

the Board's assessment of Verizon's claim that the market is currently and "irreversibly" open to local competition. Should the Board fail to properly assess that application, and misjudge the state of competition and Verizon's progress under the Act, then much of the hard work and progress made by the Board will be lost, and the future development of local competition will be in jeopardy.

Lightpath does not take its position on Verizon's Section 271 petition lightly; it is not an anti-271 zealot. Our focus is on the discrete needs of carriers seeing to enter the market with their own facilities. Since the passage of the Act, Lightpath has yet to oppose so publicly and vehemently a Bell Operating Company's petition to enter the long distance market. Indeed, in New Jersey's neighbor state, New York, Lightpath found that Verizon had been compelled through close regulation and vigorous enforcement to take such appropriate market-opening steps – especially those critical to facilities-based carriers like Lightpath – that Lightpath was willing to endorse Verizon's application before the FCC.² Because Verizon's conduct in regard to opening New Jersey's market has been so demonstrably bad, and because Verizon's intransigence even to permitting the entry of facilities-based carriers in the state so resolute, Lightpath is compelled in this case to join the chorus of opposition to Verizon's premature petition.

Opposition to Verizon's request for authority to provide long distance in New Jersey among commenters is unanimous. Commenters have provided concrete evidence that Verizon's bid for entry into New Jersey's long distance telephone market is

² See *Bell Atlantic-New York 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, Letter from James L. Dolan, President and CEO of Cablevision Systems Corporation to Magalie Roman Salas, Secretary FCC at 1-3 (filed Oct. 19, 1999) (supporting a favorable determination on Bell Atlantic's application to enter into the long distance market in New York) (Attachment 1). See also *Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*,

premature because Verizon has failed to comply with the requirements of the Act and has failed to open the local New Jersey telephone market to competition. For example, the Division of the Ratepayer Advocate, which represents the interests of New Jersey consumers, has demonstrated that competition does not yet exist in the New Jersey local telephone market, noting “consumers do not have [an] affordable choice – in fact, they do not have any choice – for their basic local telephone service.”³

That *actual competition* in New Jersey has failed to take root appears to be conceded by Verizon.⁴ True competition is the most reliable proof that Verizon has opened its local market to competition. Thus, absent an actual, market-based demonstration that New Jersey’s local phone market is “irreversibly open” to competition, as the United States Department of Justice will require,⁵ Verizon faces a *substantial and increased burden* of demonstrating to the Board that it has met, unequivocally, the requirements that would make the conditions right for competition. As noted by Lightpath, the Ratepayer Advocate, WorldCom, AT&T, XO Communications, and ATX Licensing, there remain a number of critical areas where Verizon’s failure to comply with the Act continues to impair the advance of local competition in this State, including:

15 FCC Rcd 3953, ¶ 76 (1999) (“*New York 271 Order*”) (FCC relies on Lightpath’s letter for its finding that Verizon has demonstrated compliance with checklist item 1 (interconnection)).

³ See Ratepayer Advocate Br. at 5-8; and 22-24, 32-38. See generally WorldCom Br. (noting Verizon’s failure to comply with its UNE, OSS, and reciprocal compensation obligations); AT&T Br. (same); XO Br. (noting noncompliance with checklist items 1, 4, 5, 13 and the public interest); ATX Licensing (noting Verizon’s failure to comply with its UNE and OSS obligations).

⁴ See Verizon Initial Brief (“Br.”) at 2-3, 118.

⁵ See e.g., *Joint Application by SBC Communications, Inc. et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Evaluation of the Department of Justice at 4, 10, 13-14, 26 (Dec. 4, 2000) (<http://www.usdoj.gov/atr/public/comments/sec271/sbc/7095.htm>); *Joint Application by SBC Communications, Inc. et al., for Provision of In-Region InterLATA Services in Oklahoma*, CC Docket No. 97-121, Evaluation of the Department of Justice at pages 6, 37, 41, 45, 47, 51. (Mar. 16, 1997) (<http://www.usdoj.gov/atr/public/comments/sec271/sbc/afdv03.htm>).

- Verizon stymies competitors' entry to the market by denying them nondiscriminatory access to Verizon's network and by attempting to impose heavy interconnection costs on new entrants that wish to offer competitive phone services to New Jersey customers, in violation of competitive checklist items 1 and 13. (47 U.S.C. § 271(c)(2)(B)(i), (xiii));
- Verizon does not provide nondiscriminatory access to critical network features at rates, terms, and conditions that comply with the law, raising insurmountable barriers particularly for new entrants that wish to serve New Jersey's residential consumers in violation of competitive checklist items 2 and 4 (47 U.S.C. § 271(c)(2)(B)(ii) and (iv)); and
- Verizon refuses to demonstrate that it can provide "real world" nondiscriminatory access to its operating support systems ("OSS"), merely offering bland promises that its OSS functions are operationally ready to handle commercial volumes (in violation of multiple competitive checklist items).

Despite the heavy burden that Verizon bears to prove to the Board that it has complied, Verizon is shockingly defiant in its refusal to cure or adequately address any these checklist deficiencies. For example, despite the overwhelming evidence that Verizon refuses to meet its obligations to provide interconnection (checklist item 1) and reciprocal compensation (checklist item 13) in a manner conforming to the law, Verizon simply asks the Board to ignore these facts.⁶ Rather than to demonstrate that competition in the State is flourishing – which it cannot possibly do – Verizon asks the Board to take it on faith that the public interest will be served by supporting Verizon's application because approval will *ultimately* spur competitors to enter the local market,⁷ even though such entry *must precede* Verizon's petition under section 271.⁸ Verizon continues to play

⁶ See Verizon Br. at 3-4, 8, 51-52.

⁷ VNJ Exh. 12 at ¶¶ 29-30; see also Verizon Br. at 118-119.

⁸ See *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶ 388 (1997) ("*Ameritech Michigan 271 Order*") ("Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must *first* be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other

sleight of hand with its failure to comply with the obligation to provide nondiscriminatory access to network elements at lawful rates, pointing to the Board's UNE rate decision but disregarding the fact that Verizon has yet to make the UNE rates, terms, and conditions available for CLECs. Finally, Verizon urges the Board to find that Verizon has done all that is necessary to ensure that its OSS will work under rigorous commercial use even as Verizon steadfastly refuses to submit its systems to any rigorous commercial test.

Verizon's failure to comply with federal law, combined with the overwhelming evidence that New Jersey consumers suffer from the *lowest level of residential local service competition* of any state where Verizon has sought to enter the long distance market, compel a finding to *reject* Verizon's application until such time as Verizon has truly and irreversibly opened its local market to competition in New Jersey.

ARGUMENT

I. VERIZON'S UNLAWFUL INTERCONNECTION AND RECIPROCAL COMPENSATION PRACTICES ARE DIRECTLY RELEVANT TO THE SECTION 271 PROCESS.

In order to comply with checklist item 1, Verizon must demonstrate that it provides interconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1).⁹ Section 251(c)(2), in turn, requires Verizon to provide "interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." Such interconnection must be provided "at any technically feasible point within the carrier's network."¹⁰ In order to comply with

congressional intention of creating an incentive or reward for opening the local exchange market met") (emphasis added).

⁹ 47 U.S.C. § 271(c)(2)(B)(i).

¹⁰ 47 U.S.C. § 251(c)(2).

checklist item 13, Verizon must demonstrate that it provides reciprocal compensation in accordance with the requirements of Section 252(d)(2).¹¹ Section 252(d)(2) requires Verizon to provide reciprocal compensation on just and reasonable terms, including the recovery of all “costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.”¹²

Lightpath has shown that Verizon cannot demonstrate compliance with checklist item 1 (interconnection) and checklist item 13 (reciprocal compensation) because Verizon refuses to offer CLECs nondiscriminatory interconnection at any technically feasible point and attempts to frustrate CLECs’ rights to just and reasonable reciprocal compensation.¹³ Rather than address these issues on their merits, Verizon argues that the Board should not review Lightpath’s position that Verizon does not comply with its interconnection and reciprocal compensation checklist obligations because Lightpath has also raised those issues in a pending arbitration proceeding.¹⁴ In particular, Verizon contends that any issues raised in an arbitration dispute are “irreconcilable” to the Section 271 process.¹⁵ Verizon is wrong.

¹¹ 47 U.S.C. § 271(c)(2)(B)(xiii).

¹² 47 U.S.C. § 252(d)(2).

¹³ Lightpath Br. at 12-17.

¹⁴ Verizon Br. at 3-4, 8, 51-52. Lightpath commenced interconnection negotiations with Verizon in January 2001, seeking merely to renew its existing arrangements with Verizon and to supplement its agreement with agreed-upon terms between Verizon and Lightpath from recent negotiations in Connecticut. None of Lightpath’s requests for interconnection arrangements were novel, unique, or departures from well-settled law. Nevertheless, Verizon refused to parlay on these rational terms, requiring instead that Lightpath negotiate endlessly, litigate, and ultimately prevail – on December 12, 2001 – in its plea for an adequate interconnection agreement to provide services in New Jersey. Indeed, arbitration thus far has vindicated Lightpath’s requests and demonstrated that Verizon’s tactic of delay, intransigence, and refusal, was without legal merit. The Arbitrator recommended that the Board adopt Lightpath’s position regarding its entitlement to: (1) nondiscriminatory interconnection at any technically feasible point; (2) just and reciprocal compensation for the transport of Verizon-originated traffic on Verizon’s network; and (3) the tandem reciprocal rate. *In the Matter of the Petition of Cablevision CLI – NJ, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Verizon New Jersey Inc.*, Arbitrator’s Recommended Decision to the State of New Jersey Board of Public Utilities, at 18-19, 28, 30 (Dec. 12, 2001) (“Arbitrator’s Recommended Decision”) (Attachment 2). It is unclear whether Verizon will accede to the law at this point, or continue to defy the law and delay Lightpath’s entry.

¹⁵ Verizon Br. at 3-4.

An ILEC's practices with regard to interconnection with CLECs are directly relevant to its performance under the checklist. Because Verizon refuses to permit a CLEC interconnection arrangements or reciprocal compensation arrangements that conform to FCC rules, Verizon is in violation of checklist items 1 and 13 of the Act. The rules on single point of interconnection and the tandem rate rule are quite clear.¹⁶ Verizon has ignored those rules for the better part of a year.¹⁷ By doing so, Verizon flouts the Act.

Where, as here, Verizon's actions involve *per se* violations of the Act, the Board's Orders,¹⁸ and the FCC's implementing rules,¹⁹ those actions are directly relevant to a determination of noncompliance with the Section 271 checklist.²⁰ Thus, Verizon's

¹⁶ See 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a); 47 C.F.R. § 57.711(a)(3); see also *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 ¶ 112 (2001) (“*Unified Intercarrier Compensation NPRM*”) (“[A]n ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.” (citations omitted)); *Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶ 78 (2000) (“*SBC Texas 271 Order*”) (“Section 251, and [the FCC’s] implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.”) (establishing that competitive carriers are due tandem rates when their switches “serve [] a geographic area comparable to the area served by the incumbent LEC’s tandem switch”); *TSR Wireless, LLC v. US WEST Comm., Inc.*, Memorandum Opinion and Order, FCC 00-194 ¶ 34 (rel. June 21, 2000) (“The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation”), *aff’d by Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

¹⁷ *In the Matter of the Petition of Cablevision CLI – NJ, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Verizon New Jersey Inc.*, Pre-Hearing Arbitration Brief, at 2 (filed Oct. 29, 2001). Lightpath requested renegotiation of its interconnection agreement with Verizon for the state of New Jersey in January 2001.

¹⁸ *Investigation Regarding Local Exchange Competition for Telecommunications Services*, Telecommunications Decision and Order at 103-04, Docket No. TX95120631, 1997 WL 795071 (NJ Bd. Pub. Utils. Dec. 2, 1997) (“*New Jersey Local Competition Order*”) (finding that competitive carriers have the right to interconnect at any technically feasible point in the incumbent’s network and envisioning one IP per LATA); see also Transcript of Nov. 20, 2001 Board Public Agenda Meeting, Item 4A, at 29-30.

¹⁹ See Lightpath Br. at 14, n.42; at 16, nn. 51, 53.

²⁰ *SBC Texas 271 Order*, at ¶ 22 (there is an independent obligation to ensure compliance with all terms of the competitive checklist, and “those terms generally incorporate by reference the core local competition obligations that sections 251 and 252 impose on all incumbent LECs”).

refusal to make arrangements that permit Lightpath the ability to interconnect “at any technically feasible point” and its attempt to unlawfully charge Lightpath for transport of Verizon’s traffic on Verizon’s own network demonstrate that Verizon is not in compliance with checklist item 1 and checklist item 13.²¹ Likewise, Verizon’s refusal to pay Lightpath the tandem reciprocal compensation rate for Lightpath’s transport and termination of Verizon’s call to Lightpath’s customer demonstrates noncompliance with checklist item 13.²²

Verizon’s contention that its interconnection and reciprocal compensation practices should escape Section 271 scrutiny because they were initially raised in the context of an arbitration proceeding is based on a deliberate misreading of prior FCC statements. The FCC has said that the Section 271 process is not the forum for resolving

new and unresolved interpretive disputes about the precise content of an incumbent LEC’s obligations to its competitors, disputes that [the FCC’s] rules have not yet addressed and that do not involve per se violations of self-executing requirements of the Act.²³

The FCC *did not say* that an ILEC may avoid scrutiny in the Section 271 process of clear violations of law merely because those violations concern interconnection or its obligations to competitors. Indeed, to read the FCC’s language so broadly would leave nothing to review in section 271 assessments.

Nor is there anything novel, unique, or revolutionary about Verizon’s obligation to interconnect and set reciprocal compensation arrangements with Lightpath. Verizon suggests that the Board should not consider Lightpath’s interconnection and reciprocal compensation grievances because they constitute “novel interpretative” disputes involving unsettled areas of law.²⁴ This is a ruse. Contrary to Verizon’s claim, the rules

²¹ See Lightpath Br. at 12-14.

²² See Lightpath Br. at 14-17.

²³ *SBC Texas 271 Order*, at ¶ 23; see also *id.* ¶¶ 24-27.

²⁴ See Verizon Br. 3-4.

that Verizon “disputes” are long-standing, well known, accepted and understood.²⁵

Verizon’s interconnection and reciprocal compensation practices constitute a blatant disregard of these well-established rules, and are a perfect example of Verizon’s consistent disregard of its obligations under the Act, and a basis for denying 271 relief.²⁶

Verizon’s good faith, and its willingness at long last to comply with the law, remain in doubt. Though Lightpath has obtained a legal ruling from the arbitrator vindicating its yearlong struggle with Verizon to get merely what the law requires, Verizon has yet to accede to that ruling, and history suggests that Verizon will continue to defy the law, the Board, and the FCC’s rulings.²⁷ Until the parties have an executed, approved, and fully operational agreement, and Verizon terminates its practice of increasing rivals’ costs through lengthy negotiation and litigation, it must be assumed that Verizon will continue its habit of denying interconnection on just and reasonable terms to Lightpath and other carriers in violation of competitive checklist item 1. Simply put, Verizon cannot be found to have fully implemented the competitive checklist at a time when it habitually refuses to provide a CLEC lawful terms and conditions for interconnection and reciprocal compensation.

²⁵ See Lightpath Br. at 14, n.42; at 16, nn. 51, 53.

²⁶ Lightpath Br. at 12-17. Moreover, Verizon’s unlawful interconnection and reciprocal compensation practices identified in Lightpath’s Initial Brief are not simply a carrier-to-carrier dispute between Lightpath and Verizon. This is not a case where one party is barred by its interconnection agreement from taking advantage of arrangements that are readily available to other CLECs who are not so constrained. Rather, the fact is that Verizon does not provide CLECs with access to interconnection and reciprocal compensation in accordance with the Act, the FCC’s rules, and the Board’s Orders.

²⁷ In the Parties’ previous arbitration, Lightpath filed a Petition for Arbitration containing more than fifty issues. The Parties resolved the majority of these issues during negotiations after the filing of the Petition, and ultimately, only one issue -- performance standards -- was resolved via arbitration. However, in an effort to delay implementation of the agreement after the arbitration decision came out in Lightpath’s favor, Verizon refused to accept Lightpath’s proposed performance standards language and sought clarification from the arbitrator. In response, the arbitrator rejected Verizon’s position and approved Lightpath’s proposed language. Finally, after weeks of legal maneuvering, Verizon complied with its obligations and executed an interconnection agreement with Lightpath in accordance with the arbitration decision.

II. VERIZON IS NOT IN COMPLIANCE WITH ITS OBLIGATION TO PROVIDE NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS AND OPERATIONS SUPPORT SYSTEMS.

A. Verizon Cannot Demonstrate Compliance With Its Obligation to Provide Nondiscriminatory Access to Network Elements.

In order to comply with checklist item 2, Verizon must provide “nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)” of the Act.²⁸ Verizon contends that the Board’s November 20, 2001 announcement establishing new UNE rates resolves any issue of noncompliance with its obligation to provide unbundled network elements at lawful TELRIC-compliant rates and to provide nondiscriminatory access to unbundled network elements in compliance with section 251(c)(3) and checklist items 2 and 4.²⁹ In particular, Verizon states that it has demonstrated checklist compliance because it “is committed to implement[] all [findings] consistent with the Board’s directives and established time frames” associated with the Board’s announcement to establish new UNE rates, terms and conditions.³⁰ But Verizon’s promise to comply with the law in the future and its “commitment” to comply with any findings set forth in the Board’s fully released UNE rate order does not open the market and Verizon simply cannot demonstrate compliance on this point.

Verizon must actually implement TELRIC-compliant UNE rates and provide access to network elements subject to nondiscriminatory terms and conditions in order to

²⁸ See 47 U.S.C. § 271(c)(2)(B)(ii).

²⁹ See Verizon Br. at 22-23.

³⁰ *Id.* at 23. Contrary to Verizon’s statement, paragraph 259 of the *New York 271 Order* does not support Verizon’s claim that it need not implement the Board’s UNE rate order to comply with its network element-related checklist obligations. See *id.* Rather, paragraph 259 of the *New York 271 Order* provides only that, if certain other factors are present, it is “reasonable [for the FCC] to allow a limited use of interim rates when reviewing a section 271 application where the state has not yet completed its permanent rate case for a new service.” *Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 259 (1999) (“*New York 271 Order*”).

demonstrate checklist compliance.³¹ The FCC has been crystal clear on this point: Verizon's promises of future performance cannot constitute checklist compliance.³² As AT&T correctly observed, "no one can determine [Verizon's] compliance with the Board's oral decision until it issues a written decision and [Verizon] makes compliance and/or tariff filings, and the Board and other interested parties determine whether [Verizon] has in fact carried out the Board's mandates."³³ Until these steps take place, Verizon cannot demonstrate compliance with its obligation to provide discriminatory access to network elements.

B. Verizon Cannot Demonstrate Compliance With Its Obligation to Provide Nondiscriminatory Access to Its Operating Support Systems.

Verizon contends that it has deployed the necessary systems and personnel to provide competing carriers in New Jersey with nondiscriminatory access to each of the necessary OSS functions, in compliance with its Section 271 checklist obligations.³⁴ Verizon's contentions are not based on actual commercial experience and data. Instead it relies solely on KMPG's third party testing of Verizon's OSS.³⁵ Verizon's reliance on third party testing alone is insufficient to demonstrate that it provides nondiscriminatory access to its OSS -- the systems and data base interfaces that are critical to vibrant local competition.³⁶

As noted by the Ratepayer Advocate and Lightpath, the FCC has consistently held that commercial performance data is the most probative form of evidence that OSS

³¹ See Lightpath Br. at 17-21; Ratepayer Advocate Br. at 7-8, 27-28; AT&T Br. at 28-35; WorldCom Br. at 11-14.

³² See *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶ 55 (1997) ("*Ameritech Michigan 271 Order*").

³³ AT&T Br. at 31-32.

³⁴ See Verizon Br. at 58-59.

³⁵ See Verizon Br. at 7, 68, 82-83, 87-88, 101-106.

³⁶ *SBC Texas 271 Order* at ¶ 98; *New York 271 Order* at ¶ 89.

functions are operationally ready.³⁷ All parties addressing this issue, except Verizon, agree that Verizon must subject its OSS functions to a commercial availability test period in order to determine how its OSS perform in the real world, at commercial volumes, and under a commercial cross section of ordering scenarios.³⁸ Recognizing the importance of OSS to the development of local competition, other states reviewing Verizon's application to provide long distance in other states, such as New York and Pennsylvania, have subjected Verizon to commercial tests before its OSS were certified as compliant.³⁹ Verizon cannot demonstrate that it provides nondiscriminatory access to its OSS in compliance with its Section 271 obligations until it implements similar commercial testing in New Jersey.

III. THE DISMAL LEVEL OF LOCAL COMPETITION IN NEW JERSEY ALONE SUPPORTS A FINDING THAT VERIZON'S REQUESTED ENTRY INTO THE LONG DISTANCE MARKET IS NOT IN THE PUBLIC INTEREST AT THIS TIME.

The record evidence in this proceeding demonstrates that Verizon continues to maintain overwhelming dominance in the local market and near total control of the market for residential local exchange services in New Jersey.⁴⁰ The level of local residential competition in New Jersey is the lowest of any state where Verizon has sought to obtain long distance authority.⁴¹ And, as AT&T indicated, the state of local

³⁷ See Lightpath Br. at 21 (citing *SBC Texas 271 Order*, at ¶¶ 98-99, 102; *New York 271 Order*, at ¶ 83); Ratepayer Advocate Br. at 24-25 (citing *SBC Texas 271 Order*, at ¶¶ 102; *New York 271 Order*, at ¶ 89).

³⁸ AT&T Br. 35-41; Ratepayer Advocate Br. at 24-27; WorldCom at 15-21. If anything, the concerns raised by AT&T, WorldCom, ATX, and MetTel regarding the limitations of the KMPG third-party tests and their first-hand (albeit limited) commercial experience with Verizon underscore the need for a commercial OSS testing period in New Jersey. AT&T Br. at 41-50; WorldCom Br. at 15-21; ATX Br. at 13-18.

³⁹ See Ratepayer Advocate Br. at 26; Lightpath Br. at 22-23.

⁴⁰ Lightpath Br. at 9-12; AT&T Br. at 16-20.

⁴¹ Lightpath Br. at 2, 9-10; see also AT&T Br. at 18.

competition in New Jersey is “getting worse, not better” because “residential resale is grinding to a halt and no other mode of competition is taking hold.”⁴²

Verizon’s response to the dismal state of competition in New Jersey, particularly residential facilities-based competition, is to note that a specific market share loss by a BOC is not a Section 271 requirement and to parade a host of irrelevant statistics.⁴³ Neither response is persuasive. As Lightpath, the Ratepayer Advocate, AT&T, and WorldCom have informed, the scant level of local competition -- and, particularly, the *de minimus* number of competitive, facilities-based residential lines -- is a highly relevant indicator that the market-opening goal of the Act has not yet been achieved in New Jersey.⁴⁴ Moreover, the dismal level of local competition, particularly residential competition, in New Jersey is the direct result of Verizon’s failure to comply with critical components of the Section 271 checklist for over nearly six years.⁴⁵ Verizon should not be permitted to reap the benefits of entering the long distance market without having complied with the prerequisite obligation to open the New Jersey local telephone market to competition. If Verizon prevails on its plea, New Jersey and its consumers will be

⁴² AT&T Br. at 17-18.

⁴³ Verizon Br. at 3-4. As AT&T noted in its Initial Brief, Verizon made various statements regarding the number of minutes exchanged with CLECs, the number of CLEC collocations arrangements and the number of NXX codes assigned to CLECs. Even if accurate, these facts are not relevant to the Board’s inquiry regarding the state of local competition. These facts do not establish the number of lines or customers served. See AT&T Br. at 20.

⁴⁴ See Lightpath Br. at 9-12; Ratepayer Advocate Br. at Section III; AT&T Br. at 16-20; WorldCom Br. at 7-10.

⁴⁵ See, e.g., Docket No. TX95120631, *In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services*, Telecommunications Decision and Order, at 103-04 (Dec. 2, 1997), *rev’d*, *AT&T v. Bell Atlantic-New Jersey*, Civ. Nos. 97-5762, 98-0190 (D.N.J. June 6, 2000); Docket No. TO98060343, *In the Matter of the Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic New Jersey, Inc.*, Order Approving Interconnection Agreement (Oct. 21, 1998); *In the Matter of the Petition of Cablevision CLI – NJ, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Verizon New Jersey Inc.*, Petition for Arbitration (filed Aug. 20, 2001) (filing Petition for Arbitration due to Verizon’s insistence on unlawful and anticompetitive interconnection terms).

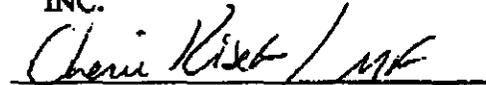
denied the benefits that a truly competitive and vibrant telecommunications market has to offer; including investment, innovation, new services, and better values.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Lightpath's Initial Brief, Verizon has failed to demonstrate that it complies with the Section 271 prerequisites necessary for support of its New Jersey long distance entry application.

Respectfully submitted,

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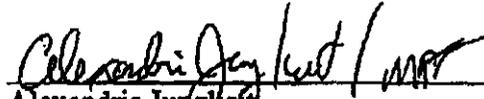
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STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
NEWARK, NEW JERSEY WEDNESDAY, NOVEMBER 7, 2001

IN THE MATTER OF THE :
CONSULTATIVE REPORT OF :
THE APPLICATION OF : BPU DOCKET NO.
VERIZON-NEW JERSEY, INC. : TO-001090541
FOR FCC AUTHORIZATION TO :
PROVIDE IN-REGION, INTER- :
LATA SERVICES IN NEW JERSEY.:
-----:

B E F O R E: PRESIDENT CONNIE O. HUGHES
COMMISSIONER CAROL MURPHY
COMMISSIONER FREDERICK F. BUTLER

A P P E A R A N C E S:

On behalf of Verizon-New Jersey, appear:

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2 Q Mr. D'Amico, is it your
3 understanding that the FCC Rules implementing
4 Section 251(b)5 of the Act, Reciprocal Comp
5 Rules, entitle CLECs to receive the tandem rate
6 for the traffic terminated on the network if the
7 CLEC switch serves a comparable geographic
8 service area to that of the ILEC tandem switch?

9 A D'Amico: I believe there is a
10 provision in the FCC's First Report and Order
11 that was released back in, I guess, the 1996 time
12 frame that addresses or -- I guess it's
13 concerning your particular question.

14 And it does state that and I'll
15 just paraphrase that if the CLEC switch serves a
16 comparable area to the ILEC tandem, that the
17 tandem rate would cover those Reciprocal Comp.

18 However, there has been a lot of
19 discussions as far as what does that mean as far
20 as serving the same geographic area; does that
21 mean the capability versus the actual serving of
22 that area with customers?

23 It's been arbitrated in several
24 states, Texas being one of them, where
25 functionality has been introduced into the --

2 into the equation. So it's -- it's to me, it is
3 not a clear answer. If I knew the answer, I
4 guess we wouldn't be arbitrating it in the
5 various states.

6 So that's my understanding of that
7 particular section.

8 MR. VALENTINO: President Hughes,
9 Commissioner, I would like to pass around
10 at this time, CLI Exhibit No. 1. CLI
11 Exhibit No. 1 is an excerpt from the Code
12 of Federal Regulations. And the excerpt
13 is to specific rule that we are speaking
14 about right now.

15 (Whereupon, Excerpt from the Code
16 of Federal Regulations, 47 parts, 40 to 69
17 Revised as of October 1, 2000, entitled
18 Telecommunication, is received and marked
19 as CLI-1 for identification.)

20 Q Mr. D'Amico, if you could turn
21 your attention to 51.703(b) on Page 57 of which
22 is listed at Page 57. It's actually Page 2 of
23 CLI Exhibit 1.

24 MR. VALENTINO: Actually, excuse
25 me, a moment's indulgence, President

2 to CFR Section 51.711(a)(1) and this would be
3 Item A.

4 MR. D'AMICO: Would you please
5 read that in the record for us?

6 A D'Amico: "Where the switch of a
7 carrier other than an incumbent LEC serves a
8 geographic area, comparable to the area served by
9 the incumbent LEC's tandem switch, the
10 appropriate rate for the carrier other than an
11 incumbent LEC is the incumbent LEC's tandem
12 interconnection rate.

13 Q Thank you.

14 Is there any mention of a
15 functional equivalency test in that section?

16 A D'Amico: Well, you know, not in
17 this section. And we actually arbitrated this
18 issue on Friday and so this is kind of like deja
19 vu.

20 But there is another section that
21 talks about comparable functionality. I'm not
22 sure that it has any relevancy to this particular
23 section. I pointed that out on Friday to the
24 arbitrator. And I think the issue there and --
25 and, again, that's why we're arbitrating it. It

2 is the position of some CLECs that, you know, say
3 that this is what this says and automatically
4 every single minute without any proof is subject
5 to the tandem rate. And what we're saying is
6 that we're not sure about that.

7 So, whatever the arbitrator
8 decides in their recommendation and then the
9 Board approves that, that is what Verizon will
10 do. So that is an open arbitration issue and I'm
11 not sure that it is relevant to whether or not
12 Verizon is meeting the No. 13 Reciprocal
13 Compensation checklist item.

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1 Ms. Cole

2 A When the traffic goes directly to that end
3 office the only cost involved to terminate that
4 call would be the relevant end office switching
5 cost in that particular end office, so that is
6 what comprises the end office rate.

7 The tandem rate is another way to get
8 traffic to an end office and it would involve
9 directing that traffic through the relevant tandem
10 and then there is additional cost in doing that
11 because the tandem is involved so that's why the
12 tandem rate is higher than the end office rate.

13 Again, what a tandem does is it, think of
14 it is as a wheel, the tandem would be the point in
15 the middle and it is just an aggregation point and
16 all of the end offices are subtandems.

17 The traffic costs are much lower, it makes
18 sense to send that traffic to the tandem even
19 though there is added cost, because of the volume,
20 it makes sense to use that additional switch,
21 instead of putting in all of the connections to
22 this end office when there is hardly any traffic
23 to it.

24 However, when you get volumes of traffic
25 like two hundred thousand per month to a

1 Mr. D'Amico

2 particular office, that's when you would have a
3 direct-- there would be the necessity for economic
4 or engineering benefits to put an end office in,
5 so that's where you have the end office rate.

6 Verizon has both of those rates, they are
7 approved by the Board, and depending on how the
8 traffic is sent to Verizon, if it is sent to the
9 tandem it is billed at the tandem rate, if it is
10 sent to the end office it is billed at the end
11 office rate.

12 The issue is when Verizon sends traffic to
13 Cablevision, for example to Cablevision's
14 Parsippany switch, what is the appropriate rate
15 that Verizon should pay to Cablevision?

16 And Verizon's position is that if they
17 meet the criteria for the tandem rates then we
18 will pay the tandem rates, but to say that, you
19 know, across-the-board, no matter what that is,
20 Verizon, you always pay Cablevision the tandem
21 rates, in our view has a lot of problems.

22 One is, is that switch doing the
23 functionality of a tandem?

24 Is that switch actually serving customers
25 in the geographic area? I know that there is some

1 Mr. D'Amico
2 language in the FCC Order and I would use that
3 maybe on a legal question on interpreting that
4 language.

5 ARBITRATOR O'HERN: Which Order?

6 MR. D'AMICO: The First Report and Order
7 that came back in 1996.

8 But even if we kind of worked through
9 those issues of is it appropriate to pay
10 Cablevision the tandem rate we have kind of a
11 fairness thing where Verizon has these two
12 opportunities or two entry points into our
13 network, a tandem or end office, and the CLEC can
14 control their costs depending on how they want to
15 interconnect, and traffic flows, et cetera.

16 We under Cablevision's proposal would
17 never be able to get a lower rate because even
18 though there is a tandem and an end office we
19 would never be able to connect to the end office
20 portion.

21 And so what Verizon is proposing, I
22 believe this was in one of the prior Board
23 orders, I think it was December 2, 1997, where
24 they came up with this blended kind of approach
25 where what would happen is if Cablevision is

1 Mr. D'Amico
2 sending Verizon fifty percent of their traffic
3 through the tandem and fifty percent of their
4 traffic to the end office, they are paying for
5 their minutes, for one hundred minutes fifty
6 percent would be billed at the higher rate and
7 fifty percent at the lower rate, so in effect it
8 is fifty percent, so what Verizon would propose is
9 that we send our traffic to Cablevision, that it
10 just be blended or we pay the blended rate based
11 on what their terminating costs are. If for some
12 reason everything is tandem routed we would pay
13 that tandem rate.

14 And that's the issue in kind of a
15 nutshell.

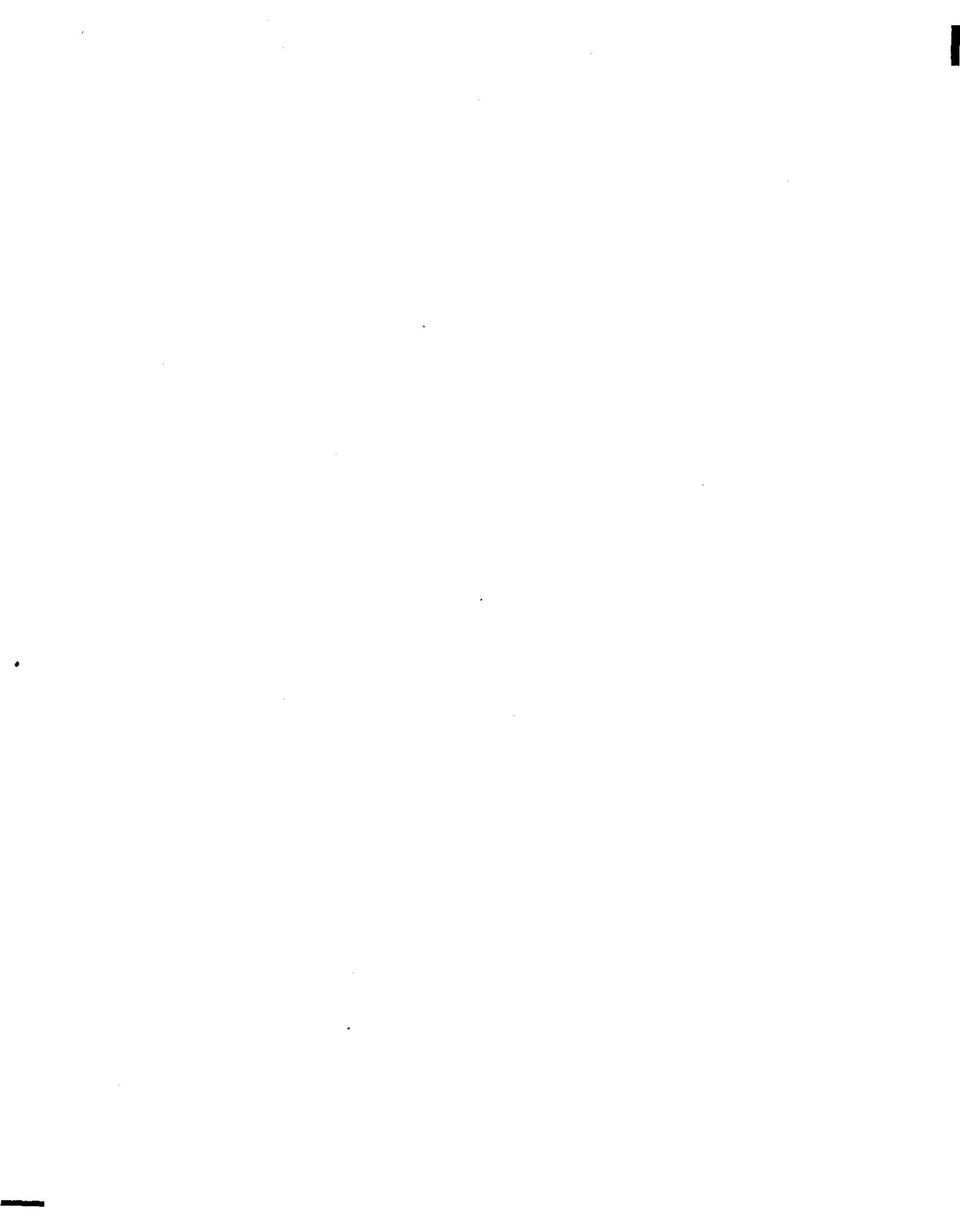
16 Q There was mention of a DS-1 limitation
17 issue. Can you tell us what that is?

18 A A DS-1, I am not an engineer, but it is
19 comprised of twenty-four individual DS zeroes.

20 Q Is that a data line?

21 A It is not a data line. It is for-- I don't
22 know, a facility. I would rather convert it to
23 minutes of use so we can better understand it.

24 The average equivalent to that would be
25 two hundred thousand minutes of use per month. So



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January 7, 2002

BY ELECTRONIC MAIL & HAND DELIVERY

Henry M. Ogden, Acting Secretary
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

**Re: In the Matter of the Petition of CABLEVISION LIGHTPATH – NJ, INC. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with VERIZON NEW JERSEY, INC.
Docket No. TO01080498**

Dear Acting Secretary Ogden:

The Arbitrator's Decision Concerning Language To Implement His Recommended Decision of December 12, 2001, Verizon New Jersey Inc. ("Verizon NJ") "direct[ed]" Cablevision LightPath NJ, Inc. ("Cablevision") to prepare, and Verizon NJ to sign and deliver an Interconnection Agreement between Verizon NJ and Cablevision (the "Agreement") today. Verizon NJ objects to the Agreement because, *inter alia*, it contains terms which,

- (i) have no basis in the Arbitrator's Recommended Decision of December 12 (e.g., §11's inclusion of UNE terms and conditions although the Arbitrator's Recommended Decision only concerned the pricing of UNEs),
- (ii) are contrary to the public interest (e.g., redefining the access charge compensation structure established by the Board);
- (iii) are improper (e.g., page 1, paragraph 1's Effective Date preempts any review of the Arbitrator's decision; §11's suggestion that New York and/or Connecticut tariffs apply in New Jersey); and
- (iv) are premature (e.g., the Agreement is being executed prior to the Board's acceptance of the Arbitrator's Recommended Decision, the receipt of exceptions or motions to modify the Arbitrator's decision).

As required by the arbitrator's decision, however, Verizon NJ has submitted the executed Agreement to Cablevision. A hard copy of the Agreement along with the executed signature pages will be forwarded separately by Cablevision.

By our countersignature on the Agreement, Verizon NJ does not agree to the Agreement as either a voluntary or negotiated agreement. The filing and performance by Verizon NJ of the Agreement does not in any way constitute a waiver by Verizon NJ of its position as to the illegality or unreasonableness of the Agreement or a portion thereof, nor does it constitute a waiver by Verizon NJ of all rights and remedies it may have to seek review of the Agreement, or to petition the Board, other administrative body, or court for reconsideration or reversal of any determination made by the Board pursuant to the above referenced arbitration, or to seek review in any way of any provisions included in this Agreement.

Verizon NJ, for the reasons stated above, therefore requests that the Board not approve the agreement in its present form unless and until it has remedied the legal infirmities identified above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'BDC', followed by a long horizontal line extending to the right.

Bruce D. Cohen

BDC:dmp
Attachment
cc: Service List