant.*” Pennsylvania Order ¶ 65 (emphasis added). Indeed, where a Bell company makes this showing, the Commission has held that there is no need to examine the manner in which the state commission applied TELRIC, or to examine the inputs that it used, because even if acted “improperly (*e.g.*, it made a major methodological mistake or incorrect input or several smaller mistakes or incorrect inputs that collectively could

render rates outside the reasonable range that TELRIC would permit),” the Commission will still “look to rates in other section 271-approved states to see if rates nonetheless fall within the range that a reasonable TELRIC-based ratemaking would produce.” Arkansas/Missouri Order ¶ 56; see also Pennsylvania Order ¶ 61 (“Even assuming, *arguendo*, that all of AT&T’s and WorldCom’s pricing claims are correct and that the specific inputs do not comply with TELRIC, we conclude that the alleged errors do not yield an end result outside a TELRIC-based range.”).

The D.C. Circuit has recently upheld the Commission’s TELRIC analysis. See Sprint, slip op. at 10-19. In particular, the court affirmed the Commission’s practice of using a benchmark test, and, where that test is met, of refusing to look behind the rates to determine whether they were “calculated by TELRIC means.” Id. at 19. The court reasoned that, “[t]o create a distinction between properly derived cost-based rates and rates that were equal to them . . . ‘would promote form over substance, which, given the necessarily imprecise nature of setting TELRIC-based pricing, is wholly unnecessary.’” Id. (quoting Kansas/Oklahoma Order ¶ 87).

Here, there is no question that the rates adopted by the Vermont PSB meet this established standard. Vermont, New York, and Massachusetts are adjoining states; Verizon has similar rate structures for unbundled network elements in all three states; and the FCC has already found — on two separate occasions — that Verizon’s rates in New York and Massachusetts are reasonable. See McCarren/Garzillo/Anglin Decl. ¶ 30; New York Order ¶ 238; Massachusetts Order ¶ 20. Moreover, as described below, both the loop and non-loop rates in Vermont are *lower* than the rates in New York or Massachusetts, even though the relative costs in Vermont are considerably *higher* than the costs in both New York and Massachusetts.

Loop Rates. The unbundled local loop rates in Vermont are *lower* than the rates that the Commission found TELRIC-compliant in Massachusetts and New York, even though the Commission's Universal Service Fund ("USF") cost model shows that the costs in Vermont are *higher* — indeed, more than double — the costs in those states. See McCarren/Garzillo/Anglin Decl. ¶¶ 27; Kansas/Oklahoma Order ¶ 84 (the USF cost model "accurately reflects the relative cost differences among states"); Pennsylvania Order ¶ 65 ("[O]ur USF cost model provides a reasonable basis for comparing cost differences between states."). For example, the statewide average loop rate in Vermont is approximately 4 percent lower than the statewide average loop rate in Massachusetts and within a penny of the statewide average loop rate in New York, even though the costs in Vermont are more than 115 percent higher than the costs in Massachusetts and more than 150 percent higher than the costs in New York. See McCarren/Garzillo/Anglin Decl. ¶ 27. As the Commission has held, where, as here, "the percentage difference between the applicant state's rates and the benchmark state's rates does not exceed the percentage difference between the applicant state's costs and the benchmark state's costs, as predicted by the USF model, *then we will find that the applicant has met its burden to show that its rates are TELRIC-compliant.*" Pennsylvania Order ¶ 65 (emphasis added).

Non-Loop Rates. The non-loop (i.e., switching-related) rates in Vermont also are lower than the rates the Commission found TELRIC compliant in Massachusetts and New York. In determining whether non-loop rates fall within the range that a reasonable application of TELRIC would permit, the Commission previously has examined those rates in aggregate.⁷⁸

⁷⁸ For example, in the Massachusetts Order, the Commission relied on a comparison of the "weighted average" of the rates for "switching [usage], transport, and switch ports." Massachusetts Order ¶ 25; see also id. (noting that an "aggregate comparison is most appropriate" because rate structures differ across various states, with some states assigning more costs to flat-rate port charges, and others assigning more costs to variable switching usage

Applying a similar comparison here demonstrates that Verizon's non-loop rates fall within the range that a reasonable application of TELRIC would produce. In Vermont, the statewide average aggregate rate for switching usage, a switching port, transport, and signaling — based on monthly usage assumptions derived from Verizon's ARMIS system⁷⁹ — is approximately 24 percent lower than the equivalent rate in Massachusetts and approximately 17 percent lower than the equivalent rate in New York, even though the costs in Vermont are approximately 96 percent higher than the costs in Massachusetts and approximately 42 percent higher than the costs in New York. See McCarren/Garzillo/Anglin Decl. ¶ 29. Accordingly, “the percentage difference between the applicant state's rates and the benchmark state's rates does not exceed the percentage difference between the applicant state's costs and the benchmark state's cost.” Pennsylvania Order ¶ 65. Verizon therefore has “met its burden to show that its rates are TELRIC-compliant.” Id.

Despite all this, the long distance incumbents will likely continue to rehash their argument that it is inappropriate to benchmark the rates adopted by the PSB against those in Massachusetts and New York, because the rates in those states are currently under review. As the Commission has repeatedly found, however, the fact that the rates in a “benchmark state” are under review is irrelevant to whether these rates can be used in a TELRIC-rate comparison. For example, in both the Massachusetts Order and the Pennsylvania Order, the Commission relied on a comparison of Verizon's rates in those states to the rates it approved in New York, even though the New York PSC already “had initiated a second UNE rate case.” Massachusetts Order ¶ 33; see Pennsylvania Order ¶ 64. As the Commission held: “It would be unreasonable to preclude charges); Arkansas/Missouri Order ¶ 60 (relying on aggregate comparison of “non-loop rates”).

⁷⁹ See Arkansas/Missouri Order ¶ 60 n.161 (holding that for purposes of establishing monthly usage assumptions, “ARMIS data is more reliable because it is based on publicly available data, rather than assumptions that vary among companies”).

incumbent LECs from relying on appropriate rates that have been found to be TELRIC-compliant merely because these rates are under some form of challenge or review where there has not been a determination that those rates are not TELRIC-compliant.” Massachusetts Order ¶ 31; see also id. ¶ 36 (“[T]he fact that a state may conduct a rate investigation and change the rates in the future does not cause an applicant to fail the checklist item at this time.”). Moreover, while the long distance incumbents will claim that the appropriate rates for comparison are those proposed by an administrative law judge in New York — but not adopted by the New York PSC — the Commission already has rejected this precise claim, concluding that the “ongoing review of the UNE rates being conducted by the New York Commission” in no way proves that the existing rates in New York and Massachusetts “are not TELRIC-based.” Massachusetts Order ¶ 31.⁸⁰

c. The Rates Adopted by the PSB Enable CLECs in Vermont To Compete Profitably.

The Commission repeatedly has held that, in order to satisfy the checklist, “incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin.” Arkansas/Missouri Order ¶ 65; see also Kansas/Oklahoma Order ¶ 92; Pennsylvania Order ¶ 70. And the D.C. Circuit has explicitly rejected the argument that the Commission must perform such an analysis in the context of determining whether rates satisfy the checklist under section 271(d)(3)(A):

[W]e can hardly find the Commission’s rejection of appellants’ proposal unreasonable. . . And it would be reasonable for the Commission to treat any questions raised by the

⁸⁰ Indeed, the New York Public Service Commission’s own staff has recommended that the New York UNE-pricing proceeding be held in abeyance to ensure that the setting of such rates is consistent with the “overarching objective” of fostering “the public interest benefits of facilities competition.” Motion to Hold UNE Rate Decision in Abeyance and Consider UNE Issues in the Verizon Incentive Proceeding, Case Nos. 00-C-1945 & 98-C-1357 (NY PSC filed Nov. 21, 2001).

low volumes, or by the appellants' evidence showing the difficulty of making a profit . . . as subsumed within the issue of TELRIC compliance. As the appellants concede, the lack of competition they allude to is neither a direct nor a conclusive proof of a checklist violation.

Sprint, slip op. at 6 (emphasis added and citation omitted).

Nonetheless, the long distance incumbents will likely attempt to repackage any substantive challenges they may have to the rates adopted by the PSB as a price-squeeze claim, arguing that the difference between the UNE rates and the retail rates in Vermont is too small for competing carriers to earn a gross profit that is large enough for these carriers to compete for residential customers. Accordingly, they will claim that Verizon's long distance entry would not be in the public interest. These arguments are misguided as both a legal and a factual matter.

As an initial matter, the Commission is under no obligation to analyze whether the UNE rates in Vermont could conceivably permit a price squeeze. In Sprint, the court held only that, where the local market is "characterized by relatively low volumes of residential competition," the FCC must *either* "pursue the[] price squeeze claim, *or* at the very least explain why the public interest does not require it to do so." Id. at 5, 7. Indeed, the court strongly hinted that a full-scale price-squeeze analysis is unnecessary. For example, it stated that "the potential scale of a serious price squeeze inquiry" may be incompatible with the "90-day limit [that] constrains the scope of the Commission's inquiries." Id. at 9. The court also indicated that a price-squeeze analysis may be futile, as "the residential market may not be attractive to competitors even if UNE costs are at the lower end of TELRIC." Id. at 10. Moreover, the court's decision did not purport to alter the long-standing rule that "the [FCC's] judgment regarding how the public interest is best served is entitled to substantial judicial deference." FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981).

In Vermont, there is ample legal justification for refusing to analyze whether the rates adopted by the PSB could conceivably permit a price squeeze.

First, courts have held that a price squeeze can exist only where a firm has monopoly control over an essential input, and its price for that input is “higher than a ‘fair price.’” United States v. Aluminum Co. of Am., 148 F.2d 416, 437-38 (2d Cir. 1945); *see also* Town of Concord v. Boston Edison Co., 915 F.2d 17, 18 (1st Cir. 1990). These conditions clearly are not met here. The price-squeeze claim advanced by the long distance incumbents relates exclusively to the price of the UNE platform, but the platform is in no way an essential input given that the Act makes available a variety of other means in which to gain access to Verizon’s network. For example, competitors also may serve customers through resale of Verizon’s services, by obtaining stand-alone UNEs from Verizon, by interconnecting their own facilities with those of Verizon, or by some combination of these options. Indeed, the Act guarantees that competing carriers can *always* avoid a price squeeze by reselling Verizon’s services, the rates for which must be set at a discount from Verizon’s retail rates. See 47 U.S.C. § 251(c)(4); id. § 252(d)(3) (“a State commission shall determine wholesale rates [for resold services] on the basis of retail rates”).⁸¹

Moreover, there is no question that Verizon is offering the UNE platform at a “fair price.” As demonstrated above, competitors may obtain the platform at rates the PUC adopted and found TELRIC-compliant. And the courts have held that where, as here, both wholesale and retail rates are fully regulated, a price squeeze normally will not occur. In Town of Concord, for

⁸¹ The Commission’s own lawyer made just this argument before the D.C. Circuit in the appeal of the Kansas/Oklahoma Order. See Transcript of Oral Argument at 28, Sprint Communications Co. v. FCC, Nos. 01-1076 et al. (D.C. Cir. Sept. 17, 2001) (noting that the “pricing provision for resale” under sections 251(c)(4) and 252(d)(3) “directly addresses the price squeeze”); id. at 29 (“competitors can compete with resale even assuming that there is a price squeeze problem on the network element side”).

example, then-Judge Breyer stated that “‘normally’ a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly.” 915 F.2d at 29.

Second, unique characteristics of local telecommunications markets in Vermont mean that “the residential market may not be attractive to competitors even if UNE costs are at the lower end of TELRIC.” Sprint, slip op. at 10. As described above, Vermont is the most rural state in the entire country, and the Commission and others have long recognized that, because of the high costs of serving such areas, they are unlikely to attract significant levels of local competition. See supra pp. 75-77. Thus, while the amount of residential competition in Vermont may be low relative to other states, this is likely caused by the highly rural nature of the state. As the D.C. Circuit correctly anticipated, conducting a price-squeeze analysis here would accordingly be futile because this analysis would never be able to prove that UNE rates, rather than the highly rural nature of Vermont, is the factor responsible for the way in which local competition in the state has developed.

Finally, the Commission can and should find that conducting a price-squeeze analysis is unnecessary because any policy that attempts to force UNE prices down to the lowest possible level is inconsistent with goals of the Act and the Commission to promote facilities-based competition. As Chairman Powell recently stated: “Facilities-based competition is the ultimate objective” of the Commission’s competition policy.⁸² Driving rates down to the lowest possible level would undermine that objective. Indeed, the Commission itself recently noted that its policies might be having just such an effect, and has accordingly sought comment “on whether we should modify or limit incumbents’ unbundling obligations going forward so as to encourage

⁸² Michael K. Powell, Digital Broadband Migration — Part II at 4 (Oct. 23, 2001), at <http://www.fcc.gov/Speeches/Powell/2001/spmcp109.pdf>; see also id. (unbundling policy “should provide incentives for competitors to ultimately offer more of their own facilities”).

incumbents and others to invest in new construction.” UNE Triennial Review NPRM ¶ 24. And facilities-based CLECs have expressed the very same concerns.⁸³

In any event, claims of a price squeeze in Vermont cannot possibly be sustained as a factual matter. In Vermont, the gross profit margins available to competitors are substantial. For example, comparing the wholesale rates for a UNE platform in Vermont with the revenues from Verizon’s Local Package (in which customers receive unlimited local calling, unlimited directory assistance, and three vertical features) yields a gross profit margin of approximately *** ** percent. See McCarren/Garzillo/Anglin Decl. ¶ 43. Moreover, the gross profit margin for the actual “average” Vermont retail customers is only slightly lower — approximately *** ** percent. See id.

2. Verizon Is Subject to Comprehensive Performance Reporting and Performance Assurance Mechanisms.

Verizon also is subject to extensive performance reporting requirements that, like the comparable requirements in New York, Massachusetts, and Connecticut, allow competitors and regulators alike to identify and investigate potential problems before they pose a risk to competition. And it also is subject to a comprehensive, self-executing performance assurance mechanism that provides still further incentives to provide the best wholesale performance possible.

⁸³ See, e.g., Letter from Kevin M. Joseph, Allegiance Telecom, to Magalie R. Salas, FCC, CC Docket Nos. 96-98, 96-262, 97-146, Att. at 2 (Feb. 2, 2001) (expanding “the availability of the UNE-P” “threatens to harm those CLECs that have built their own facilities and do not need to rely on the UNE-P to serve customers”); Ex Parte Letter from Kim Robert Scovill, Vice President and General Counsel, Choice One Communications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (Mar. 12, 2001) (“Choice One’s business experience demonstrates that new entrants can provide service to small business customers . . . without the need to rely on unbundled local switching purchased from an incumbent LEC. . . . We are unaware of any reason why another carrier could not replicate it using unbundled loops and self-deployed switches, even in second and third tier urban markets. The Commission’s rules governing unbundled local switching should reflect this fundamental fact.”).

Performance Measurements. Verizon reports its Vermont performance under an extensive set of measurements that are identical to the measurements developed in the New York PSC's collaborative carrier working group process and approved by the New York PSC. See Guerard/Canny/Abesamis Decl. ¶¶ 13-14; New York Order ¶¶ 438-439. Those measurements also are the same as those that were in effect in Massachusetts and Connecticut at the time the Commission approved Verizon's section 271 applications in those states.⁸⁴ See Massachusetts Order ¶ 243 & n.776; Connecticut Order ¶ 76 & Apps. B, C; see also Pennsylvania Order ¶ 131. The Vermont PSB adopted these measurements as its own in December 2001. See Guerard/Canny/Abesamis Decl. ¶ 13.⁸⁵ It also required Verizon to submit for its approval any changes made to Verizon's performance measurements in New York. See Guerard/Canny/Abesamis Decl. ¶ 13.

These standards require Verizon "to achieve excellent wholesale service quality" that "go[es] well beyond the Checklist requirements," "exceed[ing them] in specificity and degree."⁸⁶ As the Commission has found on three separate occasions, these measurements allow regulators and competitors alike to monitor all aspects of Verizon's wholesale performance. See, e.g., New

⁸⁴ In October 2001, the New York PSC issued its most recent order modifying the New York Guidelines. See Guerard/Canny/Abesamis Decl. ¶¶ 15-20. As a result, Verizon's November 2001 performance in Vermont, Massachusetts, Connecticut, and New York was calculated under the revised guidelines. See id. ¶ 14.

⁸⁵ In January 2002, the Vermont PSB required Verizon to report its billing performance using the versions of two new billing measurements in effect in Pennsylvania and Rhode Island, rather than the interim versions of those measurements that the New York PSC approved in its October 2001 Order. See Guerard/Canny/Abesamis Decl. ¶ 19, 72.

⁸⁶ Petition of New York Telephone Co. for Approval of its Statement of Generally Available Terms and Conditions, Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan at 31, Case Nos. 97-C-0271 & 00-C-0949 (NY PSC Nov. 3, 1999); 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, Evaluation of the New York Public Service Commission at 3-4, CC Docket No. 99-295 (FCC filed Oct. 19, 1999) ("NY PSC Evaluation").

York Order ¶ 431. Verizon also is subject to the same performance standards — either retail analogs or benchmarks — in Vermont as in New York, Massachusetts, and Connecticut.

Verizon's performance is measured against these standards in order to ensure that it provides service to CLECs in "substantially the same time and manner" as the service it provides to its own retail operations. Id. ¶¶ 44, 431.⁸⁷

Performance Assurance Plan. Verizon is subject to a self-executing Performance Assurance Plan ("Plan") in Vermont that parallels the plans in effect in New York, Massachusetts, and Connecticut. Indeed, the Plan in effect in Vermont is substantially identical to the plans in effect in New York, Massachusetts, and Connecticut when the Commission approved Verizon's section 271 applications in those states. The Commission has previously found that this plan provides "strong assurance that the local market will remain open after [Verizon] receives section 271 authorization." New York Order ¶ 429; see Massachusetts Order ¶ 242; Connecticut Order ¶ 76.

Verizon's Vermont Plan will place nearly \$15 million in annual remedy payments at risk. See Guerard/Canny/Abesamis Decl. ¶ 85.⁸⁸ Like the plan that the Commission approved in Massachusetts, that amount is equal to 39 percent of Verizon's net return in Vermont. See id. ¶ 79; Massachusetts Order ¶ 241 & n.769.⁸⁹ The Vermont Plan also has a nearly identical

⁸⁷ PwC concluded that Verizon's procedures and systems to capture and report its performance measurement results for Vermont are the same as those used in Massachusetts, Rhode Island, New Hampshire, and Maine. See Guerard/Canny/Abesamis Decl. ¶ 75.

⁸⁸ This figure includes \$470,000 in remedy payments available to CLECs operating in Vermont if Verizon's performance under the Vermont Change Control Assurance Plan — which is the same as those in effect in Massachusetts and New York (which also covers Connecticut) — is unsatisfactory. See Guerard/Canny/Abesamis Decl. ¶¶ 83, 112-114.

⁸⁹ The amount at risk in the Vermont Plan is thus greater than the 36 percent of net return the Commission found sufficient in approving Verizon's application in New York and SBC's applications in each of the five SWBT states. See New York Order ¶ 435; Texas Order ¶ 424 & n.1235; Kansas/Oklahoma Order ¶ 274 & n.837; Arkansas/Missouri Order ¶ 129 & n.409.

structure and allocation of remedy payments as the New York, Massachusetts, and Connecticut plans, which the Commission found are both “reasonably designed to detect and sanction poor performance when it occurs” and “reasonably self-executing.” New York Order ¶¶ 440-441; Guerard/Canny/Abesamis Decl. ¶¶ 23, 78-79.⁹⁰ For all these reasons, the Vermont Plan, like the plan in New York, “require[s] [Verizon] to achieve service quality that . . . go[es] well beyond the Checklist requirements.”⁹¹ Indeed, the Plan can require Verizon to make remedy payments despite extremely good performance, whether because Verizon misses a 95-percent benchmark by 1 percentage point (thereby still providing excellent, 94-percent performance) or because a small disparity of 0.1 percentage points is found to be statistically significant. See Guerard/Canny/Abesamis Decl. ¶¶ 95, 115-117.⁹²

Finally, Verizon has a strong business interest in providing superior wholesale service in order to encourage other carriers to use its network. See Lacouture/Ruesterholz Decl. ¶ 392. Even aside from this business interest, however, Verizon also is subject to a host of additional safeguards and remedial measures that provide abundant protection against the possibility of anticompetitive conduct. See also Pennsylvania Order ¶ 130 (“the PAP is not the only means of ensuring that Verizon continues to provide nondiscriminatory service to competing carriers”). For example, competing carriers still have recourse to the appropriate regulatory and judicial forums to enforce their legal or contractual rights. Likewise, the Commission itself retains the ability to enforce the requirements of section 271 with penalties, up to and including possible

⁹⁰ The Vermont PSB, in approving Verizon’s proposed Plan, required Verizon to make certain state-specific modifications. See Guerard/Canny/Abesamis Decl. ¶¶ 23, 79, 82, 88, 93, 96, 102; Arkansas/Missouri Order ¶ 129 (noting utility of such modifications).

⁹¹ NY PSC Evaluation at 3-4.

⁹² Therefore, to avoid making remedy payments, Verizon must provide service that is better than parity and that far exceeds the benchmarks.