Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Petition for Declaratory Ruling Regarding CLEC Obligations To Cure Assigned Indebtedness	)	**WC Docket No. 02-80**
	)	

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),[1] through undersigned counsel and pursuant to *Public Notice* DA 02-1017 (released May 3, 2002), hereby offers the following comments on the counter petition for declaratory ruling filed by Verizon Communications Inc. and its affiliated local telephone companies ("Verizon") in the above-referenced proceeding on April 29, 2002 (the "Counter Petition"). In its Counter Petition, Verizon asks the Commission to make the following "three key rulings:"

> The Communications Act does not except carriers from the rights afforded by section 365 of the Bankruptcy Code;
>
> Where one CLEC wishes to take over another's service arrangement with nothing more than a name change, that constitutes "an assignment or transfer" within the meaning of Verizon's tariffs, so that the assignee/transferee CLEC must assume the outstanding indebtedness of the prior CLEC for such service; and
> To the extent it does not do so separately by issuing a clarification of

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[1] ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

> its previous public notice reflecting the obligation of carriers to provide notice to affected customers, the Commission should clarify the circumstances under which carriers in bankruptcy are obligated to provide notice of possible discontinuance or transfer to the customers.

ASCENT submits that while the Commission cannot, and should not, grant Verizon the specific relief the carrier seeks, it should use Verizon's Counter Petition to strike an appropriate balance between the competing requirements of the Communications Act of 1934 (the "Communications Act"), as amended by the Telecommunications Act of 1996 (the "Telecommunications Act"), and the federal bankruptcy laws (the "Bankruptcy Code").

The Verizon Counter Petition was filed in conjunction with the carrier's comments opposing an Emergency Petition for Declaratory Ruling ("Emergency Petition") filed by Winstar Communications, LLC ("IDT Winstar").[2] In its Emergency Petition, Winstar had asked the Commission to declare unlawful any action by an incumbent local exchange carrier ("LEC") to disconnect circuits that had been used by Winstar Wireless, Inc. ("Old Winstar") to serve customers acquired by IDT Winstar in the Old Winstar bankruptcy proceedings. As described by IDT Winstar, several incumbent LECs, including Verizon, were threatening to disconnect the circuits because IDT Winstar had rejected the associated leases and declined to cure Old Winstar's past payment defaults.

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[2] ASCENT urges the Commission to address the issues raised by Verizon apart from the specific facts of the instant dispute between IDT Winstar and Verizon and the other involved incumbent LECs, and to then apply its determinations to that dispute. The issues raised by Verizon will establish precedents that will apply to the universe of competitive carriers and far too often resolution of such matters within the context of a specific factual construct produces bad law.

As Verizon acknowledges, it is incumbent upon the Commission when construing the Communications Act to consider other federal policies and to "reconcile and harmonize" the Communications Act with other statutory schemes.[3] Moreover, Verizon concedes that any conflict between statutory schemes should not be resolved "by simply using the provisions of one statute to trump another."[4] Yet, the relief Verizon seeks would produce just such a result, with the Bankruptcy Code "trumping" the policies underlying the Communications Act.

Although Verizon contends otherwise, there is a conflict between the operation of Section 365 of the Bankruptcy Code[5] and the policies underlying the Communications Act. Pursuant to Section 365, a debtor in bankruptcy may accept or reject an executory contract, with acceptance requiring, among other things, cure of past payment defaults, and rejection constituting a breach of the contract, relieving the other contracting party of any further obligations. Strictly applied, Section 365 would allow an incumbent LEC, to the extent a bankrupt competitive LEC had not accepted associated leases and fully cured all payment defaults, to disconnect any and all circuits used by a bankrupt competitive LEC to serve customers, including those whose accounts had been sold to another provider for the benefit of creditors.

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[3] Bulldog Trucking , Inc. v. B&L, Inc., 66 F.3d 1390, 1395 (4th Cir. 1995) (*subsequent history omitted*); Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Assoc., 491 U.S. 490, 510 (1989) (*subsequent history omitted*); LaRose v. Federal Communications Commission, 494 F.2d 1145, 1148 (D.C. Cir. 1974) (*subsequent history omitted*).

[4] Counter Petition at 16.

[5] 11 U.S.C. § 365.

Such an action would implicate two critical public interest concerns under the Communications Act -- *i.e.*, protection of consumers and preservation of competition. The customer served by a circuit that would be disconnected pursuant to operation of Section 365 obviously has an interest in the uninterrupted provision of service, as well as the avoidance of the expenditure of resources necessary to secure a replacement facility, and the attendant risks of service failure and delay. And as part of its mandate to protect the public interest, the Commission has an obligation to take all reasonable steps to ensure the continuous provision of service to customers impacted by carrier failures and/or sales.[6]

An analogy can be drawn to the Commission's determination that end-users have a interest in the continued use of toll-free numbers secured from network service providers, and provided to them, by switchless resale carriers that is sufficient to allow them to retain and port those numbers to another carrier.[7] While the Commission acknowledged that the switchless resale carrier was the customer, indeed, the "customer of record," for such toll-free numbers, it nonetheless determined that the end-user should not be "denied the flexibility and competitive benefits afforded

[6] Recognizing this obligation, the Commission has taken a variety of steps to facilitate the continuous provision of service to customers in the context of carrier failure or sales of carrier assets. For example, the Commission has adopted "a streamlined self-certification process for the carrier-to-carrier sale or transfer of subscriber bases" to, among other things, ensure that customers "experience a seamless transition of service from their original carrier to the acquiring carrier." 2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers (First Report and Order), 16 FCC Rcd, 11218, ¶¶ 9 - 10 (2001) (*subsequent history omitted*). And the Commission has admonished incumbent LECs to "establish migration procedures that facilitate quick and seamless transfer of customers to comparable service from alternate providers", avoiding in so doing "service disrupting 'disconnect' and 'reconnect' scenarios with the attendant risks of failure and delay." Requirements for Carrier to Obtain Authority before Discontinuing Service in Emergencies (Public Notice), 16 FCC Rcd. 10924 (2001).

[7] 800 Presubscription Rules for 800 Providers and Responsible Organizations (Order), 8 FCC Rcd. 7315 (CCB 1993) (*subsequent history omitted*).

by 800 number portability." The Commission, accordingly, subordinated the interest of the switchless resale carrier to achieve this public interest end.[8]

The Commission has an obligation to preserve, and the consuming public has an interest in the preservation of, service alternatives to incumbent LECs. "In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets."[9] Given that incumbent LECs remain the predominant, and often the exclusive, source for local network facilities necessary to provide connectivity to individual customers,[10] adherence to this Congressional mandate requires that the Commission take all reasonable and necessary steps to ensure that incumbent LECs do not exploit their dominant market position to the detriment of competition.

The question raised by Verizon's call for relief is how the Commission can meet these public interest obligations under the Communications Act without unduly interfering with the workings of the Bankruptcy Code. The answer is not for the Commission, as suggested by Verizon,

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8 Id. at ¶¶ 14 - 19.

9 Southwestern Bell Telephone Company v. Federal Communications Commission, 153 F.3d 597, 600 (8th Cir. 1998) (*subsequent history omitted*).

10 The Commission, for example, has characterized the "wholesale market . . . in loop fiber" as "nascent," concluding that the wholesale market in fiber loop facilities is "not extensive enough" to provide a ubiquitous alternative to incumbent LEC facilities. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, ¶ 197 (1999) (*subsequent history omitted*). The New York Public Service Commission ("NYPSC") recently echoed this assessment, finding that Verizon "continue[d] to occupy the dominant position in the Special Services market and by its dominance . . . [was] a controlling factor in the market." While noting that competitors had brought fiber to a tiny fraction of the over 220,000 "mixed use, commercial, or public institutions" in New York City, the NYPSC emphasized that "virtually all" of these locations were served by Verizon, and that outside of New York City, competitors were even more reliant on Verizon facilities. Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc./Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case Nos. 00-C-2051, 92 - C - 0665, Opinion No. 01-1, p. 9 (NYPSC June 15, 2001).

to defer completely to the Bankruptcy Code. That is not reconciliation and harmonization; it is capitulation. The law does not require, and the Commission's statutory obligations do not permit, such a result.

"[T]he Bankruptcy Court's jurisdiction over . . . contracts . . . does not infringe on the jurisdiction of the . . . [Commission] over the service obligations of . . . [the parties]."[11] A distinction can be draw between a service contract by and between private carrier parties, the acceptance or rejection of which falls within the purview of the Bankruptcy Court, and the obligation of an incumbent LEC to provide service upon reasonable request, over which the Commission exercises exclusive authority.[12] Thus, for instance, while the Bankruptcy Court can sanction rejection of a contract of service, the carrier rejecting the contract must nonetheless secure permission from the Commission before it can discontinue service.

Application of these concepts to Verizon's request for "three key rulings" produces a result different from that the carrier seeks. While Verizon is correct that "the Communications Act does not exempt carriers from the rights afforded by section365 of the Bankruptcy Code," neither does Section 365 divest the Commission of its jurisdiction over Verizon's service obligations. As to Verizon's request that the Commission rule that a carrier "wishing to take over another's service arrangement with nothing more than a name change " must "assume the outstanding indebtedness of the prior CLEC for such service," such a holding would require the Commission to subordinate its public interest authority to the workings of the Bankruptcy Code, which ASCENT does not believe the Commission can or should do.

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[11] Columbia Gas System, Inc. v. Columbia Gas Transmission Corp., 134 B.R. 808, 810 (1991). (*subsequent history omitted*).

[12] In re Tilco, 408 F.Supp. 389, 395 (D.KS. 1976) (*subsequent history omitted*).

ASCENT submits that rather than having the Bankruptcy Code "trump" the Communications Act, the Commission should fulfill its obligations to protect consumers and preserve competition by requiring incumbent LECs to allow competitive LECs acquiring customer accounts in bankruptcy proceedings to serve the acquired accounts using the preexisting facilities that had been utilized by the bankrupt carrier to serve the acquired customer accounts, while requiring the acquiring competitive LECs to put the incumbent LECs providing those facilities in roughly the same monetary position as if the facilities had been ordered anew -- *i.e.,* by paying to the incumbent LECs some reasonable portion of the non-recurring charges that would have been associated with installation of such new facilities.[13] As Verizon acknowledges, the acquiring competitive LEC could order new facilities to replace the preexisting circuits without being required to cure the bankrupt carrier's payment defaults. If the acquiring carrier made such an election, the incumbent LEC would be entitled to payment of installation charges, a significant portion of which would be expended in effecting the installation. Hence, if the acquiring competitive LEC were to pay the incumbent LEC some reasonable portion of such installation charges for the preexisting circuits it continued to use, the incumbent LEC would be placed in very much the same monetary position as if the acquiring competition LEC had ordered new facilities.

[13] Payment of only a portion of the installation charge would be appropriate because the incumbent LECs would incur no installation costs.

All that the incumbent LEC would lose under such a scenario is the right to disconnect a circuit and compel the acquiring competitive LEC to await the installation of new facilities at the same location. Loss of this opportunity would not translate into lost revenues for the incumbent LEC because it would receive a reasonable portion of the installation charges it would have assessed on the acquiring competitive LEC; indeed, by ensuring continuous service to the end-user by the acquiring competitive LEC over preexisting facilities might preserve revenues which otherwise could be lost during a prolonged period of service interruption. The only thing the incumbent LEC would lose through loss of this opportunity would be loss of an opportunity to inflict damage upon a competitor through exploitation of its continuing near monopoly on local network facilities.

As noted above, the Commission should defer to the workings of the Bankruptcy Code by ensuring that incumbent LECs over whose preexisting facilities an acquiring competitive LEC provides service to acquired customer accounts be paid a reasonable portion of the installation charges the acquiring competitive LEC would have incurred had new circuits been ordered. If the two statutory schemes are to be harmonized, with effect being given to the underlying legislative intents, the Bankruptcy Code must give way to the Commission's undisputed authority over the incumbent LECs service obligations, particularly to the extent of the public interest obligations imposed on the Commission by the Communications Act. Certainly, reconciliation of the operation of the Bankruptcy Code with the policies underlying the Communications Act requires, at a minimum, elevation of protection of consumers and preservation of competition over what otherwise would be an incumbent LEC's right to disconnect a circuit following rejection of a contract pursuant to Section 365. Absent such reconciliation, the Bankruptcy Code would operate in a manner which would interfere with the Commission's fulfillment of its statutory responsibilities.

By reason of the forgoing, ASCENT urges the Commission to deny Verizon the relief the carrier seeks, and to instead issue a declaratory ruling consistent with the above.

Respectfully submitted,

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