

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Application by Verizon New Jersey)
Inc., Bell Atlantic Communications,)
Inc. (d/b/a Verizon Long Distance),)
NYNEX Long Distance Company)
(d/b/a Verizon Enterprise Solutions),)
Verizon Global Networks Inc., and)
Verizon Select Services Inc., for)
Authorization To Provide In-Region,)
InterLATA Services in New Jersey)

WC Docket No. 02-67

RECEIVED

JUN 14 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VERIZON'S REPLY TO AT&T'S MOTION FOR EMERGENCY RELIEF

Verizon has demonstrated that local markets in New Jersey are open, that the checklist is satisfied, and that its Application to provide long distance service should be granted. AT&T now claims that Verizon's Application should be denied because Verizon voluntarily disclosed that it inadvertently sent advertising to a small percentage of its customers in New Jersey before the mistake was discovered. Upon discovering the mistake, however, Verizon promptly halted any further mailings. In addition, Verizon has notified or is in the process of notifying all customers that received the inadvertent mailings that Verizon does *not* provide long distance service at this time. Moreover, Verizon's existing fail-safe procedures have ensured that this simple mistake did not lead Verizon to provide service to *any* customers in New Jersey. And Verizon is instituting new procedures further to ensure that incidents such as this do not happen again. Under these circumstances, there is no reason to delay or deny Verizon's Application and AT&T's Emergency Motion should be rejected.

No. of Copies rec'd 014
List ABCDE

BACKGROUND

The crux of AT&T's motion is a pair of separate and unrelated incidents in which Verizon mistakenly sent advertisements to a small percentage of its customers in New Jersey for long distance service that Verizon does not and cannot provide. These actions were inadvertent, and Verizon's existing fail-safe procedures effectively prevented Verizon from actually providing long distance service to any customers.

On May 30th, Verizon learned that a direct-mail company had mistakenly sent an advertisement for Verizon long distance service to approximately 4,000 customers in New Jersey. That same vendor also was sending direct-mail pieces to customers in other states where Verizon is authorized to provide long distance service. The vendor at issue assigns unique numerical codes for each marketing campaign, and the codes it assigned to the New Jersey mailings were similar to the codes it assigned to other states in which it was conducting mailings. Consequently, that vendor accidentally sent advertisements to 4,000 New Jersey customers prematurely. When Verizon learned of the inadvertent mailing, it immediately notified the Commission. See Ex Parte Letter from Dee May, Verizon, to Marlene Dortch, FCC, WC Docket No. 02-67 (May 31, 2002). Verizon also sent its service representatives a notification explaining that, if customers called to request long distance service, they were to be told that Verizon does not yet have authority to provide long distance services in New Jersey. See Attachment A. In addition, Verizon sent a Western Union letter to the 4,000 customers explaining that the mailing had been sent in error and that Verizon cannot provide long distance service in New Jersey. See Attachment B.

On June 11th, Verizon learned that bill inserts advertising Verizon long distance service were accidentally mailed to approximately 554,000 customers in New Jersey – approximately 17

Verizon also began taking additional steps to prevent future advertisements from being mailed to customers prematurely. Although Verizon is still developing these added safeguards, it has already established the broad outlines of the new procedures. First, even in circumstances where there is a chance that Verizon will receive expedited approval of a 271 application, Verizon will no longer schedule a mailing until 100 days from the date that Verizon files the application – which accounts for the full 90-day review period plus 10 additional days. Second, Verizon is adopting new procedures to make sure that all mail advertising is affirmatively approved by appropriate marketing and regulatory executives before mailing to ensure it is not sent prematurely. Finally, Verizon also will continue to investigate the root causes of these incidents and to develop additional procedures, as necessary, to prevent them from recurring.

Contrary to AT&T's unfounded speculation, see Motion at 12, Verizon did not provide long distance service for any customers in New Jersey, nor establish a waiting list for customers wishing to sign up for Verizon long distance service in the future. Rather, Verizon's existing fail-safe procedures ensured that neither of these consequences resulted from Verizon's simple mistake. Indeed, Verizon could not somehow accidentally provision long distance service in New Jersey today. For example, Verizon's provisioning systems are designed to prevent switching a customer's presubscribed long distance carrier to Verizon. In addition, even if an order did somehow make it through, there is an additional safeguard because Verizon's long distance affiliate's switching equipment is not yet programmed to carry long distance service originating from New Jersey.

AT&T also has it completely backwards in claiming that Verizon purposely sent out these advertisements to gain an unfair competitive advantage. See Motion at 2-3, 11. The mailing of these notices was not only accidental, but, if anything, is likely to cause Verizon

competitive harm by confusing its potential customers. For example, customers that received the initial mailings are receiving letters informing them that those mailings were erroneous, and may as a consequence assume that subsequent valid advertisements they receive from Verizon are erroneous as well. Likewise, any customers that called Verizon to obtain service and were turned away may decide not to bother calling again out of fear that the same thing will happen the next time. Moreover, even customers that did not receive a mailing may have read about Verizon's retraction and may, as a result, treat with skepticism any advertisements for Verizon long distance service that they receive or see in the future.

ARGUMENT

I. VERIZON DID NOT PROVIDE LONG DISTANCE SERVICE IN NEW JERSEY TO ANY CUSTOMERS.

AT&T's entire legal argument for why the Commission should now reject Verizon's Application rests on its assertion that, pursuant to the Qwest Teaming Order,¹ Verizon was "providing" long distance service in New Jersey under section 271(a).

But the situation here bears no resemblance to the one in Qwest. In that case, there was no question that some entity – either the BOCs or Qwest – was actually providing long distance service; the only question was which one. Ameritech and U S WEST argued that they were "merely marketing" long distance service that was actually being "provided" by Qwest. See Qwest Teaming Order ¶ 50. The Commission held that, in light of the extensive involvement and control that Ameritech and U S WEST had exercised over the bundled service offerings that enabled them to sign up significant numbers of long distance customers and earn significant revenues, they should be deemed the "providers" of service.

¹ AT&T Corp v. Ameritech Corp, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) ("Qwest Teaming Order").

Here, by contrast, neither Verizon nor its long distance affiliate provided long distance service to *any* customers in New Jersey, so the question at issue in Qwest does not even arise. As described above, Verizon's fail-safe procedures have ensured that it has not launched long distance service. On the contrary, Verizon is informing all customers to which it mistakenly advertised long distance service that it cannot provide long distance service in New Jersey at this time. And Verizon's long distance affiliate is physically incapable of providing long distance service to customers in New Jersey today.

Unlike in Qwest, therefore, Verizon has not obtained any "material benefit" from its conduct – and, if anything, has been harmed by it. Id. ¶¶ 37; see also id. ¶ 39; Motion at 7. In Qwest, the FCC relied on the fact that Ameritech and U S WEST had already "successfully persuaded" numerous customers to obtain their service, were "deriv[ing] material financial benefits from each sale," and had therefore obtained an actual "competitive advantage" by "strengthen[ing] and entrench[ing] their relationships with . . . in-region local customers." Id. ¶¶ 42-44.² Verizon has not obtained *any* benefit in New Jersey, because its advertisements were mistakenly sent to begin with, were immediately retracted, and did not and could not lead to the actual procurement of subscribers. Verizon has not persuaded *any* customers in New Jersey to obtain service, has not received *any* financial reward, and has not received *any* competitive advantage. In fact, as described above, the inadvertent mailings put Verizon at a competitive

² Given that there is no actual service that Verizon or its long distance affiliate was ready, willing, or able to provide in New Jersey, the other factors that the Commission identified in Qwest for determining what entity should be considered the provider – such as whether Verizon was "holding itself out as a provider of long distance service" or "performed activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public" – do not come into play here. Qwest Teaming Order ¶¶ 37, 45-46; see Motion at 7.

disadvantage because it has confused potential long distance customers, making it less likely that they will switch to Verizon long distance service in the future.

The situation here is further distinguishable from Qwest because Verizon has demonstrated that it has fully opened its local markets to competition in New Jersey and is satisfying the checklist. In Qwest, the Commission's concern was that the premature involvement of a BOC in the long distance market would "enable[] it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition." Qwest Teaming Order ¶ 37. The Commission found that, "[b]ecause neither Ameritech nor US WEST has satisfied the market-opening criteria established by Congress, we are required to prohibit their involvement in the long distance market under the arrangements with Qwest at issue here." Id. ¶ 2. Here, by contrast, Verizon *has* opened its markets and met the checklist.

Finally, the "totality" of the circumstances here, see id. ¶ 37, distinguishes this case from Qwest. Verizon's conduct here was accidental and did not result in any customers receiving long distance service. Indeed, Verizon's fail-safe procedures ensured that Verizon did not begin providing long distance service to customers in New Jersey. By contrast, Qwest involved the deliberate marketing of service to millions of customers, and the provision of service to many thousands of customers, in multiple states. See id. ¶¶ 8-16, 43-44. Moreover, Verizon immediately and voluntarily disclosed to the Commission the full extent of its accidental conduct as soon as it learned about it. In Qwest, by contrast, the parties began to provide long distance service without previously notifying the Commission of their intent, and opposed attempts to require them to discontinue service. See id. ¶¶ 11, 16-19.

II. DENIAL OR DELAY OF SECTION 271 AUTHORIZATION IS INAPPROPRIATE.

As discussed, Verizon did not provide long distance service to any customer in New Jersey. But even if the advertisements that were mailed by mistake could somehow be deemed to amount to the “provision” of service, AT&T cannot, and does not, provide any coherent basis for the ultimate remedy that it seeks: denial or delay of section 271 authorization.

AT&T claims that, under the “public interest” standard of section 271(d)(3)(C), Verizon’s alleged violation “provides an *independent ground* for rejecting Verizon’s application” even if Verizon has successfully demonstrated compliance with every item on the checklist. Motion at 13 (emphasis added). AT&T misconstrues the statute. The very premise of section 271 is that, once a BOC has opened its local markets to competition (and takes the required steps to protect unaffiliated long distance carriers from discrimination), consumers necessarily benefit when the BOC is then permitted to introduce additional, price-reducing competition to the long distance market. Indeed, the only conceivable rationales for keeping a BOC out of that market *before* it has complied with the checklist are (1) to ensure that it has sufficient incentives to bring itself into compliance, or (2) to preclude it from leveraging any undue advantage in the local market – achieved through non-compliance with the checklist – to obtain an anticompetitive advantage over unaffiliated IXC’s in the long distance market.

Because AT&T presents its section 271(a) argument as an “independent ground” for denying this application, however, the argument must be evaluated on the assumption that Verizon *has* satisfied the checklist. That fact is fatal to AT&T’s argument. Once a BOC has met every item on the checklist, it makes no logical sense to claim, as AT&T does (at 11), that the BOC could nonetheless obtain an “anticompetitive ‘jump start’” over rival IXC’s by offering long-distance services to end users. By meeting the checklist, the BOC has so thoroughly

opened its local markets to competition that the public interest would be thwarted, not promoted, by continuing to keep the BOC out of the long distance market.

Indeed, that conclusion would follow even if – quite unlike the case here – the BOC actually provisioned long distance services and completed calls before receiving authority. The question is one of remedy, not culpability. The proper remedy even for such conduct would be to fine the BOC or to impose some other appropriately tailored penalty. The proper remedy in those circumstances would *not* be to deprive all consumers of new price-lowering competition in the long-distance market by delaying section 271 authorization itself even after a finding of checklist compliance.

That same conclusion follows *a fortiori* where, as in this case, the BOC has obtained no conceivable advantage from (and, in fact, is commercially *disadvantaged* by) its supposed violation of section 271(a). Well after submitting its section 271 application, Verizon mistakenly sent materials to a small percentage of its customers advertising a service that it is physically incapable of providing; it immediately alerted the Commission to the mistake; and it took prompt (and commercially embarrassing) steps to notify the customers in question that it still lacks legal authority to sell the service. It would be senseless to deny section 271 authorization under these circumstances. The upshot of AT&T's contrary argument is that the Commission should deprive *all* New Jersey customers of the benefits of greater long-distance competition simply to punish Verizon for erroneously sending and then retracting ineffectual long distance advertisements to less than 20 percent of its customer base – even though, *before* the mailings in question, Verizon had fully opened its local markets to competition and had precluded any possibility of an anticompetitive advantage in the long-distance market. That argument has nothing to do with the

“public interest” and everything to do with insulating an entrenched long-distance incumbent from the challenge of fair competition.

III. AT&T’S OTHER REQUESTS SHOULD BE ADDRESSED, IF AT ALL, SEPARATELY FROM THIS PROCEEDING.

As a fall-back position to its wrong-headed request that the Commission reject Verizon’s Application, AT&T asks the Commission to: (1) issue a cease and desist order to prevent Verizon from sending out further long distance mailings; and (2) open a broader inquiry into Verizon’s conduct. In light of the factual showing that Verizon has made here, however, none of these steps is necessary or appropriate. In any event, should the Commission nonetheless determine that further investigation of this matter is warranted, its Enforcement Bureau can conduct that inquiry separately. The Commission need not address these issues here, which would unnecessarily delay this proceeding and deny the much-deserved benefits of competition to New Jersey consumers.

First, the facts do not support AT&T’s request for a standstill order. See Motion at 9-12. Verizon already has assured that mailings in New Jersey will not be sent prior to Commission approval, and is advising the customers that inadvertently received mailings that Verizon is not actually providing long distance service in New Jersey today. Thus, there is no ongoing conduct for the Commission to halt here. Moreover, as demonstrated above, Verizon did not provide long distance service to any customers in New Jersey, and AT&T has accordingly failed to make “a strong showing that [it] is likely to succeed on the merits” in seeking injunctive relief. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The premise of AT&T’s request for injunctive relief is that Verizon has acted willfully and intentionally, and is therefore likely to do so again. But the facts show that Verizon’s conduct resulted from a simple mistake, and that Verizon is

taking adequate steps to prevent this from recurring. And there already are substantial regulatory incentives in place to ensure that Verizon does so. See, e.g., 47 U.S.C. § 271(d)(6).

Second, there is no reason for the Commission to open a broader inquiry here. See Motion at 12-13. AT&T claims that a more thorough investigation is needed because Verizon's conduct was part of an "orchestrated campaign . . . to jump the gun" below the Commission's radar. Id. at 12. But nothing could be further from the truth. Verizon has been extremely candid with the Commission about this matter from the beginning and informed the Commission immediately upon learning about it. Verizon also has demonstrated beyond serious dispute both that its conduct was accidental, and that it is developing procedures to prevent it from happening again. AT&T's request is, therefore, not predicated on any legitimate claim that Verizon intentionally acted improperly, but is yet another self-serving attempt to hobble Verizon as much as possible.

In any event, even if the Commission decides that it is necessary to pursue this matter further, the Commission's Enforcement Bureau can do so separately. Resolving this issue in such a manner is consistent with the purposes of section 271. As described above, once Verizon has demonstrated that its local markets are open to competition and that the checklist is satisfied, it would be contrary to the public interest to delay Verizon's entry into the long-distance market. By conducting any further investigation separately, the Commission will ensure that the deliberations and timing of this proceeding are not affected, and that the undisputed benefits of Verizon's long distance entry can be brought expeditiously to consumers in New Jersey.

CONCLUSION

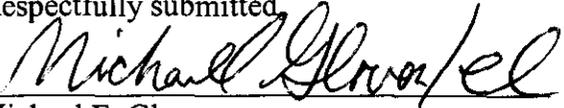
For the foregoing reasons, AT&T's Motion for Emergency Relief should be denied and Verizon's Application to provide interLATA service originating in New Jersey should be granted.

Evan T. Leo
Scott H. Angstreich
Kellogg, Huber, Hansen, Todd &
Evans, P.L.L.C.
Sumner Square
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Jonathan E. Nuechterlein
Catherine K. Ronis
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037
(202) 663-6380

June 14, 2002

Respectfully submitted,



Michael E. Glover
Karen Zacharia
Leslie V. Owsley
Donna M. Epps
Joseph DiBella
Verizon
1515 North Court House Road
Suite 500
Arlington, Virginia 22201
(703) 351-3860

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2002, I caused true and correct copies of the foregoing Response to AT&T's Motion for Emergency Relief to be served on all parties by mailing, postage prepaid to the addresses listed on the attached service list.

Dated: June 14, 2002
Washington, D.C.


Michelle Dawson

SERVICE LIST

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Miles
Policy and Program Planning Division
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Qualex International
Portals II
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554

John M. Lynch
U.S. Department of Justice
Antitrust Division
Telecommunications Task Force
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530

Anthony Centrella, Director
Division of Telecommunications
New Jersey Board of Public Utilities
Two Gateway Center, 8th Floor
Newark, NJ 07102

Mark C. Rosenblum
Lawrence Lafaro
James Talbot
Frederick C. Pappalardo
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

David L. Lawson
C. Frederick Beckner III
Christopher T. Shenk
Sidley Austin Brown & Wood, L.L.P.
1501 K Street, N.W.
Washington, D.C. 20005

A

Service Alert

x	Informational		Urgent
---	---------------	--	--------

VZ Points: N/A

Systems Impacted: N/A

Distribution Date: May 29, 2002

Effective Date: Immediately

To: Verizon: Former BA NJ only CSSCs, SRCs, VCCDs, MSSCs

Staff Contact: Christopher D. Curtin 617 743-1816

Subject: **Verizon Long Distance Mailing To NJ Customers In Error**

In Brief . . .

- A pocket of NJ Verizon Customers recently received a direct mail piece, in error, asking them to call in and sign up for Verizon Long Distance Service.
- Please apologize to all customers impacted by this direct mailing error.
- Customers calling the CSSC inquiring about Verizon's long distance service should be advised that Verizon has not gained FCC approval to offer long distance service.
- Once Verizon Long Distance gains approval to offer long distance a Service Alert will be sent to all consultants notifying them of this important date.

May 29, 2002

Reviewed by: Christopher D Curtin

v

B



DraftWorldwide

919 3rd Avenue
New York, NY 10022-3902
Tel: 212 546 8000

Copy

Date: May 31, 2002

Job #:

Rev #:

Client: Verizon Long Distance

File Name:

Job Description: Western Union Letter

To [name of customer]:

Recently, you received a mailing from Verizon Long Distance offering you long distance phone services. We regret to inform you that, at this time, Verizon Long Distance is not yet authorized to offer long distance services in New Jersey. The mailing you received should be disregarded.

We apologize for the mistake and for any inconvenience that this matter may have caused you.

Respectfully,

Verizon Long Distance

2

3

Service Alert

Informational

x

Urgent

VZ Points: N/A

Systems Impacted: N/A

Distribution Date: June 12, 2002

Effective Date: Immediately

To: Verizon: Former BA NJ only CSSCs, SRCs, VCCDs, MSSCs

Staff Contact: Christopher D. Curtin 617 743-1816

Subject: Verizon Long Distance Bill Insert To NJ Customers - Sent In Error

In Brief . . .

- Recently, approximately 500,000 Verizon New Jersey Customers received a Verizon Long Distance bill insert asking them to call in and sign up for the Verizon Long Distance "Timeless" calling plan. This bill insert was mailed in error. Verizon does not yet have authority to provide long distance services in New Jersey.
- Please apologize to all customers who call the CSSC in response to this bill insert.
- Customers calling the CSSC inquiring about Verizon's long distance service should be advised that Verizon has not yet gained FCC approval to offer long distance service.
- Once Verizon Long Distance gains approval to offer long distance a Service Alert will be sent to all consultants notifying them of this important date.

June 12, 2002

Reviewed by: Christopher D Curtin



80000 SERIES
30% P.C.W.

v

D



DraftWorldwide

919 3rd Avenue
New York, NY 10022-3902
Tel: 212 546 8000

Copy

Date: June 12, 2002

Job #:

Rev #:

Client: Verizon Long Distance

File Name:

Job Description: Western Union Letter

To [name of customer]:

Recently, you received an insert in your Verizon bill encouraging you to sign up for long distance phone services from Verizon Long Distance. That insert was sent to you by mistake. At this time, Verizon Long Distance is not yet authorized to provide long distance services in New Jersey. You should disregard the bill insert you received.

We apologize for the mistake and for any inconvenience that this matter may have caused you.

Respectfully,

Verizon Long Distance