Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Application by Verizon New England Inc., Verizon Delaware 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 Hampshire and Delaware	)	WC Docket No. 02-157

COMMENTS OF AT&T CORP.

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In the Matter of Application by Verizon New England Inc., Verizon Delaware 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 Hampshire and Delaware	)	WC Docket No. 02-157

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these comments in opposition to the joint application of Verizon for authorization to provide in-region, interLATA services in Delaware and New Hampshire.

INTRODUCTION AND SUMMARY

Two months after the Supreme Court in *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646 (2002), definitively upheld the TELRIC standard for UNE pricing established by the Commission in its 1996 *Local Competition Order*, the Commission confronts a Section 271 applicant whose UNE prices satisfy neither TELRIC nor any other measure of cost.

In Delaware, Verizon charges recurring prices for switching and other non-loop elements that exceeded TELRIC when set in 1997 (based on 1994-96 data), and which have diverged even further from costs with the passage of time. Earlier this year, the

Delaware PSC concluded a supplemental phase of the 1997 rate case, instituted to set prices for a number of UNEs first offered after 1997. In its final decision, the PSC found that Verizon's capital and common overhead costs have declined significantly since 1997, and set rates for the new UNEs that reflected the cost reductions. The PSC refused AT&T's repeated request to consider reducing Verizon's obsolete recurring rates for its original set of UNEs on the basis of the same cost changes.

The Delaware PSC has also refused to set TELRIC-compliant non-recurring charges ("NRCs"). Two years ago, a reviewing court held in *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 219 (D.Del. 2000), that Verizon's NRCs in Delaware violated TELRIC because they were calculated to recover the costs of Verizon's embedded, heavily manual, order processing rather than the operations of an efficient forward-looking firm. The court's directive to the PSC to set TELRIC-compliant NRCs has met with defiance. The revised NRCs subsequently approved by the PSC are—in the unanimous judgment of its Staff, its hearing examiner, and the Department of Public Advocate—still based on Verizon's existing processes. Indeed, in many respects, the "new" Verizon NRCs are a step backwards; NRCs for many key processes are *higher* than those struck down in *McMahon*.

In New Hampshire, there is not even a pretense that Verizon's rates are TELRIC-compliant. On July 15, 1998, in the midst of Verizon's UNE pricing case, Verizon struck a side deal with the trial staff of the New Hampshire PUC concerning the UNE prices that each party would support. The PUC, over AT&T's vehement objections, approved the "stipulated" rates as "reasonable" essentially because the PUC's trial staff had agreed to them, the switching rates were lower than what Verizon had originally proposed, and the rates appeared to be a good proxy for Verizon's *embedded* or *short-run* costs. The switching rates remained unchanged until a month ago, near the end of the Section 271 proceedings before the PUC, when the PUC accepted Verizon's proposal in to reduce its switch usage rates by 17 percent in lieu of further cost-based adjustments to Verizon's rates. At no time since 1996 has the PUC considered whether the rate concessions doled out piecemeal by Verizon from its original maximalist position have reduced Verizon's switching rates to levels reflecting the long-run forward-looking costs of switching using the most efficient technology in a fully reconstructed network.

These patent TELRIC violations cannot be papered over by benchmarking Verizon's rates in Delaware or New Hampshire with those in New York. On a cost adjusted basis, Verizon's Delaware non-loop rates are nearly 50 percent higher than their New York counterparts. Verizon's New Hampshire switching rates likewise exceed Verizon's New York switching rates by approximately 13 percent on a cost-adjusted basis. And benchmarking obviously cannot excuse Verizon's inflated, non-TELRIC-based NRCs in Delaware.

The balance of these comments is organized as follows. Part I explains why many of Verizon's recurring rates in Delaware and New Jersey fail the Commission's benchmark test. Part II identifies the patent violations of TELRIC that taint Verizon's recurring rates for switching and other non-loop elements. Parts III demonstrates that Verizon's Delaware NRCs continue to violate TELRIC and the District Court order in *Bell Atlantic-Delaware v. McMahon*. Part IV explains why Verizon's Section 271 application in Delaware must be denied because Verizon's UNE rates create a discriminatory price squeeze in violation of Checklist Item 2. And Part V demonstrates that Verizon's monopoly power over residential service in Delaware and New Hampshire remains virtually unchecked, and Verizon's local markets in Delaware and New

Hampshire remain virtually closed to UNE- and facilities-based competition. For all of these reasons, approval of Verizon's application would be inconsistent with the public interest.

I. VERIZON'S DELAWARE AND NEW HAMPSHIRE SWITCHING-RELATED RATES FAIL THE COMMISSION'S BENCHMARK TEST.

The Commission has in the past used Verizon's New York UNE rates to determine whether Verizon's UNE rates in other states are within a range that a reasonable application of TELRIC principles would have produced.[1] As shown in the attached declaration of Michael Lieberman, Verizon's non-loop rates in Delaware and switching rates in New Hampshire fail this benchmark test.

A. Verizon's Delaware Non-Loop Rates Greatly Exceed Those Of New York On A Cost Adjusted Basis.

Verizon's non-loop rates in Delaware exceed those in New York by 64 percent. Yet, Verizon's Delaware non-loop costs are only 10 percent above those in New York. *See* Lieberman Decl. ¶ 6. A 10 percent difference in costs obviously cannot justify a 64 percent difference in rates.

Verizon does not deny this fact. Instead, Verizon invites the Commission to ignore these disparities—and Commission precedent—by "benchmarking" the sum of Verizon's loop and non-loop rates in Delaware and New Hampshire to the sum of its loop and non-loop rates in other states. The Commission has never approved a section 271 application on the basis of such a "kitchen sink" comparison, and for good reason. "TELRIC rates are calculated on the basis of *individual* elements." *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1678 (2002) (emphasis added). A BOC's

[1] *See, e.g.,* NJ 271 Order ¶¶ 49-55; VT 271 Order ¶ 26; RI 271 Order ¶ 39.

rates for a network element thus comply with Checklist Item 2 only if they are "based on the cost . . . of providing . . . *the* network element." 47 U.S.C. § 252(d)(1) (emphasis added). Therefore, to gain § 271 approval, a BOC must show that the rates for each of its network elements complies with TELRIC principles.

Indeed, the whole purpose of unbundling is to allow an entrant to purchase – at cost-based rates – only the elements necessary to implement its particular entry strategy. If a BOC were free to evade the requirement to offer each element that qualifies for unbundling at cost-based rates by offering some elements at low rates and others at inflated rates, the BOC would have the ability to tailor its rates to impede the entry strategies that posed the greatest risk to its local monopolies. Moreover, CLECs are not indifferent to the relative levels of non-loop and loop costs. A substantial portion of non-loop costs are recovered on a usage basis, whereas loop costs are fixed. A CLEC that serves high usage customers, therefore, would be very sensitive to usage costs, and less sensitive to non-usage costs.[2]

To be sure, the Commission has recognized that the potential arbitrariness of certain allocations may require some combination of rate elements to achieve meaningful comparisons. The Commission has, for example, compared total switching costs (and even total non-loop costs) in recognition of the fact that states may differ in the ways that they allocate such costs among usage and port charges. However, no such issues arise with non-loop and loop-related costs. That is because the Commission's rules specifically prohibit state commissions from allowing carriers to allocate loop-related

[2] In the past, Verizon's has claimed that no CLEC *currently* purchases switching elements separately from loop elements. That claim is beside the point. If Verizon were permitted to charge above-cost rates for certain elements simply because they were not purchased separately today, that would enable Verizon to foreclose all future entry strategies that rely on purchasing those elements separately.

costs to a switching element or vice-versa. *See* 47 U.S.C. 51.509(a)-(b). *See also PA 271 Order* ¶ 66 ("we consider the reasonableness of loop and non-loop rates separately"); *KA/OK 271 Order* ¶¶ 82-95 (comparing loop costs only); *MA 271* ¶ 26 (comparing only non-loop rates).

Where, as here, the applicant's non-loop rates are higher (on a cost-adjusted basis) than those in a valid benchmark state, the applicant must prove – with specific cost evidence – that its non-loop rates are appropriately cost-based. Verizon did not, and could not, do that. As demonstrated below, Verizon's Delaware UNE rates are riddled with clear fundamental TELRIC errors.

B. Verizon's New Hampshire Switching Rates Greatly Exceed Those Of New York On A Cost Adjusted Basis.

As noted above, the Commission has in the past used the Synthesis Cost Model to make cost-adjusted state-to-state comparisons of non-loop rates – which include the costs of the switch port, switch usage, switch features, transport, signaling, and tandem switching. However, such a comparison is not appropriate when comparing rates in very rural states (*e.g.,* New Hampshire) to rates in more densely populated states (*e.g.,* New York) because the Synthesis Cost Model substantially overstates non-loop costs in rural states relative to less rural states, thereby substantially overstating any such cost justification for non-loop *rate differences*. *See* Lieberman Decl. ¶¶ 11-13. Thus, Verizon's assertion that this Commission should rubber stamp its New Hampshire non-loop rates based on Verizon's non-loop benchmarking analysis between New Hampshire and New York must be rejected.

The primary reason that the Synthesis Cost Model overstates non-loop cost differences between New Hampshire and New York is that the Synthesis Cost Model vastly overstates cost differences for transport and for tandem switching (non-loop costs are equal to the sum of the costs of switch port, switch usage, switch features, *transport*, signaling, and *tandem switching*). *See* Lieberman Decl. ¶ 11-12. Therefore, to the extent that any switching-related benchmark analysis between New Hampshire and New York is appropriate, that analysis should at least exclude the costs of transport and tandem switching. *See id.* ¶¶ 13-14. And that analysis confirms that Verizon's New Hampshire switching rates cannot be justified by a comparison to Verizon's New York switching rates. Verizon's New Hampshire switching rates are 13 percent higher than those in New York on a cost adjusted basis. *See id*. Thus, on this record, the Commission cannot reasonably rubberstamp Verizon's New Hampshire switching rates based on a benchmark comparison of Verizon's New Hampshire rates to Verizon's New York rates.

Moreover, the fact that Verizon's New Hampshire *switching* rates are 13% higher than in New York on a cost adjusted basis is fatal to Verizon's claim that its rates can be rubber-stamped by this Commission for a second independent reason. As noted, "TELRIC rates are calculated on the basis of *individual* elements." *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1678 (2002) (emphasis added). Hence, a BOC's rates for a network element comply with Checklist Item 2 only if they are "based on the cost . . . of providing . . . *the* network element." 47 U.S.C. § 252(d)(1) (emphasis added). Therefore, to gain § 271 approval, a BOC must show that the rates for *each* of its network elements – including switching – complies with TELRIC principles. Because Verizon's switching rates cannot be justified based on a valid benchmark comparison, Verizon must prove, not simply assert, that its New Hampshire switching rates are TELRIC-compliant. Verizon has not done so, and as demonstrated below, Verizon cannot show that its switching rates are TELRIC-compliant. On the contrary, Verizon's New Hampshire switching rates are inflated by myriad clear TELRIC errors.[3]

II. VERIZON'S RECURRING RATES VIOLATE BASIC TELRIC STANDARDS.

A. Verizon's Non-Loop Rates In Delaware Violate Basic TELRIC Standards.

Verizon's recurring rates for switching and other non-loop elements in Delaware are inflated by numerous clear violations of TELRIC. Some of these violations taint only the switching rates; others inflate the rates of every network element that Verizon is required to offer. The resulting cost overrecovery is large. As Catherine Pitts and Michael Baranowski explain in their attached declaration, for example, Verizon's recurring rates for switch utilization, if applied to projected utilization over the projected lives of Verizon's switching equipment in Delaware, would overrecover Verizon's initial switch investment by *126 percent*. Pitts/Baranowski Decl. ¶¶ 6-8.

How can the Delaware UNE prices for switching, purportedly based on cost estimates generated by Telcordia's well known SCIS/MO model, be so wide of the mark? One reason is how Verizon used SCIS. Verizon estimated the cost of a minute of use ("MOU") of switching in Delaware by combining the individual unit cost outputs of SCIS/MO to produce an aggregate cost per MOU. Although it is permissible for SCIS model to be run in this fashion, Verizon's bottoms-up approach produces accurate results only if three fundamental input quantities—percent utilization of processor capacity, busy hour traffic on a per line basis (e.g., busy hour calls per line), and busy hour usage data

[3] Verizon also invites the Commission to ignore any analysis of separate rate elements and, instead, consider only a combined non-loop and loop benchmark comparison between New Hampshire and New York. For the reasons stated above, the Commission must reject Verizon's invitation.

used as inputs for the related SCIS/IN model of feature costs—are applied accurately and consistently. If these inputs are off, the results can be badly in error. This is not an uncommon occurrence, because many of the key input values are not metered by the switch, or involved predictions of future traffic volume, and therefore must be estimated or projected. Pitts/Baranowski Decl. ¶¶ 9-11.

1. The Cost Data Underlying Verizon's UNE Rates Fail To Reflect The Decline In Forward-Looking Costs Since The Mid-1990s.

The switch investment costs underlying the Delaware UNE rates are further overstated because they are based on stale switch discount and switch investment data. Most of Verizon's UNE prices for most network elements were last adjudicated by the Delaware PSC in 1997.[4] Moreover, some of the most important input values are based on data that were no longer current even in 1997. Because many of the costs of providing local telephone service have fallen sharply since the mid-1990s, the gap between Verizon's UNE rates and TELRIC-compliant rate levels has become a gulf. Pitts/Baranowski Decl. ¶¶ 12, 15-16; Lieberman Decl. ¶ 17-19.

To determine the forward-looking cost of purchasing switching equipment, for example, Verizon's cost study used the discounts offered by Verizon's switch vendors in 1995. In the intervening seven years, however, the available discounts offered to Verizon and other incumbent LECs have become much deeper, and the effective discounted prices have fallen substantially. Pitts/Baranowski Decl. ¶¶ 12-13.

Similarly, the cost studies submitted by the parties in the 1997 UNE litigation relied on cost data for a Bell Atlantic that extended only from Virginia to Pennsylvania.

[4] Findings and Recommendations of Hearing Examiners, Delaware PSC Docket No. 96-324 (De. PSC Apr. 7, 1997), *modified*, Order No. 4542, at ¶ 29 (De. PSC July 8, 1997), *affirmed in part and reversed in part*, *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 219 (D.Del. 2000).

Since then, of course, Bell Atlantic has merged with NYNEX and then GTE to form Verizon, a mammoth enterprise whose footprint spans nearly the entire Northeast Corridor—the most telecommunications-intensive region in the United States—and whose revenue now exceeds that of any other telecommunications carrier in the United States, including AT&T. Verizon obtained regulatory approval for these mergers in part by representing that they would benefit ratepayers by generating substantial economies of scale and scope. Pitts/Baranowski Decl. ¶ 12-13. Both this Commission and the Delaware PSC have found that the two merger transactions were likely to generate large cost savings. None of those cost savings, however, are reflected in the pre-merger cost data underlying the Delaware PSC's 1997 UNE rate prescriptions. *id*.

The Delaware PSC's failure to update Verizon's UNE rates to reflect these and other cost changes cannot be excused on the theory that the cumulative decline in costs is still too small to warrant the trouble and expense of another rate case. The decline in Verizon's costs since the 1997 case clearly has been large. As demonstrated in the attached declaration of Michael Lieberman (¶¶ 17-19), for example, an analysis of Verizon's ARMIS data for its Delaware net switch investments and its dial equipment minutes ("DEMs") shows that net switch investments have declined on a per-minute-of-use basis for the past several years, and that net switch investment has grown much slower than DEMs. The slow growing net switch investment, combined with the explosive increase in minutes, shows that there has been a 25 percent decline in switching investment per DEM between 1996 and 2001. *See id*. Thus, Verizon's switching rates clearly exceed today's forward-looking costs by a wide margin.

Moreover, updating Verizon's 1997 UNE rates would not have required an entirely new rate case. Indeed, updating some of the most important inputs underlying those rates would have required virtually no additional work at all.

On May 24, 2001, Verizon filed a "Revised UNE Rate Filing" with the PSC, thereby triggering a second round of UNE rate litigation ("Phase II Proceeding").[5] The scope of the Phase II case was two-fold. First, the PSC needed to revise Verizon's non-recurring charges in response to the finding of the court in *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218, 250-51 (D. Del. 2000), that the NRCs set in 1997 violated TELRIC. Second, the PSC needed to set TELRIC-compliant rates for a variety of UNEs newly introduced by Verizon after the close of the 1997 rate case. During Phase II, AT&T and other parties repeatedly asked that the PSC to expand the scope of the case to update the rates set in 1997 for Verizon's existing UNEs. The PSC denied each request. *See*, *e.g.*, Delaware PSC Docket No. 96-324 (Phase II), Findings, Opinion and Order No. 5967 (issued June 5, 2002) ¶¶ 23-25.

2. Verizon Has Obtained Excessive Rates For Minutes-Of-Use And Features By Mis-Allocating Fixed Costs To Those Outputs.

The "getting started" cost of a switch is often called the "first cost" or "start-up cost." A small percentage of this cost is associated with the central processor, and the remainder reflects the costs associated with maintenance, administrative, test, and spare equipment, memory, and other common equipment in the switch. Starting up cost is a significant fraction of the total switch investment in Delaware. Pitts/Baranowski Decl. ¶ 14.

[5] The PSC initiated the Phase II proceeding by Order No. 5735, dated June 6, 2001.

The getting started cost of a switch should be assigned to the port UNE elements. The Verizon cost studies used to justify its switching UNE charges, however, allocated the “getting started” switch costs produced by the SCIS/MO model to the minute-of-use (traffic sensitive) and feature rate elements. This allocation was improper. Getting started switch costs do not vary with the number of lines and trunks on the switch or switch usage. The average current processor utilization for Verizon switches in Delaware is sufficiently low that the amount of traffic could increase several fold without exhausting the processors. Because adding calls or features requires no additional switch processing capacity, use of the processor has no economic cost. Likewise, removing calls or features from the switch will not result in a decline in processing costs. *See id.*

A cost-based switching rate structure requires that non-traffic sensitive switch costs be recovered via non-traffic sensitive switch rate elements. Otherwise, as minutes of use increase, over-recovery of the getting started cost will occur because the getting started costs do not change as minutes increase. The Verizon cost study suffered from Verizon’s misassignment of a substantial share of switch investment to the minute of use rate element. The resulting rates for switching UNEs are almost certain to generate a massive overrecovery of cost overrecovery as minutes grow and Verizon collects increased revenues. Pitts/Baranowski Decl. ¶¶ 14.

B. Verizon’s Recurring Rates For Switching In New Hampshire Were Also Set In Disregard For TELRIC.

Verizon’s recurring rates for switching in New Hampshire are also inflated by clear TELRIC errors. Moreover, the New Hampshire PUC has not even pretended to comply with the Commission’s TELRIC requirement that costs for UNEs “be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505(b)(1). In its UNE decision of July 6, 2001, the PUC announced that it had decided to disregard this requirement because the July 18, 2000, decision of the Eighth Circuit in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. July 18, 2000) ("*Iowa III*"), had found Section 505(b)(1) unlawful. *See* PUC Order No. 23,738 (issued July 6, 2001) at 5-6, 57-59, 85-88. Hence, the PUC stated, if would base its cost findings on the Eighth Circuit's holding in *Iowa III*, not the FCC's TELRIC rules as written.[6]

AT&T moved for reconsideration, noting the Eighth Circuit had stayed the portion of its *Iowa III* decision that would have suspended the effectiveness of the TELRIC rules pending further judicial review.[7] On reconsideration, the PUC waffled, asserting that its July 6 decision "was not based upon a misunderstanding that *Iowa III* is the law," but rather on two more generic benchmarks for setting "just and reasonable rates":[8]

> (1) economic cost modeling is an imprecise art that aspires to establish a zone of reasonableness rather than a single correct answer, and (2) a reasonable approach to modeling a forward-looking network requires some relationship to the reality of the current network world.[9]

The PUC did not retreat, however, from its refusal to apply the TELRIC standard of the efficient long run costs of the "lowest cost network configuration."

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[6] *See* Docket DE 97-171, Order No. 23,738 at 5-6, 57-59, 85-88 (July 6, 2001).

[7] Order on motion to stay mandate, *Iowa Utilities Board v. FCC,* Docket Nos. 96-3321 *et al.* (8th Cir., Sept. 25, 2000).

[8] *See* Docket DE 97-171, Order No. 23,847 at 12-13 (November 21, 2001).

[9] *Id.* at 14.

The switching rates ultimately approved by the PUC confirmed that it had no intention of tethering its ratesetting to TELRIC. In July 1998, in the middle of hearings, Verizon and the PUC's trial staff struck a side deal concerning the rates they would support.[10] The PUC, over the objections of AT&T,[11] approved the "stipulated" rates as "reasonable" essentially because (1) the PUC's trial staff had agreed to them, (2) the stipulated switching rates were intermediate between the levels originally proposed by Verizon and the levels proposed by AT&T, and (3) the sample of switch purchase prices selected by Verizon to support its proposed switching prices satisfied the PUC's desire to model a "forward-looking" in a way that bore "some relationship to the reality of the *current* network world"—i.e., to Verizon's *embedded* network *See* PUC Order No. 23,738 (issued July 6, 2001) at 95-97 (emphasis added).

The switching rates remained unchanged until a month ago, near the end of the Section 271 proceedings before the PUC, when the agency accepted Verizon's proposal to reduce its switch usage rates by 17 percent in lieu of a further inquiry into Verizon's switching costs. At no time since 1996 has the PUC even tried to determine whether the rate reductions doled out piecemeal by Verizon have reduced its switching rates to levels approaching TELRIC compliance.

1. The New Hampshire PUC has never determined whether Verizon's switching rates are TELRIC-compliant.

The rates approved by the New Hampshire PUC are the result of a bilateral side deal ("stipulation") between Verizon and the PUC's trial staff, and are not based on costs.

[10] NH PUC Docket No. DE 97-171, Exh. 61 (Verizon/Staff stipulation).

[11] *See, e.g.*, NH PUC Docket No. DE 97-171, AT&T initial brief (Feb. 10, 1999) at 10-15; *id*., AT&T Reply Brief (filed March 3, 1999) at 5-8; *id*., AT&T Motion for Rehearing (filed Jan. 8, 2002) at 14-16.

Outside the hearings during the summer of 1998, the Staff requested Verizon to run its cost model assuming a meld of 80% new switch discount and 20% growth discount, and Verizon and Staff agreed upon an arbitrary value of $325 per line for switching investment. By the admission of the witness who sponsored the switching cost study, Verizon's cost personnel then ran their cost model with various combinations of switching price data as inputs until the model disgorged the desired result. Pitts/Baranowski Decl. ¶¶ 15.

In fact, the samples of purchase price data that Verizon seized upon to make the $325 value fall out of the model were grossly unrepresentative of the forward-looking costs that Verizon actually faced as a purchaser of switches in 1996 or 1997, let alone today. The sampled purchase contracts covered switch purchases *before 1992*, at higher prices than Verizon's contracts established at that time. Another set of data samples involved primarily remote switches, all of which were smaller than the normal remote switch in New Hampshire, thus producing a higher cost per line (as Verizon also admitted in the hearings). Pitts/Baranowski Decl. ¶¶ 16-17.

Despite the crudely result-oriented process that gave birth to the $325 value, the PUC found it an acceptable estimate of embedded or short-run costs, the version of ostensibly "forward-looking" costs that the PUC had decided to apply instead of TELRIC.[12] The PUC reduced the $325 value to $294.61 to reflect a reduction in engineering and installation costs, but otherwise embraced the Verizon/Staff bargain without modifying the underlying switch material investment. Pitts/Baranowski Decl. ¶¶ 15.

[12] *See* PUC Order No. 23,738 (issued July 6, 2001) at 95 ("As we have determined above, a reasonable approach to modeling a forward-looking network requires some relationship to the reality of the current network world.").

The PUC's foray into result-oriented ratemaking did not end in 1998. In the recent state Section 271 proceeding, the PUC accepted another Verizon deal: Verizon cut its switch usage rates by 17 percent, and the PUC agreed not to probe further into the cost justification for Verizon's switching rates. Verizon's arbitrary reduction of selected switch UNE rates on June 14, 2002, has not cured the foregoing violations of TELRIC.[13] To this date, the PUC has never judged Verizon's switching rates against the benchmark actually established by the FCC: the long run forward-looking costs of an efficient firm unconstrained by a legacy of inefficient embedded investment. For these reasons, Verizon's rates remain patently in violation of TELRIC.

2. Verizon's switching rates in New Hampshire reflect 1994 or 1995 switch discount percentages, which were already obsolete even by 1998.

Verizon's based its switching cost study on equipment contract prices that were outdated even by the 1998 proceeding. Verizon used a 1995 version of the SCIS/MO model to develop the switch investments that underlie the rates for unbundled switching. Telcordia typically releases at least one update per year, making the model version three-years old in 1998. And Verizon used switch contract prices for *1994* to determine the discount input for SCIS/MO model, even though more recent contracts were available. Pitts/Baranowski Decl. ¶ 16-17.

As in Delaware, using more recent information would dramatically reduce the per-line investment cost of switching. First, it is well known that switch prices are declining for both the purchase of new switch equipment and for add-on equipment to existing switches ("growth"). Second, switch components have been evolving, allowing

[13] Pitts/Baranowski Decl. ¶¶ 15-23; Docket No. DT 01-151, letter-decision from the PUC to J. Michael Hickey, President of Verizon-New England, dated June 14, 2002.

greater capacities, thus reducing unit costs. Hence, Verizon's use of old, higher prices at the time of the hearing resulted in switch UNE rates that were not cost based. Pitts/Baranowski Decl. ¶¶ 16-17.

3. Verizon's switching cost study modeled technology that was obsolete and overly costly even in 1998.

The SCIS/MO model is periodically updated to reflect advances in technology as soon as components incorporating it are made available from switch manufacturers. The 1995 version of SCIS/MO that Verizon used in New Hampshire therefore reflected older technology than assumed in the current versions of the SCIS model in 1997 or 1998. Verizon also modeled obsolete technology by assuming that all digital loop carrier lines were served via TR008 SLC-96 technology instead of the forward-looking GR303 already available in 1998. Pitts/Baranowski Decl. ¶¶ 18-19.

The cost and engineering advantages of GR-303 (formerly called TR-303) over TR008 are well known and widely accepted in the industry. In particular, TR008 has very little dedicated port cost, but a high usage-sensitive cost as modeled in SCIS/MO, resulting a low port rate, but contributing to an excessive MOU rate. Indeed, another incumbent LEC, BellSouth, recently filed expert testimony which asserted that

> Generic Requirement 303 ("GR-303") (authored by Bellcore) provides a set of generic requirements that describe more flexible [than TR008] NGDLC system types and a more flexible interface at a local digital switch. . . . The concentration allowed over these interfaces is variable and can be matched to the services being made available from the remote NGDLC site to allow the most economic concentration ratio consistent with the service being provided. While there are many variables that impact the decision of which switch termination type to use for the interface between a remote NGDLC site and the local digital switch, generally the most economic configurations are provided by using GR-303 sites with more than 150

lines in the three to five year planning period.

Direct Testimony of W. Keith Milner on behalf of BellSouth Telecommunications, Inc., Oct. 1, 2001, Georgia Docket No. 14361-U. *See also* Pitts/Baranowski Decl. ¶¶ 18-19.

Nevertheless, Verizon chose to model *none* of its lines in New Hampshire study as forward-looking GR-303 IDLC lines. Instead, Verizon assumed that *all* of the IDLC lines would employ older technology based on TR-008 standards (specifically Verizon used TR-008 Mode I). Verizon's assumption that approximately 90 percent of the lines in New Hampshire would be on less-efficient IDLC produces switch UNE rates that exceed TELRIC. *See also* Pitts/Baranowski Decl. ¶¶ 19; *accord, In the Matter of the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc*., Docket No. TO00060356 (March 6, 2002) ("New Jersey UNE Rate Decision") at 71-72 (adopting assumption that forward-looking network would use 100% IDLC GR-303); *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Penn. PUC Docket No. R-00016683, Recommended Decision issued May 3, 2002, at 37-39 (same).

The PUC's failure to address the GR-303 issue cannot be blamed on AT&T's failure to present it squarely: AT&T raised the issue repeatedly.[14] The PUC rejected AT&T's position on the ground that Verizon, given the constraints of its *existing* network, would find a migration to GR-303 uneconomic in the next few years. Order No. 23,738 at 61-62, 88. This embedded or short-run perspective is a basic violation of the forward-looking, reconstructed-network paradigm of TELRIC.

[14] *See*, *e.g.*, NH PUC Docket No. DE 97-171, Ex. 89, AT&T witness Petzinger (subsequently Pitts) Rebuttal at 4, 8-9; *id*., AT&T initial brief (Feb. 10, 1999) at 43-44; *id*., AT&T Reply Brief (filed March 3, 1999) at 18; *id*., AT&T letter to the PUC dated Dec. 16, 1999 (lodging Verizon testimony from Massachusetts and engineering documents); *id*., AT&T letter dated Apr. 4, 2000 (lodging Verizon testimony in New York); *id*., AT&T Motion for Rehearing (filed Jan. 8, 2002) at 10-14.

4. The PUC accepted a common cost factor that is patently violative of TELRIC.

In their July 1998 agreement, Verizon and the PUC Staff agreed to recommend that a joint and common cost factor of 15 percent should be added to the revised investment cost outputs from the SCIS model. The 15 percent factor represented a 50 percent increase over the common cost factor originally supported by the PUC Staff and AT&T witnesses.[15] The proponents of the 15 percent value offered no data or analysis to indicate that an efficient forward-looking company would have overhead costs so large, and the number appears to have been pulled out of thin air. To the contrary, Dr. Johnson candidly admitted that he was acquiescing in the 15 percent factor instead of his original proposal, 10 percent, because "Bell Atlantic preferred something higher."[16]

The PUC likewise offered no reasoned explanation for adopting the higher figure, and cited no data in its support. Instead, the PUC stated only that it was accepting the 15 percent value "on the basis of credibility" or—more candidly—because "[t]o judge that the cost study's results are reasonable, we must find that the common cost factor is reasonable." Docket No. DE97-171, Order No. 23,738 (issued July 6, 2001) at 93.

In its *Local Competition Order*, the Commission found that the common costs recoverable from prices for UNE are limited to the forward-looking common costs of an efficient firm. *Local Competition Order* ¶¶ 694-96. Moreover, because of the "likely asymmetry of information regarding network costs," incumbent LECs have the "burden to prove the specific nature and magnitude of these forward-looking common costs." *Id.* ¶ 695. Under the circumstances, the New Hampshire PUC's uncritical acceptance of the 15 percent factor was a patent violation of TELRIC.

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[15] Johnson, Tr. 9/1/98 at 33 & 172.

[16] Johnson, Tr. 9/1/98 at 33.

5. Verizon's switching cost study misallocated fixed costs to usage element.

As in Delaware, Verizon has included in its New Hampshire minute of use rate element the fixed cost of "getting started." In New Hampshire, the getting started cost is 25 percent of the total switch investment. The average current processor utilization for Verizon switches in New Hampshire is only a small fraction of processor capacity. At these low levels of utilization, the amount of traffic could expand greatly without exhausting the processors; therefore, using the processor does not have an economic cost because adding calls or features causes no additional switch processing costs. The mis-assignment of 25% of the total switch investment to the minute of use rate element will result in severe cost overrecovery as minutes grow and Verizon collects increased revenues, but its fixed costs remain static.[17]

AT&T raised this point repeatedly during the UNE proceedings below.[18] The PUC dismissed AT&T's objections on the ground that the "getting started" and other non-traffic sensitive switching costs are recurring, and therefore must be recovered from recurring rates:

> AT&T's objection to the inclusion of switching costs in the recurring cost portion of the SGAT is not credible. Just as

[17] Pitts/Baranowski Decl. ¶¶ 20-21; *accord*, Massachusetts D.T.E. Docket No. 01-20, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts* (decision issued July 12, 2002) at vii, 248-50, 262, 270-71, 287-90 (accepting AT&T's position and rejecting Verizon's).

[18] *See, e.g.*, New Hampshire PUC Docket No. DE 97-171, Ex. 89, AT&T witness Petzinger (subsequently Pitts) Rebuttal at 9-10; *id*., Initial Brief Of AT&T Communications Of New England, Inc. Regarding Proposed Recurring And Non-Recurring Charges For Unbundled Network Elements, Operations Support Systems Access, Collocation, And Using BA-NH's House And Riser Cable (filed Feb. 10, 1999) at 14-15; *id*., Motion By AT&T For Rehearing Of The Recurring Cost And Non-Recurring Cost Issues Addressed In Order No. 23,738 (filed Aug. 2, 2001) at 16.

> loop costs “recur,” as that term is used in UNE cost modeling, so too do switch costs. The forward-looking nature of these studies includes the concept that neither loop nor switch costs occur as one-time costs.

Order No. 23,738 at 92. That response, however, merely begs the question of *which* recurring charge should be used to recover the costs: the recurring charge for ports, or the recurring charge for minutes of use.

6. Verizon further overstated its MOU switching costs by overstating its peak capacity requirements.

Another highly significant error in Verizon-New Hampshire’s cost methodology relates to its MOU rate element. To calculate a minute of use rate element for unbundled switching, Verizon initially calculated the cost for a “busy-hour,” *i.e.*, the peak usage. Those busy-hour minute of use costs are then converted to a cost for “any hour of the day” by multiplying a 11 percent busy hour to total business day (BHTD) ratio and then dividing by 252 business days per year. This calculation ensures that Verizon will recover 100 percent of the costs from traffic that occurs on business days, an outcome that is consistent with sound economic principles for attributing the costs of peak load capacity requirements. Pitts/Baranowski Decl. ¶¶ 22-23.

This calculation may be acceptable for business-related service cost studies, such as Centrex, but it is entirely inappropriate for a wholesale rate element that will be used by residential and business customers. The revenue received from the minute of use rate element in the remaining 113 days of the year would be pure profit to Verizon because it has calculated that rate element to ensure that it fully recovers its costs from the traffic occurring on business days. Instead of Verizon’s method, the proper approach is plainly to divide the peak period costs over all 365 days per year, because the switch will in fact be used all of the days of the year. Pitts/Baranowski Decl. ¶¶ 22-23.

III. VERIZON'S NONRECURRING CHARGES IN DELAWARE ARE INFLATED BY CLEAR TELRIC ERRORS.

The Commission has long recognized that cost-based nonrecurring charges ("NRCs") are critical to making competitive local telephone entry economically feasible.[19] Regardless of the level of the recurring rate, an ILEC will foreclose meaningful competition if it is allowed to increase potential competitors' costs significantly through inflated non-recurring charges. New entrant competitive carriers must pay NRCs up-front, and if NRCs are significantly overstated, then potential new entrants will not be able to afford to enter the market. Moreover, higher NRCs increase the level of market risk faced by potential new competitive local exchange market entrants because the high price of entry substantially reduces the potential competitors' pricing flexibility relative to the pricing flexibility enjoyed by the incumbent, which does not have to pay the NRCs. In Delaware, Verizon's NRCs are not even remotely TELRIC-compliant.

Bell Atlantic-Delaware (now Verizon-Delaware) first proposed UNE rates in 1997.[20] The PSC largely followed Verizon's approach of basing its NRCs on the costs of the largely manual, non-automated procedures used by Verizon, rather than the forward looking costs an efficient firm would incur to provision UNEs.

AT&T sought judicial review from the U.S. District Court in Delaware. AT&T argued that the NRCs adopted by the PSC in Order No. 4542 did not reflect the rates that

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[19] *See, e.g., AT&T Communications*, 103 FCC 2d 277, ¶ 37 (1985) ("It is evident that nonrecurring charges can be used as an anticompetitive weapon to . . . discourage competitors"); Second Memorandum Opinion and Order on Reconsideration, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd. 7341, ¶ 43 (1993) ("absent even-handed treatment, nonrecurring reconfiguration charges could constitute a serious barrier to competitive entry").

[20] Application of Bell Atlantic Delaware Inc. for Approval of its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, PSC Docket 96-325 (filed December 16, 1996).

an efficient LEC would provide for fully-mechanized electronic interfaces and systems for ordering, provisioning, billing, and related non-recurring operations, but rather, allowed Verizon to collect NRCs based on Verizon's inefficient and more costly antiquated manual processes.

The court agreed. In *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218, 250-51 (D. Del. 2000) ("*McMahon*"), the court found that the Verizon NRCs set by the Delaware PSC in 1997 violated the 1996 Act and the Commission's rules because the rates were based on Verizon's existing, inefficient processes. The court rejected the very same arguments that Verizon had advanced before the PSC – that Verizon's NRCs were "forward-looking" even though they were based on Verizon's embedded processes for providing UNEs. The court explained:

> The mechanization of Bell's current internal service order processes is irrelevant to the legal standard for determining network element costs. At no point in their analysis did the Hearing Examiner's address Bell's proposed NRC charges in light of "the most efficient telecommunications technology currently available and the lowest cost network configuration." 47 CFR §51.505(b)(1). There is simply no mention of the "most efficient, currently available" telecommunications technology – even though the Commission since has conceded that Bell's service order processing system does not meet this standard . . . . Where, as here, an agency ignores a controlling legal standard, its rulings are arbitrary and capricious. *See Florida Power Light Co.* 470 US at 743.

McMahon, 280 F. Supp. 2d at 251.

Recognizing that the PSC would need to develop a factual record to determine the forward looking costs that an efficient carrier would incur to provide the services, the court "remand[ed] the NRC charge issue for renewed evidentiary hearings consistent with the *Local Competition Order* and its implementing regulations, specifically, 47 CFR

§51.505(b)(1)." *Id.* The court expressly prohibited the PSC from relying on Verizon's current processes as a basis for determining NRCs. *See McMahon*, 80 F. Supp. 2d at 251 ("[t]he mechanism of [Verizon's] current internal service order processes is *irrelevant* to the legal standard for determining network element costs") (citing 47 C.F.R. § 51.505(b)(1)).

Despite these instructions in *McMahon*, the NRCs proposed by Verizon in 2001 were, in the unanimous judgment of the PSC's Staff, the Department of Public Advocate and the PSC's own hearing examiner, still based on Verizon's existing processes.[21] Indeed, in many respects, the "new" Verizon NRCs were a step backwards; NRCs for many key processes were *higher* than those that had been struck down in *McMahon*.[22]

As explained by the attached declaration of Richard Walsh, Verizon based its Phase II nonrecurring charges on a "new" Non-recurring Cost Model ("NRCM"), which purported to measure the "forward-looking" costs of the tasks necessary to provide UNEs. Like Verizon's Phase I NRC study, however, Verizon's "new" study took as its starting point Verizon's existing systems. Generally speaking, the NRCM was based on surveys of the time Verizon's employees took to provision certain UNEs, utilizing existing systems and processes. The survey responses were then averaged and adjusted by an unnamed "panel of experts" who made undocumented "forward-looking adjustments." The PSC's own Staff described Verizon's jury-rigged methodology as follows:

> 1. Assume that current systems, processes, work activities, and work times represent the appropriate baseline for a study of forward-looking economic costs calculated pursuant to the TELRIC standard;

[21] *See* Findings and Recommendations of the Hearing Examiner on Remand (Feb. 28, 2002) ("Hearing Examiner Remand Findings"); Staff's Initial Mem. on Remand (Feb. 15, 2002); Public Advocate's Comments & Recommendations Concerning Remand Issues, at 4 (Feb. 15, 2002).

[22] April 30, 2002 Meeting Tr. at 2384-85.

> 2. Conduct surveys of employees performing tasks using existing systems.
>
> 3. Compile the results, creating an "average of averages;"
>
> 4. Through the operation of a panel of unnamed experts whose operation is completely undocumented, make any changes deemed necessary to ensure the data accurately reflects the panel's assumptions regarding existing tasks and task times;
>
> 5. Through the operation of a panel of unnamed experts whose operation is completely undocumented, make any changes deemed necessary to ensure the data accurately reflects the panel's assumptions regarding how Verizon's existing systems and processes will be improved in the future; and, then,
>
> 6. Calculate non-recurring costs based on these unsupported assumptions.

Staff's Initial Mem. on Remand, at 9 (Feb. 15, 2002) (footnote omitted).

AT&T, on the other hand, advocated forward-looking NRCs based upon the processes that would be used by an efficient carrier unconstrained by an outdated legacy system. *See* Prefiled Testimony of Richard Walsh (Sep. 14, 2001). Accordingly, AT&T's proposed NRCs were well below those proposed by Verizon. Walsh Decl. ¶ 22.

The Hearing Examiner issued Findings and Recommendations on December 21, 2001 (the "Initial Report"), finding that AT&T's NRC cost model was "forward-looking." Initial Report ¶ 247. He also found "understandable" the uniform criticism of Verizon's study. *Id.* Nevertheless, he declined to recommend AT&T's model, instead recommending that the PSC adopt the Verizon's NRCM. According to the Hearing Examiner, by adjusting its existing processes to reflect future improvements, Verizon made a "good-faith" effort to reflect a forward-looking environment. *Id.*

On February 19, 2002, the PSC met to deliberate and consider the Hearing Examiner's Initial Report. The PSC was unable to reach a decision on the NRCs, noting that "the record developed by the parties is not, in the Commission's opinion, sufficient to allow the Commission to render an informed decision on the issue of whether Verizon-Delaware's non-recurring cost model complies with the District Court's determinations and TELRIC and whether the rates produced are just and reasonable under the TELRIC's pricing standards." Order No. 5896 at 1.

On remand to the Hearing Examiner, PSC Staff, the Public Advocate, Cavalier, and AT&T showed that Verizon's use of existing processes and times (even "adjusted" for future efficiencies), constituted the exact approach rejected by the District Court. The parties criticized extensively the premises, procedures, inputs, and assumptions made in the development of the model and the resulting NRCs and made clear that while Verizon's NRCM was labeled as "forward-looking" it was actually an embedded historical cost study. *See, e.g.*, PSC Staff Reply Mem. on Remand, at 5 (Feb. 21, 2002).

In this regard, the parties demonstrated that Verizon's model assumed only those incremental changes that Verizon planned to make to its existing *legacy* processes, and did not, as required by the TELRIC rules, estimate the costs of the most efficient processes that could be used to provide UNEs to competitors. *See, e.g.*, Public Advocate's Comments & Recommendations Concerning Remand Issues, at 4 (Feb. 15, 2002). For example, Verizon assumed that new service orders for UNEs by competitive carriers would require costly manual processing 23% of the time, despite the fact that efficient ordering systems are available that would all but eliminate the need for such manual processing. Supplemental Filing of AT&T, at 10 (Nov. 28, 2001). And it was precisely because of these fundamental flaws that Verizon's "new" NRCs were for the most part higher than the "old" NRCs that all acknowledge were improperly based on inefficient processes. April 30, 2002 Meeting Tr. at 2384-85.

The PSC's own Staff agreed that the focus of Verizon's new NRCM study remained embedded or short run. "Verizon has been candid in representing: (1) that the starting point for [its cost study] process was the design of its *current* systems and the work tasks associated with those systems and (2) that adjustments were made to reflect expected enhancements to these systems, based on the opinions of a panel of in-house experts whose expertise lie in Verizon's existing processes, existing systems, and the company's existing plans to mechanize those systems." Staff's Initial Mem. on Remand at 6.

The parties also showed that Verizon did not even measure its embedded costs properly. Verizon calculated its NRCs by relying on a survey of the time employees said they spent performing the tasks necessary for provisioning UNEs. While Verizon represented that this survey was conducted by Andersen Consulting, that was not the case. *Id.* Rather, Andersen conducted a survey at a later date than the internal Verizon survey that was used and the Andersen survey generally measured shorter times than the survey that Verizon used. Order No. 5967 ¶ 88. Finally, the parties demonstrated that Verizon's study was a "black box" with no evidence supporting the adjustments Verizon made to transform existing inefficient processes into efficient, forward-looking processes. *See, e.g.*, AT&T Reply to Verizon's Br. on Remand, at 4-7 (Feb. 21, 2002).

On February 28, 2002, the Hearing Examiner issued a ruling that reversed his earlier recommendation on the NRC issue, frankly acknowledging that he had erred in previously determining that the Verizon NRCM produced TELRIC-compliant rates. In his decision, the Hearing Examiner explained:

> 18. My [original] Recommendation in favor of the NRCM was based on two underlying conclusions. First, based on PSC Order No. 5735, I concluded that the Commission purposely limited the scope of this proceeding by creating certain presumptions in favor of the Phase I

inputs and by establishing an expedited schedule. Second, I concluded that Verizon-Delaware's broad interpretation of TELRIC and the District Court remand was a supportable position and that its NRCM was consistent with such interpretation, notwithstanding the other parties' protests that a TELRIC based model cannot start with embedded technology and processes and that the record support for the inputs to the NRCM was inadequate.

19. On remand, however, these two conclusions are called into question. First, in its deliberations, and as reflected in the remand itself, the Commission understandably shows a reluctance to set "permanent" UNE rates in a limited proceeding and reveals a preference to err in favor of full development of the record. In addition, the Commission's rationale for expediting this proceeding in the first instance may now be moot. An express purpose for expediting the proceeding was to facilitate Verizon-Delaware's entry into the long distance market in Delaware by providing a full set of permanent UNE rates for inclusion in Verizon-Delaware' imminent 271 filing. Order No. at 5735 at 6. Verizon-Delaware, however, recently filed for its Section 271 review in Delaware and apparently intends to move forward with its FCC application, irrespective of the status of this UNE proceeding.

20. Second, on remand, Staff points out that Verizon-DE has argued before the U.S. Supreme Court that TELRIC is not the flexible version ("TELRIC Light") it supports in this case. [Staff Initial Brief at 2]. Rather, to support its position that TELRIC results and consistent rates, Verizon-Delaware has argued that TELRIC requires rates based solely on a network of available, but yet to be deployed, technology and processes. This interpretation is, of course, in line with Staff and AT&T's more rigid version of TELRIC. I agree with Staff that Verizon-Delaware's inconsistency in its interpretation of TELRIC weakens its position in this case.

21. In addition, Staff notes on remand that Verizon Delaware's main complaint is that without relying on its embedded systems as a starting point, it is "impossible to create rates that have any relation to the cost that will be incurred by Verizon-Delaware." *Id.* at 5, quoting Verizon-DE Opening Brief at 49.

> Staff argues, however, that:
>
> > seeking such a match is not the goal of TELRIC, which instead is designed to divine economic costs (47 C.F.R. §51.505) and which expressly prohibits the use of embedded costs. 47 C.F.R. §51.505(d)(1). As the District Court stated clearly, the mechanization of Bell's current internal service order processes is irrelevant to the legal standard for determining network element costs.
>
> *Id.* at 6, quoting District Court Remand at 251.
>
> 22. For these reasons, on remand, I recommend that the Commission adopt Staff's interpretation of TELRIC and its position that Verizon-Delaware's NRCM falls short of the TELRIC standard and the District Court Remand.

Hearing Examiner Remand Findings ¶¶ 18-22 (footnotes omitted).

The Hearing Examiner further explained that these conclusions were supported by the testimony of Verizon's own witnesses, who effectively conceded that the Verizon NRCM did not calculate costs based on the most efficient technology currently available, but instead used a "'what Verizon-DE will actually achieve' outlook." *Id.* ¶ 24 (citations omitted). Finally, the Hearing Examiner also agreed with the parties' criticism that the methodology used by Verizon for making so-called "forward-looking" adjustments to its existing processes was effectively a "black box" with no record support. *Id.* ¶¶ 25-26. Thus, even if Verizon's approach of beginning with its existing processes were appropriate, there was no way to judge the reasonableness of the "adjustments" that Verizon purported to make to those existing processes.

For these reasons, the Hearing Examiner recommended that the Commission "reject Verizon-Delaware's proposed non-recurring UNE rates because the NRCM violates the TELRIC pricing standard and the District Court Remand and because

Verizon-Delaware has failed to provide adequate support for the work times used as model inputs." *Id.* ¶ 43.

At its meeting on March 5, 2002, the PSC considered the Hearing Examiner Remand Findings but again failed either to resolve the issue of whether Verizon's NRCM met TELRIC standards and the *McMahon* order or to set a structure for how NRC rates should be set. Rather, the PSC directed Verizon to perform "re-runs" of its cost study. PSC March 5, 2002 Meeting Tr. at 2340, 2354. In particular, as the PSC later described its directive, Verizon was directed to take the survey responses for each task and determine the "average time" which Verizon-Delaware had used in its studies, the "mode time (being the most frequently occurring number in the sample), and the "minimum time" and "maximum time." Order No. 5967 ¶ 88. Verizon was directed to provide results using both its internal survey and the "recently discovered" Andersen survey data. *Id.* On April 9, 2002, Verizon filed the matrix of alternative rate runs (called the "Re-Run Matrix") requested by the Commission at its March 5, 2002 meeting. Verizon amended the filing on April 16, 2002 to correct minor errors. On April 18 and April 22, 2002, the Commission Staff, the OPA, AT&T and Cavalier filed Comments regarding the Re-Run Matrix. Verizon filed Reply Comments on April 25.

At its public meeting on April 30, 2002, the Commission considered the Re-Run Matrix, the Comments, Verizon's Reply Comments, and the oral argument of the parties. There the Commission adopted the Verizon NRCM, adjusted to reflect somewhat lower manual work times than what Verizon had originally proposed. Most of the Commissioners' discussion centered around how much time it should take Verizon employees to perform various tasks using Verizon's existing systems and processes, the same existing systems the Court said were irrelevant to the determination of TELRIC compliant rates. There was no discussion of whether the rates it was adopting were based on the most efficient technology available. Rather, the discussion centered on whether Verizon was using its existing systems in the most efficient way. *See* April 30, 2002 Meeting Tr. at 2414-32. Near the conclusion of the meeting, almost as an afterthought, one Commissioner noted that the rates the PSC was adopting needed to be deemed "TELRIC," as if affixing a TELRIC label to the rates it was approving could somehow paper over it reliance of Verizon's existing systems and processes to set rates. The Commission voted in favor of a motion to apply the TELRIC label. *See id.* at 2435-36.

In its Order No. 5967 memorializing that meeting, the PSC agreed with the criticisms leveled by Staff and AT&T, and the other parties that Verizon's NRCM was flawed. Order No. 5967 ¶ 84. It even acknowledged that "alter[ing]" inputs used in the NRCM, was not the "best way of calculating non-recurring rates," but nevertheless reiterated its finding that the results would be "TELRIC-compliant rates." *Id.* ¶ 85.

On other key issues, Order No. 5967 made no findings. The PSC did not explain: 1) why it was not using AT&T's forward-looking cost model; 2) why the methodological shortcomings in the Verizon NRCM identified by the Hearing Examiner and the parties were not valid; and 3) why, even apart from Verizon's failure to look at the most efficient processes available rather than its existing processes, Verizon's NRCM could be relied upon in light of the Hearing Examiner's express finding that Verizon had not properly supported its purported "forward-looking" adjustments to its existing processes.

In short, when the PSC in Order No. 5967 adopted NRCs based on Verizon's study,[23] the PSC adopted rates based on the same methodology that the District Court

[23] Findings, Op., & Order No. 5967 (June 4, 2002).

found violated the Act, and that it accordingly directed the PSC *not* to use. Walsh Decl. ¶¶ 16-34.

On June 25, 2002, AT&T appealed Order No. 5967 to the U.S. District Court for the District of Delaware—the same court that had issued the *McMahon* decision two years earlier. Complaint for Declaratory and Injunctive Relief, *AT&T Communications of Delaware, Inc. v. Verizon Delaware, Inc., et al.*, Case No. 02-580 (D. Del.). Until the PSC establishes NRCs that actually comply with the TELRIC rules and the District Court's mandate enforcing them, it is premature even to consider Verizon's 271 application in Delaware.

Beyond this threshold defect, Verizon's NRCs suffer from several additional errors. First, Verizon's $9.01 charge for service order feature changes is unjust, unreasonable and discriminatory. This charge is unsupported by the rate calculation set forth in Verizon's workpapers, and is patently exorbitant. Verizon imposes only an $0.28 charge to process an *entire UNE-P initial service order*, including whatever features (often multiple) the customer has ordered. *See id.*, line 36. The notion that the TELRIC cost of changing a *single* feature is $9.01, or 323 times as much, is absurd on its face. In the Delaware state UNE proceeding, AT&T submitted a comprehensive non-recurring cost study showing that a forward-looking feature service order change NRC should be no higher than *27 cents*. Walsh Decl. ¶¶ 42-51. Likewise, Verizon imposes "disconnect" service order charges that were never supported by cost evidence and that, absurdly, are equal to its "connect" service order charges which reflect facilities check costs that do not even occur in connection with disconnects. *Id*. ¶¶ 40-41.

Verizon's Field Installation NRCs also violate TELRIC costing principles and discriminate against CLECs. Indeed, Verizon effectively recovers these costs *twice*, once through recurring charges and again through non-recurring charges. Walsh Decl. ¶¶ 52-64.

The Field Installation activities at issue relate to work between the NID and the central office, such as connecting the feeder cables to the distribution cables (e.g., the field cross-connect at the Feeder Distribution Interface). Verizon imposes Field Installation NRCs when facility paths are not established between the NID and the central office MDF. Verizon included these Field Installation activities in its VZ-DE NRCM cost study on the theory that on its existing network such field activities are *sometimes* "necessary" to fulfill a CLEC's request. Verizon imposes a Field Installation NRCs whenever it chooses to dispatch a technician to complete the CLEC's request. However, Verizon is wrong for assuming these activities are proper NRC activities. Walsh Decl. ¶¶ 52-64.

The loop element as typically and appropriately analyzed in UNE recurring cost analysis, represents a complete transmission facility between the NID and the Central Office. As such, it includes all features, functions, capabilities and connections of such a transmission facility. The forward-looking economic recurring cost of the local loop, reflected by the recurring monthly rate for the use of that loop, includes all of the costs associated with the construction and maintenance of the network including the necessary cross-connections to complete the transmission path. In other words, the UNE loop recurring cost is the cost associated with building and maintaining the transmission facility and is not the cost of laying feeder cable somewhere near distribution cable (to be connected at some later date). Thus, it must necessarily include the cost of this field cross-connect. Without the cross-connect, the loop will not work. Accordingly, Verizon already recovers through its recurring UNE rates the cross-connect costs that it has improperly included in a separate "field installation" NRC. *See id*.

Verizon claims that cross-connect and other field installation activity costs are nonetheless appropriately recovered (or, more precisely, double recovered) through separate NRCs, because those costs are "incurred in response to a specific event initiated by a specific cost-causer and [that] generally involve easily identifiable, concrete costs." Verizon tags the CLEC's service order request as the specific event which "causes" the field installation costs to occur. But that is no response at all to the problem of double recovery – Verizon already recovers the same costs in its recurring charges. Moreover, the continual need to increase, rearrange and maintain network facilities in response to demand increases, maintenance problems and customer moves arises regardless whether consumers are served by the ILEC or a CLEC, so the CLEC is *not* in any meaningful sense the cost causer – indeed, it would be flatly discriminatory to impose "field installation" costs on CLECs based on the fortuity that a cross-connect is required to make the particular UNEs they order operational. Indeed, the field installation NRC *facilitates* anticompetitive discrimination. Verizon controls the assignment of facilities necessary to meet service demands. If multiple facilities are available at particular service address, there is nothing preventing Verizon from assigning facilities that require Field Dispatch, and recovering costs through non-recurring rates, even though connected facilities may already exist. Clearly CLECs are at Verizon's mercy. *See id*.

Verizon invokes the *Local Competition Order* for the proposition that Verizon is "entitled to recover one-time costs caused by a CLEC order on a non-recurring basis from that CLEC," *citing Local Competition Order* at ¶¶ 742–743. In fact, *Local Competition Order* ¶ 743 makes clear that field installation activity is properly recovered in recurring charges. The paragraph draws reference to "charges for dedicated facilities be flat-rated, including, but not limited to, charges for unbundled loops, dedicated transport, interconnection, and collocation." "Flat rated charges" classifies the cost as a recurring cost. Field installation activities are necessary to construct new loops between the NID and the central office, maintain the network, (*i.e.*, repairs), and rearrange the network to meet demand needs (*i.e.*, moves). All of these categories of costs are factored into recurring cost estimates and recovered through flat rate monthly (recurring) charges.

In two recent decisions, state regulators in Verizon's territory have considered and rejected the same arguments that Verizon has advanced in Delaware for its field installation charge.[24] The same result is warranted here.

Finally, Verizon's Delaware hot cut NRC of $35 is not TELRIC-compliant. AT&T recognizes that the Commission has upheld a hot cut rate of $35 in New York and New Jersey, and Verizon presumably filed the same rate in Delaware for that reason. AT&T respectfully submits, however, that the $35 rate is unsupported by any cost study (let alone a TELRIC-compliant study), and the evidence shows that a TELRIC compliant hot cut rate should not exceed $5.00.[25] Moreover, the $35 rate is only temporary. In less

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[24] Massachusetts Department of Telecommunications and Energy, Docket No. DTE 01-20, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*., served July 11, 2002, at 420-23; Pennsylvania PUC Docket No. R-00016683, *Generic Investigation of Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Recommended Decision of Administrative Law Judge Michael Schnierle issued May 3, 2002, at 69-70. *See also* Walsh Decl. ¶¶ 59-64 (discussing Massachusetts and Pennsylvania decisions).

[25] *See Application of 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, Supplemental Declaration Of Richard J. Walsh On Behalf Of AT&T Corp.*, CC Docket No. 01-347 (filed March 13, 2002).

than two years, Verizon's Delaware hot cut rate will increase to well over $100. Walsh Decl. ¶ 65.

In sum, because Verizon's NRCs in Delaware are based on Verizon's current, inefficient internal order processing system, the NRCs clearly exceed the rates needed to cover the costs of the "most efficient, currently available telecommunications technology currently available and the lowest cost network configuration," 47 C.F.R. § 51.505(b)(1). Stated otherwise, the NRCs are inflated, anti-competitive, and incompatible with the FCC's TELRIC cost methodology and the Act.

IV. VERIZON'S UNE RATES IN DELAWARE CREATE A DISCRIMINATORY "PRICE SQUEEZE" IN VIOLATION OF CHECKLIST ITEM 2.

Section 271 bars the Commission from granting Verizon long distance authority unless the Commission finds that the UNE rates are "nondiscriminatory" as well as cost-based.[26] The Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility's retail services to any class of customers.[27] Thus, if Verizon's high end UNE rates foreclose UNE purchasers from economically providing residential competition, Verizon is engaged in "discrimination" and has not satisfied checklist item two. And because Section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," to the extent that Verizon's UNE rates in any state are discriminatory, the Application must be denied.

[26] *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).

[27] *FPC v. Conway Corp.*, 426 U.S. 271, 278-79 (1976).

The Commission recently offered guidance on the type of "margin analysis" that should be employed to test whether a BOC's rates are, in fact, discriminatory. The Commission explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants.[28] The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy.[29]

AT&T has conducted such an analysis (which accounts for resale, as well as interLATA and intraLATA toll contributions). That analysis confirms that a residential entry strategy that employs combination of UNE-based and facilities-based entry (the analysis assumes that a UNE-based approach where that approach produces the highest margin, and a resale-based approach where that approach produces the highest margin) is *not* economically feasible in Delaware. The state-wide average *gross* margin (not accounting for entrants' internal costs) in Delaware is only $2.79. *See* Lieberman Decl. ¶¶ 42-46.[30] That margin does not even come close to covering an efficient carrier's internal costs of entry. *See id.* As demonstrated in the attached declaration of Stephen Bickley (¶ 2-11), an efficient new entrant's internal costs exceed $10.00 in Delaware.[31]

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[28] *See, e.g., Vermont 271 Order* ¶ 71.

[29] *See id.* ¶ 69.

[30] Verizon also filed a margin analysis. But as explained in the attached declaration of Michael Lieberman, that analysis is fundamentally flawed because it is undocumented and contains several fundamental errors.

[31] In the past, the Commission has questioned whether the well-known internal cost estimate is that of an efficient carrier. The answer to that question is yes. As explained by Mr. Bickley, that internal cost figure does not reflect carriers' *current* internal costs, but their forward-looking costs that accounts for future savings associated with efficiencies and increased scale. *See* Bickley Decl. ¶¶ 1-2.

After accounting for the internal costs of entry, the *net* margins that are available to new entrants in Delaware are *negative*. *See* Lieberman Decl. ¶¶ 42-46. Thus, competitive entry is not feasible in Delaware, which confirms that Verizon's UNE rates are discriminatory in violation of Checklist Item 2.[32]

V. VERIZON'S ENTRY INTO THE INTERLATA MARKET IS INCONSISTENT WITH THE PUBLIC INTEREST.

Even if the Commission could find that Verizon had fully implemented its obligations under the competitive checklist, the record here precludes any finding that Verizon's entry into the InterLATA market in Delaware or New Hampshire would be consistent with the public interest. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination of whether, notwithstanding checklist compliance, the local market is in fact fully and irreversibly open to competition. Because the Commission cannot make this determination in Delaware and New Hampshire, a grant of section 271 authority is premature and wholly at odds with the fundamental premise of the Act.

A. InterLATA Authorization Is Not In The Public Interest Unless Verizon's Local Markets Are Irreversibly Open To Competition.

As a threshold matter, Verizon "disagrees as a legal matter that the Commission may conduct any analysis of local competition in its public interest inquiry." Verizon Br. 116 n.75. The Commission has previously considered and flatly rejected the argument once again advanced by Verizon:

> "We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing

[32] As demonstrated below, the existence of this price squeeze also confirms that a grant of Verizon's application would contravene the public interest.

> whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition by removing operational, economic, and legal barriers to entry, and, ultimately, to replace government regulation of telecommunications markets with the discipline of the market.. In order to promote competition in the local exchange and exchange access markets in all states, Congress required incumbent LECs, including the BOCs, to provide access to their networks in a manner that allows new entrants to enter local telecommunications markets through a variety of methods. In adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[33]

Moreover, in Verizon's view (Br. 175-76), the Commission should virtually presume that the public interest will be served by granting Verizon's application, because (in Verizon's view) Verizon has met its checklist obligations and approval of its application will spur competitors to enter the local market. Any such presumption, however, would conflict directly with the plain language of the statute, which puts the burden on the applicant to show that its entry would be "consistent with the public interest;" the Commission has squarely rejected the argument that the public interest test can be satisfied by simply presuming that the benefits of entry into long distance will outweigh competitive harms from premature authorization.[34]

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[33] *Michigan 271 Order* ¶ 386. *See also Massachusetts 271 Order* ¶ 233 ("we 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 under the particular circumstance of this application").

[34] *See Michigan 271 Order* ¶ 43 ("Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied"); ¶ 388 ("As we have previously observed, 'the entry of the BOC interLATA affiliates into the provision of interLATA services has the potential to increase price competition and lead to innovative new services and marketing efficiencies.' Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local

In fact, the absence of any meaningful local competition is itself a compelling reason to reject an application as inconsistent with the public interest.[35] The lesson from experience in Texas is clear: allowing an incumbent LEC to provide interLATA services before local markets are open will not spur successful local competition.[36] If CLECs cannot profitably offer local residential service to customers, they cannot and will not effectively compete in local markets, regardless of whether the incumbent has obtained long-distance authorization.[37]

Accordingly, as the Commission has recognized, granting Verizon's request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."[38] In order to determine whether the BOC's local telecommunications markets are in fact open to competition, the Commission first reviews the extent to which new entrants "are actually offering" local

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

[35] *See Sprint* v. *FCC*, 274 F.3d 549 (D.C. Cir. 2001).

[36] Although Verizon boasts (Br. at 119-20) of competition currently being provided by Texas CLECs, the January 2001 *TPUC Report* on the "Scope of Competition in Telecommunications Markets of Texas" reveals that "monopoly power exists . . . in residential and rural markets in Texas" (*id.* at 83; *see* xiii) and severe financial problems have caused both large and small CLECs to reduce or eliminate their residential service in Texas (*id.* at 55-58, 80-81). The Report also reveals that the lack of competition has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services, and to *raise* its prices for local services to both residential and business customers. *Id.* at x, 62-64, 79, 81). In sum, the TPUC concludes: "By the end of 2000, SWBT's financial position had strengthened relative to the CLECs. *SWBT's entry into the long distance market has weakened the ability of CLECs to challenge SWBT in local voice service*. *Id.* at 81 (emphasis added).

[37] Emboldened by its ability to market bundles of local and long distance services without any competition, in February, 2001, SWBT *raised* its residential long distance rates in Texas by 10 to 33 percent, *increased* its basic rates for long-distance service by more than 10 percent, and *also increased* the "discounted rate" for customers who buy other services from SWBT by 33 percent. "SWBT Raises Nonlocal Call Rates: Company Says Prices Better Reflect Costs," *The Dallas Morning News*, February 2, 2001.

[38] See SBC Texas 271 Order ¶ 431.

service to both business and residential customers through each of the three means offered by the Act. *Michigan 271 Order* ¶ 391. Second, where local competition is not securely established, the Commission determines whether this reflects the continuing presence of entry barriers and BOC misconduct, or is attributable instead solely to the business decisions of potential new entrants.

A. Verizon Maintains Monopoly Power Over Residential Service In Delaware And New Hampshire.

The "Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale," (*id.* ¶ 96). Congress "sought to ensure that all procompetitive entry strategies are available." *Id*. ¶ 387. As the Commission has recognized, its "public interest analysis of a section 271 application, consequently, *must* include an assessment of whether all procompetitive entry strategies are available to new entrants." *Id.* (emphasis added). And, as the Commission explained in the *Michigan 271 Order*, "[t]he most probative evidence that all entry strategies are available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof) in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)." *Id.* ¶ 391 (emphasis added). In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act. *See, e.g., New York 271 Order* ¶¶ 13-14; *Texas 271 Order* ¶¶ 5-6.

Here, Verizon's own data confirm that there has been almost no UNE-based entry in either Delaware or New Hampshire and that competitors have not yet been able significantly and irreversibly to enter the local residential markets in those states. Using the E911 and UNE-P data presented by Verizon witness John A. Torre, Tables 1-4 shows the amount of CLEC competition Verizon claims to exist in Delaware and New Hampshire. These tables show that less than 1% of the lines in both Delaware and New Hampshire are served by UNE-based competitors and nearly no residential lines are served by such competitors. Table 2 shows that only 1.8% of the residential lines in Verizon's Delaware service territory are served by facilities-based competitors and close to 0% (40 lines in total) are served by UNE-based competitors. Table 4 shows that only 6.9% of the residential lines in Verizon's Delaware service territory are served by facilities-based competitors[39] and again close to 0% (40 lines in total) are served by UNE-based competitors.

TABLE 1: Total CLEC Penetration in Verizon's Delaware Service Territory

	Quantity	**Share**
Verizon Retail Switched Access Lines (Torre Dec., Att. 2 ¶ 3)	587,000	92.3%
CLEC Facilities-Based Lines (Torre Dec., Att. 2 Table 1)	32,700	5.1%
CLEC UNE-P Lines (Torre Dec., Att. 2 Table 1)	3,200	0.5%
CLEC Resale Lines (Torre Dec., Att. 2 Table 1)	13,400	2.1%
Total Lines in Verizon Delaware Service Territory	**636,300**	**100.0%**

[39] Verizon's data indicates that all of the facilities-based lines in New Hampshire are served by AT&T via cable facilities. Torre Decl. Att. 1 ¶ 24. The footprint of AT&T Broadband, however, is limited to the three counties in the southeast corner of New Hampshire (Hillsborough, Rockingham and Merrimack Counties). In the most of the state—particularly the rural areas where Verizon's retail rates are highest—AT&T Broadband has no presence, and Verizon faces no facilities-based local competition at all.

TABLE 2: Residential Market CLEC Penetration in Verizon's Delaware Service Territory

	Quantity	Share
Verizon Retail Residential Switched Access Lines [40]	380,000	97.0%
CLEC Residential Facilities-Based Lines (Torre Dec.. Att. 2 Table 1)	7,200	1.8%
CLEC Residential UNE-P Lines (Torre Dec. Att. 2 Table 1)	40	0.0%
CLEC Residential Resale Lines (Torre Dec. Att. 2 Table 1)	4,700	1.2%
Total Residential Lines in Verizon Delaware Service Territory	**391,940**	**100.0%**

TABLE 3: Total CLEC Penetration in Verizon's New Hampshire Service Territory

	Quantity	Share
Verizon Retail Switched Access Lines (Torre Dec., Att. 1 ¶3)	748,000	83.8%
CLEC Facilities-Based Lines (Torre Dec., Att. 1 Table 1)	104,000	11.7%
CLEC UNE-P Lines (Torre Dec., Att. 1 Table 1)	6,500	0.7%
CLEC Resale Lines (Torre Dec., Att. 1 Table 1)	34,000	3.8%
Total Lines in Verizon New Hampshire Service Territory	**892,500**	**100.0%**

TABLE 4: Residential Market CLEC Penetration in Verizon's New Hampshire Service Territory

	Quantity	Share
Verizon Retail Residential Switched Access Lines [41]	481,000	92.8%
CLEC Residential Facilities-Based Lines (Torre Dec. Att. 1 Table 1)	36,000	6.9%
CLEC Residential UNE-P Lines (Torre Dec. Att. 1 Table 1)	430	0.0%
CLEC Residential Resale Lines (Torre Dec. Att. 1 Table 1)	1,100	0.2%
Total Residential Lines in Verizon New Hampshire Service Territory	**518,530**	**100.0%**

Moreover, Verizon's data *overestimate* the amount of CLEC facilities-based competition for average consumers, including both residential and small business customers. Significantly, Verizon ignores the most direct measure available to evaluate

[40] FCC, Statistics of Communications Common Carriers as of December 31, 2000, at Table 2.6 (September 1, 2001).

[41] Verizon reports that it serves 748,000 lines in New Hampshire, without providing a break-down between residential and business lines. Torre Decl. Attachment 1, ¶ 3. To extrapolate the percentage of Verizon's total switched lines in New Hampshire that are provided to residential customers, we have relied on data reported by Verizon to the Commission as of December 31, 2000, indicating that of the 7,241,653 total switched access lines served by Verizon New England Inc. (which includes Massachusetts, New Hampshire and Vermont), 4,655,604, or 64.3%, were residential access lines. FCC, Statistics of Communications Common Carriers as of December 31, 2000, at Table 2.6 (September 1, 2001). 64.3% of 748,000 is 480,964.

such facilities-based competition – *i.e.*, the traffic on the interconnection facilities between Verizon and CLEC networks as measured by minutes of use. This measure is particularly useful, because it provides insight not only into the competitive *penetration* achieved by facilities-based entrants, but also into the *types* of consumers such competitors have attracted. Strikingly, Verizon reported that CLECs' *terminating* minutes of use constitute *over 96%* percent of CLECs' total traffic in Delaware.[42] The likely explanation for this phenomenon is that the vast bulk of CLEC traffic is for Internet Service Providers (ISPs)– *not* the conventional customers who represent the core of Verizon's local monopoly. If ISP lines were eliminated from the numbers reported by Verizon, the number of facilities-based lines served by Verizon would be reduced significantly.

In addition, as Attachment 1 hereto shows, many of the facilities-based CLECs that Verizon identifies as its competitors in the Delaware and New Hampshire states,[43] have gone, or are going, out of business or are otherwise in financial distress.

The prospects for increased UNE-based competition are also bleak. If Verizon actually offered CLECs non-discriminatory access to the full economies of scale in its existing network, the Commission should see meaningful entry by and increasing competition from UNE-based entrants. Yet, since the passage of the Act, all CLECs combined have managed to serve only trivial numbers of UNE-based lines in Delaware and New Hampshire – less than 1% of all lines and close to 0% residential lines.

Finally, resale is an inherently limited competitive vehicle, both because resale-based competitors cannot alter the nature of the service they are reselling (and thus

[42] Response of Verizon Delaware to In-Hearing Data Request TR 435, received April 25, 2002, in DE PSC Docket No. 02-001.

[43] Torre Decl. Atts. 1 & 2.

cannot provide consumers with innovative or improved services), and because resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.[44] The record thus shows that resale is not a growing, viable source of future competition for Verizon in Delaware and New Hampshire.

B. Verizon's Local Residential Markets Remain Closed To UNE- and Facilities-Based Competition Due To Entry Barriers And Verizon's Own Actions.

Because the relevant data show a lack of meaningful local competition, the Commission must next determine "whether the lack of competitive entry is due to the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason." *Michigan 271 Order* ¶ 391. To make this determination, the Commission should consider all "relevant factors" that might "frustrate congressional intent that markets be open [to competition]." *Kansas/Oklahoma 271 Order* ¶ 267. A review of the evidence makes clear that entry barriers and Verizon's own actions have perpetuated its monopoly over residential service in the Delaware and New Hampshire states.

In sum, the lack of facilities- and UNE-based CLEC competition for service in Delaware and New Hampshire is due to Verizon's "failure to cooperate in opening its network to competitors" and the "existence of barriers to entry," *not* "the business decisions of potential entrants" that are independent of the entry barriers and BOC misconduct. *Michigan 271 Order* ¶ 391. Nothing suggests that potential entrants have

[44] The avoided cost discount has proved inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not "avoid") the huge customer acquisition costs that CLECs confront, nor do they face the lack of economies of scale that a new entrant must address. And CLECs providing resale do not benefit from access revenue. For all of these reasons, CLECs seeking to provide a broad-based, significant competitive alternative to the incumbents' local residential monopoly cannot do so through the resale of local service.

decided that the local markets in these two states, though open, are simply not worth pursuing, or "that competitive alternatives can flourish rapidly throughout the state." *Id.* ¶ 392. The local markets in these two states are simply not open to competition, let alone irretrievably open.

C. Verizon's UNE Rates Preclude UNE-Based Entry In Delaware.

The evidence shows that Verizon's UNE rates, at least in Delaware, are so high that they preclude efficient local entry. Specifically, those rates effect a price squeeze that prevents UNE-based competitors from earning sufficient margins to provide local service economically in competition with Verizon, by imposing wholesale costs on Verizon's competitors that render it impossible for them to offer a retail service that would be price competitive. *See* Lieberman Decl. ¶¶ 42-46.

As discussed above (see Part IV) Section 271 bars the Commission from granting Verizon long distance authority unless the Commission finds that the UNE rates are "nondiscriminatory" as well as cost-based.[45] Because Section 271 categorically bars long distance authorization unless Checklist Item Two has been "fully implemented," to the extent that Verizon's UNE rates in any state are discriminatory, the Application must be denied.

Verizon's imposition of rates that foreclose broad-based local competition not only establishes that those rates violate Checklist Item 2 because they are discriminatory, but also establishes that granting the application could not be consistent with the "public interest." 47 U.S.C. § 271(d)(3)(C). The Commission has held that the "public interest" prong of Section 271 requires it to "ensure that no other relevant factors exist that would

[45] *See* 47 U.S.C. §§ 252(d)(1), 271(c)(2)(B)(ii) & (d)(3)(A).

frustrate the congressional intent that markets be open."[46] The central purpose of section 271 is to ensure that local telephone markets in a state are open to competition – and that competing carriers therefore have the legal and economic ability to provide competing local services – before a BOC in that state is permitted to provide long-distance services. A price squeeze that would foreclose efficient local entry into the residential market obviously constitutes such a "relevant factor." And proof that such a factor in fact exists demonstrates conclusively that the market is not – and cannot be – open.

Despite the nondiscrimination and public interest provisions of Section 271, the Commission had previously held that it need not consider evidence of a price squeeze in evaluating a section 271 application. That holding was based on the Commission's view that such evidence was "irrelevant," and that considering it would improperly involve the Commission in the process of setting local retail rates that are outside its jurisdiction.[47] But the United States Court of Appeals for the D.C. Circuit, relying on the Supreme Court's decision in *Conway*, has now squarely rejected that view.[48] Indeed, because the central purpose of the 1996 Act is "stimulating competition," the D.C. Circuit held that the "public interest" analysis under section 271 may weigh even "*more heavily* towards addressing potential 'price squeeze'" than was required under the Federal Power Act in

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[46] *Kansas/Oklahoma 271 Order* ¶ 267. The Supreme Court has explained that the statutory term "public interest" "take[s] [its] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). As the Commission has held, Congress adopted Section 271 in order to assure that BOCs could not provide long distance service at a time when their local monopolies would give them an "unfair advantage" over long distance competitors in, *inter alia*, providing "combined packages" of local and long distance service to customers who desire "one-stop shopping." *AT&T* v. *Ameritech*, 13 F.C.C. Rcd. 21438, ¶¶ 5, 39 (1998), *aff'd sub nom. U S WEST* v. *FCC*, 177 F.3d 1057 (D.C. Cir. 1999). If, by contrast, long-distance entry were allowed before other carriers could provide competing combined packages, it would "threaten competition" in both the local and the long-distance markets by granting the BOC a monopoly in the provision of such combined services. *Id.* ¶ 5.

[47] Kansas/Oklahoma 271 Order ¶ 92.

[48] *Sprint* v. *FCC*, 274 F.3d 549 (D.C. Cir. 2001).

Conway.[49] Under *Sprint* v. *FCC*, therefore, when evidence is presented in a section 271 proceeding that UNE-based residential competition is economically infeasible, the Commission cannot grant that application without evaluating and addressing that evidence. Unless the Commission rejects this application on other grounds, it must develop and apply a framework for analyzing AT&T's claims.

This interpretation has gained added force from the Supreme Court's decision two months ago in *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646, 1661 (2002). The 1996 Act, noted the Court, represented the "first time" in which "Congress passed a ratemaking statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, *even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets*." *Id*., 122 S.Ct. at 1661 (emphasis added).

In the face of *Sprint v. FCC*, the *Vermont 271 Order* (¶ 67), advancing three purported distinctions, suggests that *Conway* may be inapplicable in this context. As *Sprint v. FCC* makes clear, however, the court that reviews the Commission's section 271 decisions has concluded that *Conway* is controlling here. In any event, the suggested distinctions that the Commission has raised are specious. The first two distinctions cited by the Commission—that UNEs, unlike the electricity at issue in *Conway*, are not "undifferentiated commodities" and have prices that may vary by retail-customer location—do not in any way blunt the force of the legal rule set forth in *Conway*: where

[49] *Id.* at 564 (emphasis added). Moreover, the *Sprint* Court also confirmed that the Commission's lack of jurisdiction over retail rates was no bar to such an analysis, because the Commission can respond to a price squeeze without disturbing retail rates. Instead, because the Commission has said that TELRIC rates exist within a "band," one entirely permissible solution is to "'fix[] the wholesale rates, which [a]re under its jurisdiction, at a lower level within'" that band. *Id.* at 564 (citing *Conway*, 426 U.S. at 279). Here, because, as AT&T has shown, Verizon's Delaware rates are not TELRIC-compliant to begin with, there is certainly plenty of room for downward movement.

a price squeeze is demonstrated, wholesale rates are discriminatory and contrary to the public interest. The existence of price variations (and product "differentiation") may, of course, impact the calculations to determine *whether* a price squeeze exists (and AT&T's margin analyses do, indeed, account for geographic rate and cost differences). But if, accounting for these rate and cost differences, a price squeeze is shown to exist, *Conway* applies with full force in this context, as the D.C. Circuit has recognized. It is also not relevant that "intentional state policy" may have caused wholesale rates to exceed retail rates. AT&T does not ask the Commission to interfere with (or even comment upon) state policy, but merely to determine whether a price squeeze exists and, if so, to decide whether it would serve the public interest to grant a section 271 application notwithstanding the price squeeze. As explained above, where local markets are not open to competition, granting section 271 authority will necessarily permit a BOC to extend its local monopoly into markets for bundled local and long distance service. The fact that "intentional state policy" may have contributed to the local monopoly does not make the leveraging of that monopoly consistent with the public interest. As explained by the Supreme Court two months ago, "[t]he Act . . . appears to be an explicit disavowal of the familiar public-utility model of rate regulation . . . presumably still being applied by many States for retail sales, . . . in favor of novel rate setting designed to give aspiring competitors every possible incentive to enter local retail telephone markets."[50]

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[50] *See Verizon* v. *FCC*, 122 S. Ct. 1646, 1661 (2002). As other courts have recognized, implicit subsidies – "that is, 'the manipulation of rates for some customers to subsidize more affordable rates for others'" – are fundamentally incompatible with efficient competition. *See Alenco Communications Inc.* v. *FCC*, 201 F.3d 608, 616 (5th Cir. 2000); *Texas Office of Public Utility Counsel* v. *FCC*, 183 F.3d 393, 406 (5th Cir. 1999). Accordingly, Section 254(d) expressly authorizes state commissions to adopt universal service mechanisms to convert intrastate implicit subsidies into explicit subsides. *See* 47 U.S.C. § 254(f). To be sure, some states have chosen for policy reasons of their own to maintain the pre-existing system of implicit subsidies, and have thus far declined to establish a competitively neutral system of explicit subsidies. To the extent that those policies facilitate a price squeeze, however, Section 271 precludes the Commission from granting interLATA authority in that state. And there is no rational basis for the

The third purported distinction cited by the Commission – the availability of resale – is also unavailing. As AT&T has repeatedly shown, and demonstrates again here, resale requirements do not solve the price squeeze because, *inter alia*, the wholesale discounts available are also too small to allow profitable entry. And, as explained above, the margin analysis performed by Michael Lieberman assumes that local entrants will engage in resale activities where higher margins are available from providing resale than from providing services on a UNE-P basis. That analysis shows that, even accounting for resale opportunities, statewide net margins in Delaware are negative.[51]

Notwithstanding its reservations about the applicability of *Conway*, in its *Vermont 271 Order* (¶ 71), the Commission also offered guidance on the type of "margin analysis" that should be employed to test whether a BOC's rates results in an anticompetitive price squeeze. The Commission explained that, in addition to the revenues that are directly available due to local entry, several other revenue sources would be relevant to a price squeeze analysis including, intraLATA toll and interLATA toll revenue contributions, and the amount of federal and state universal service revenues that would be available to new entrants.[52] The Commission also stated that a margin analysis should consider whether entry is viable using a mix of a UNE-based and resale-based local entry strategy.[53]

AT&T has conducted such an analysis. It demonstrates that a residential entry strategy that employs combination of UNE-based and facilities-based entry (the analysis

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Commission to disregard its public interest and nondiscrimination mandates and to reward state commissions and RBOCs that choose to maintain competition-foreclosing regulation that is contrary to the terms and core competitive purposes of the 1996 Act.

[51] *See* Lieberman Decl. ¶¶ 42-46.

[52] *See Vermont 271 Order* ¶ 71.

[53] *See id.* ¶ 69.

assumes that a UNE-based approach where that is the most profitable entry mode, and a resale-based approach where that is the most profitable mode of entry) is *not* economically feasible in Delaware. The state-wide average *gross* margin (not accounting for carriers' internal costs) in Delaware is $2.79,[54] which does not even come close to covering an efficient carrier's internal costs of entry.[55] Because the *net* margins that are available to new entrants in Delaware are *negative*, competitive entry is not feasible in Delaware. Thus, approval of Verizon's Application is not consistent with the public interest.

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[54] *See* Lieberman Decl. ¶¶ 42-46.

[55] *See* Bickley Decl. ¶ 2.

CONCLUSION

For the foregoing reasons, Verizon's application for authorization to provide in-region, interLATA services in Delaware and New Hampshire should be denied.

Respectfully submitted,

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July 17, 2002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 17th day of July, 2002, on the following:

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Attachment 1

Facilities-Based Providers (NH, DE)	**Change in Mkt. Cap.**[i]	**Current Financial Situation**
Adelphia Communications/ Adelphia Business Solutions	-99.47% ($0.22)/ -99.73% ($0.01)	Adelphia Communications filed for bankruptcy in June 2002, lost $1.71 billion in 2001, and being investigated for questionable dealings between company and Rigas family resulting in estimated $3.1 billion in family debts;[ii] Nasdaq delisted stock in June 2002;[iii] Adelphia Business Solutions filed for bankruptcy in March 2002 (as have several affiliate units) citing deteriorating market for competitive local exchange carriers, and petitioning bankruptcy court to sell Total Service Resale in nine southeastern U.S. states to BellSouth;[iv] announced in September 2001 significant capital expenditure reductions for 2001-2003 and eliminating further investment in approximately 10 markets.[v]
AT&T	-52.66% ($10.16)	Posted a 1st Quarter 2002 loss of $975 million (including $240 million impairment charge related in part to faltering investments in Time Warner Telecom), revenue decline of 11%, expects 2nd Quarter 2002 revenue to fall 8.4% and to reduce capital expenditures by $300 million to $400 million;[vi] announced in January 2002 plans to record $1 billion 4th Quarter 2001 restructuring charge and expects to eliminate 5,000 employees in 2002, after cutting 8,000 in 2001;[vii] posted overall loss of $191 million for 2nd Quarter 2001,[viii] following net loss of $373 million for 1st Quarter.[ix]
Broadview Networks	N/A	Never generated positive cash flow;[x] laid off approximately 40 employees in May 2002[xi] and more than 90 employees in September 2001;[xii] withdrew IPO offer in Fall 2000;[xiii] net losses for 3rd Quarter and first nine months of 2000 of $441,202 and $283,721, respectively, with lower sales as compared to 1999.[xiv]
Cavalier Telephone	N/A	Called off planned merger with two other CLECs in August 2000 due to decline in Nasdaq market.[xv]
Choice One Communications	-92.31% ($0.50)	UBS Warburg downgraded rating on stock in July 2002, citing $95 million funding gap which could cause company to run out of capital and force

Facilities-Based Providers (NH, DE)	**Change in Mkt. Cap.**[i]	**Current Financial Situation**
		bankruptcy filing;[xvi] reported 1st Quarter 2002 net losses of $57.8 million;[xvii] reported 2001 loss of $248.8 million and 4th Quarter 2001 loss of $44.8 million;[xviii] yet to return profit and does not expect to be profitable until 2003;[xix] reported net losses of $65.1 million and gross losses of $217 million in 2000.[xx]
Comcast	-44.94% ($22.48)	Reported 1st Quarter 2002 loss of $88.9 million;[xxi] reported 4th Quarter 2001 loss of $321 million;[xxii] reported 3rd Quarter 2001 loss of $106.8 million;[xxiii] reported 1st Quarter 2001 net loss of $290.6 million;[xxiv] value of acquisition of AT&T Broadband has fallen $20 million due to low stock value.[xxv]
Conversent Communications	N/A	Has never and does not expect to generate positive cash flow until at least Fall 2002.[xxvi]
CoreComm/ATX Communications	-60.94% ($1.25)	CoreComm changed name to ATX Communications in July 2002, but new company still faces delisting from Nasdaq if stock price drops too low;[xxvii] reported 1st Quarter 2002 net loss of $12.5 million;[xxviii] reported 3rd Quarter 2001 loss of $51 million;[xxix] lost $313.8 million in 2000;[xxx] Nasdaq has sought to delist stock since July 2001;[xxxi] closed Ohio office and discontinued service there, eliminating 180 positions, in August 2001;[xxxii] eliminated 110 jobs in July 2001;[xxxiii] cut 210 jobs in May 2001.[xxxiv]
Covad Communications	-69.84% ($1.10)	Reported First Quarter 2002 loss of $56.8 million, has severely curtailed operations, and warned that revenue will likely be flat in 2nd Quarter;[xxxv] reported net loss of $689 million for 2001, and 4th Quarter 2001 net loss of $175.2 million;[xxxvi] filed for Chapter 11 Bankruptcy in August 2001 designed to eliminate $1.4 billion in debt;[xxxvii] reported 2001 1st Quarter net loss of $199 million, laid off 1,200 employees in 2000-2001, and closed 350 local equipment hubs.[xxxviii]
DSL.net	-80.54% ($0.29)	Reported 1st Quarter 2002 net loss of $9.45 million;[xxxix] reported 2001 net loss of $115.5 million and 4th Quarter 2001 net loss of $11.2 million;[xl] reported 3rd Quarter 2001 net loss of $21.9

Facilities-Based Providers (NH, DE)	**Change in Mkt. Cap.**[i]	**Current Financial Situation**
		million;[xli] reported 2000 net loss of $105.8 million;[xlii] Nasdaq contacted in July 2001 regarding possible delisting;[xliii] applied to FCC in July 2001 to discontinue interstate special access DSL service for high-speed Internet access in 22 states;[xliv] announced in July 2001 elimination of 90 jobs and closing of 250 operational central offices.[xlv]
Hughes Electronics Corp.	N/A	Reported 1st Quarter 2002 loss of $156.4 million;[xlvi] reported year 2001 net loss of $621.6 million and 4th Quarter 2001 net loss of $132.6 million;[xlvii] satellite Internet subsidiary Hughes Network Systems reported 1st Quarter 2002 loss of $27.5 million,[xlviii] laid off 200 workers in December 2001,[xlix] and cut forecasts for new subscribers and reported negative 3rd Quarter 2001 EBITDA of $22.6 million.[l]
MediaCom Communications	-70.37% ($5.66)	Reported 1st Quarter 2002 loss of $35.2 million;[li] reported 4th Quarter 2001 loss of $88.3 million;[lii] reported 3rd Quarter 2001 net loss of $65.3 million;[liii] reported 2nd Quarter 2001 loss of $32.7 million.[liv]
Network Access Solutions	-98.25% ($0.01)	Filed for bankruptcy in June 2002 on $84.9 million in debt, and reported net operating losses of $104.4 million and negative cash flow from operations of $33.2 million in 2001;[lv] laid off 95 employees in November 2001, and closed approximately 205 unprofitable central office collocation facilities and laid off 140 employees (34% of workforce) in May 2001.[lvi]
PaeTec Communications	N/A	Never returned profit and does not expect to be profitable until 2003;[lvii] canceled planned initial public offering in early 2001.[lviii]
StarBand Communications	N/A	Filed for bankruptcy in June 2002 because capital ran out, listing liabilities of $229 million;[lix] laid off 30% of employees in 2001 and has not made a profit for investors due in part to slower than expected demand.[lx]
WorldCom/MCI Group	-99.00% ($0.16)/ -98.65%	Revealed in June 2002 that nearly $4 billion in operating expenses were hidden in financial statements from 2001 and 1st Quarter 2002, bank

Facilities-Based Providers (NH, DE)	**Change in Mkt. Cap.**[i]	**Current Financial Situation**
	($0.22)	lenders suspended $4.25 billion in loans and canceled $1.5 billion securitization of receivables, and laid off 17,000 employees (over 20% of workforce) with additional layoffs possible;[lxi] CEO stated on July 11, 2002 that avoiding bankruptcy filing "is looking much more difficult" and that decision will be made within three weeks, and announced no dividend payment for MCI Group tracking stock;[lxii] expected to cut $1 billion from 2002 capital expenditures;[lxiii] announced in August 2001 cut in capital spending by $2 billion for 2002;[lxiv] laid off 6,300 employees (6-7% of workforce) in February 2001,[lxv] 361 in March 2001,[lxvi] and 832 in April 2001,[lxvii] and 1,000 across Europe in October 2001.[lxviii]
XO Communications, Inc.	-98.75% ($0.03)	Filed for bankruptcy in June 2002, listing total liabilities of $8.5 billion and owing lenders more than $4.4 billion;[lxix] reported 1st Quarter 2002 net loss of $2.2 billion;[lxx] delisted by Nasdaq and erased value of public stock as part of $800 million restructuring plan attempting to avoid bankruptcy;[lxxi] reported 3rd Quarter 2001 loss of $50.8 million and Standard & Poor's downgraded credit rating in November 2001;[lxxii] announced in October 2001 elimination of 600 jobs (8% of workforce) and reported 2nd Quarter EBITDA loss of $70.7 million;[lxxiii] posted 1st Quarter 2001 loss of $443.5 million, cutting $2 billion from planned capital expenditures over the next five years, halting European expansion, delaying some domestic expansions, and curtailing some costly services that had limited potential.[lxxiv]

[i] The figures in this column represent the percentage below the 52-week high for the respective publicly traded stocks—as calculated by Morningstar.com—and the last price of each stock at the close of trading on July 11, 2002.

[ii] *See* Bill Bergstrom, *Adelphia Slams Deloitte & Touche*, AP ONLINE, July 9, 2002, *available in* 2002 WL 23894642; Jonathan Berke, *DIP newcomer aids ABIZ*, THE DAILY DEAL, June 22, 2002, *available in* 2002 WL 2239867; Diane Mermigas, *Chap. 11 looms for Adelphia: Besieged company may file for relief this week*, ELECTRONIC MEDIA, June 17, 2002, *available in* 2002 WL 9505598; *LCR Notes: Adelphia CLEC Files Chapter 11*, LOCAL COMPETITION REPORT, April 8, 2002, *available in* 2002 WL 16916403.

[iii] *See* Bill Bergstrom, *Business: Nasdaq to delist Adelphia Communications' stock*, THE NANDO TIMES (May 31, 2002) <http://www.nandotimes.com/business/story/419512p-3345117c.html>.

[iv] *See* Diane Mermigas, *Chap. 11 looms for Adelphia: Besieged company may file for relief this week,* ELECTRONIC MEDIA, June 17, 2002, *available in* 2002 WL 9505598; *Adelphia Business Solutions In $15 Million DIP Financing Pact*, DOW JONES (June 21, 2002) <http://news.morningstar.com/news/DJ/M06/D21/1024654262401.html>; *Eleven More Adelphia Business Affiliates File for Ch. 11*, DOW JONES (June 19, 2002) <http://news.morningstar.com/news/DJ/M06/D19/1024494661196.html>; *Adelphia Business Seeks Court OK On Sale to BellSouth*, DOW JONES (June 4, 2002) <http://news.morningstar.com/news/DJ/M06/D04/1023232263064.html>.

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[ix] *See* Andy Pelander, *CLEC: Tower of Babel*, UPSIDE MAGAZINE, August 1, 2001, *available in* 2001 WL 2023187.

[x] *See* Peter J. Howe, *'New Voice Over DSL' Launch Set in Boston*, THE BOSTON GLOBE, October 29, 2001, *available in* 2001 WL 3959112.

[xi] *See* Steve Adams, *Broadview Networks ponders relocation*, THE PATRIOT LEDGER, May 15, 2002, *available in* 2002 WL 20512015.

[xii] *See* Tim Knauss, *Caverns to Store Natural Gas*, HERALD AMERICAN, September 23, 2001, *available in* 2001 WL 5565702.

[xiii] *See* Lisa Bransten, *Deals & Deal Makers: Venture Capital Flows On, Despite Jitters*, THE WALL STREET JOURNAL, November 1, 2000, *available in* 2001 WL-WSJ 26615197.

[xiv] *Business Briefs*, STAR-TRIBUNE, March 21, 2001, *available in* 2001 WL 9618389.

[xv] *Cavalier's Merger with Companies Called Off*, RICHMOND TIMES-DISPATCH, August 29, 2000, *available in* 2000 WL 5046197.

[xvi] *See* Richard Mullins, *Analyst's alert sparks Choice One sell-off*, DEMOCRAT & CHRONICLE, July 4, 2002, *available in* 2002 WL 23410681.

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[xxi] *Comcast Loss Has an Upside*, SERVICE PROVIDER WEEKLY (May 11, 2002) <http://www.spweekly.com/artengine/publish.php?cmd=viewart&artid=21>.

[xxii] *Comcast Reports Fourth Quarter Loss, Acquisition of AT&T Broadband Blamed* (February 6, 2002) <http://www.internetindustry.com/News/2602.shtml>.

[xxiii] *Comcast reports loss but beats expectations*, CANOE (October 31, 2001) <http://www.canoe.ca/MoneyEarningsArchive/oct 31_comcast-ap.html>.

[xxiv] *Business: Nation/World Briefs*, THE DETROIT NEWS, May 9, 2001, *available in* 2001 WL 3756493.

[xxv] *See* Diane Mermigas, *Chap. 11 looms for Adelphia: Besieged company may file for relief this week*, ELECTRONIC MEDIA, June 17, 2002, *available in* 2002 WL 9505598.

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[xxviii] *CoreComm lessens losses* (May 16, 2002) <http://columbus.bizjournals.com/columbus/stories/2002/05/13/daily36.html>.

[xxix] *See* Dan Sabbagh, *City-NTL invests $15m in Knapp company*, THE DAILY TELEGRAPH, December 24, 2001, *available in* 2001 WL 31847615.

[xxx] *Bala Cynwyd firm's parent receives delisting notice*, THE PHILADELPHIA INQUIRER, July 27, 2001, *available in* 2001 WL 24964991.

[xxxi] *See* Dominic Rushe, *The Rise and Fall of Corecomm*, SUNDAY TIMES – LONDON, December 23, 2001, *available in* 2001 WL 31731729; *Struggling British Cable Firm Bails out Boss's U.S. Telecom Firm*, KNIGHT-RIDDER BUSINESS NEWS, December 23, 2001, *available in* 2001 WL 32034843.

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[xxxv] *See* Todd Wallack, *Covad trims losses, plans to cut prices*, THE SAN FRANCISCO CHRONICLE, May 3, 2002, *available in* 2002 WL 4019490.

[xxxvi] *See* Joelle Tessler, *Covad losses narrow on strong revenue gains*, SAN JOSE MERCURY NEWS, March 27, 2002, *available in* 2002 WL 14901307.

[xxxvii] *See Covad Communications Group, Inc.: Reorganization Plan is Filed; Service Won't Be Disrupted*, THE WALL STREET JOURNAL, August 28, 2001, *available in* 2001 WL-WSJ 2873990.

[xxxviii] *See* Mitchell Pacelle & Shawn Young, *Deals & Deal Makers: Bondholders Press Telecom Firms to Halt Spending Spree*, THE WALL STREET JOURNAL, July 2, 2001, *available in* 2001 WL-WSJ 2868311.

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[xli] *See* John M. Moran, *Looking More Like A Survivor*, THE HARTFORD COURANT, January 26, 2002, *available in* 2002 WL 4789070.

[xlii] DSL.net Lowers Losses For Quarter, The Hartford Courant, March 7, 2002, available in 2002 WL 4795398.

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[xliv] *See Today's Key FCC Actions*, WASHINGTON TELECOM NEWSWIRE, August 16, 2001, *available in* 2001 WL 7162383.

[xlv] *See* Rodney L. Pringle, *DSL.net Cuts 90 Jobs, Lowers 2001 Outlook*, COMMUNICATIONS TODAY, July 3, 2001, *available in* 7/3/01 COMTD.

[xlvi] *Satellite Business*, SATELLITE WEEK, April 22, 2002, *available in* 2002 WL 8277178.

[xlvii] *Hughes Electronics Reports Net Loss*, AP ONLINE, January 15, 2002, *available in* 2002 WL 10031467.

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[li] *Mediacom posts wider first-quarter net loss*, FORBES (May 13, 2002) <http://www.forbes.com/newswire/2002/05/13/rtr600140.html>.

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[liii] *Broadcast Financials Down*, TELEVISION DIGEST, November 12, 2001, *available in* 2001 WL 7882594.

[liv] *Mediacom second-quarter losses widen* (August 10, 2001) <http://thestandard.com/wire/0,2231,22573,00.html>.

[lv] *See* Jonathan Berke, *Network Access goes offline*, THE DAILY DEAL, June 6, 2002, *available in* 2002 22398063.

[lvi] *Financial*, THE WASHINGTON POST, April 29, 2002, *available in* 2002 WL 20707819.

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[lx] *See* Yuki Noguchi, *Slow to Take Off; Internet Service Via Satellite Remains an Expensive Choice*, THE WASHINGTON POST, August 8, 2001, *available in* 2001 WL 23185389; Nir Goldberg, *Gilat Satellite Networks' unsuccessful investments*, ISRAEL BUSINESS ARENA, July 14, 2001, *available in* 2001 WL 24719066; *The Satellite News Financial Ticker*, SATELLITE NEWS, August 20, 2001, *available in* 2001 WL 523096.

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[lxix] *See Post says TD Bank, Scotiabank face XO loan woes*, CANADA STOCKWATCH, June 18, 2002, *available in* 2002 WL 21839611.

[lxx] *See* Hilary Smith, *XO plots out restructuring options*, RCR WIRELESS NEWS, May 20, 2002, *available in* 2002 WL 10370771.

[lxxi] S*ee* Carol M. Cooper, *Where to Invest: Strategies for Stock & Bonds: The Pros*, BUSINESSWEEK, December 31, 2001, *available in* 2001 WL 26536113; *XO is Forced into Bailout Erasing its Stock Value*, TELECOM MANAGER'S VOICE REPORT, *available in* 2001 WL 23837639; Jerry Knight, *Telecom Firms Knew Market Wouldn't Be All That Fell*, THE WASHINGTON POST, December 3, 2001, *available in* 2001 WL 30330083.

[lxxii] *S&P Downgrades XO's Debt Rating*, COMMUNICATIONS TODAY, November 12, 2001, *available in* 2001 WL 29446532.

[lxxiii] *XO Cuts 600 Jobs*, COMMUNICATIONS TODAY, October 3, 2001, *available in* 2001 WL 673406; *XO Communications Inc.: Layoffs of 600 Are Planned, 'Primarily' in Staff Support*, THE WALL STREET JOURNAL, October 2, 2001, *available in* 2001 WL-WSJ 2877288.

[lxxiv] *See* Shawn Young, *XO Reports Wide Loss for First Quarter, Gets $250 Million in Additional Funding*, THE WALL STREET JOURNAL, April 27, 2001, *available in* 2001 WL-WSJ 2861760.