SIDLEY AUSTIN BROWN & WOOD LLP

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NEW YORK
SAN FRANCISCO

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

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TOKYO

WRITER'S DIRECT NUMBER
202.244.2018

WRITER'S E-MAIL ADDRESS
dlevy@sidley.com

September 16, 2002

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: WC Docket No. 02-157, *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*

Dear Ms. Dortch:

AT&T Corp. ("AT&T") respectfully submits this letter in response to the *ex parte* letter submitted by Verizon on September 13 concerning the September 10 public meeting of the Delaware Public Service Commission.[1] The agenda of the meeting was to decide whether to approve the reductions in switching rates "voluntarily" proposed by Verizon on August 30 in a belated attempt to salvage its 271 application for Delaware. The PSC decided at the meeting to take no action on Verizon's proposal.[2] Verizon's spin on this outcome is that the PSC "determined that no formal PSC action needed" for the rate changes to take effect, and that the rates "are therefore currently in effect."[3]

The actual transcript of the September 10 meeting tells a very different story: the PSC determined that it would take *no* action whatsoever concerning Verizon's proposed rate reductions—not even to "acquiesce" in them.[4] The PSC's refusal to act stemmed from its

[1] Ex Parte Letter dated September 13, 2002, from Richard T. Ellis (Verizon) to Marlene H. Dortch (FCC Secretary), WC Docket No. 02-157.
[2] Transcript of Hearing on Sept. 10, 2002 in PSC Docket No. 96-324 (Phase II) (reproduced as Attachment 1 to Sept. 13 Verizon *ex parte* letter) at 2481-88.
[3] *Id*. at 1.
[4] *See* Hearing Tr. 2483-84 (PSC Chair McRae); *id*. at 2484 (Public Advocate Padmore) ("There

recognition that it lacked both the time and the record evidence needed to judge the reasonableness of the proposed rates on such short notice.[5] At least two members of the PSC were also offended at the possibility that the rate reductions had been orchestrated by the Commission, a role that the two commissioners regarded as a usurpation of the PSC's authority and a violation of the federal/state comity contemplated by the Act.[6] The effect of the PSC's deliberate inaction is to continue until further notice the inflated switching prices that Verizon has insisted on maintaining since 1997.

To understand why, it is important to keep in mind the context of this dispute. The Commission long ago put Verizon and other RBOCs on notice that a 271 application, "as originally filed," must include "all of the factual evidence on which the applicant would have the Commission rely in making its determination."[7] Verizon has also been aware for some time—if only because AT&T and others have repeatedly raised the issue—that its prices for unbundled switching in Delaware, most recently adjudicated by the Delaware PSC in 1997, have become increasingly vulnerable to challenge. Changing market conditions, including a continuing decline in the price of switching equipment, have reduced the forward-looking cost of unbundled switching to levels far below those indicated by the vendor contracts from the early and mid-1990s relied on by the Delaware PSC in its 1997 decision.[8]

Until now, however, Verizon has adamantly opposed reopening the 1997 decision in light of these changed circumstances. In the second-generation UNE proceeding before the PSC in 2001, Verizon repeatedly opposed—and opposed successfully—the requests of AT&T and other participants to reopen Verizon's switching UNE prices. Verizon's theory was that any

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is no approval. No acquiescing, or anything of the sort."); (PSC Chair McRae) ("I . . . just simply choose not to validate what is occurring").

[5] *See* Hearing Tr. at 2453 (Public Advocate Padmore) ("I'm having a little problem here with the utility making its own rate without any Commission review . . . I don't want to go on the record as being against lower rates either, but I'm kind of stuck here.").

[6] *Id*. at 2454-55 (PSC Vice-Chairman Twilley)("And so, all of this is an FCC approved rate, not a Delaware approved rate. . . . You might as well just chuck and throw out the window all of the hearings and debates and everything else that we did over the last year-and-a-half . . ."); *id*. at 2468 ("It is pretty obvious that what has just happened is that the Federal authority has completely superceded the State efforts here to regulate these matters . . ."); *id*. at 2488 (Chair McRae) ("as Commissioner Twilley sadly noted, it is really an FCC negotiation here, and Delaware is incidental to it, frankly").

[7] September 4 Commission Public Notice at 1-2 & n.3 (citing Commission precedent establishing "as filed" rule).

[8] *See* AT&T Comments (July 17, 2002) at 8-11.

decline in switching costs since the mid-1990s was too small to warrant the trouble and expense of relitigating the issue.[9]

In the past year, however, UNE decisions by other state commissions in Verizon territory have reduced this claim to shambles. The non-loop rates prescribed by the New York State PSC nine months ago are approximately *one third* lower than Verizon's Delaware rates on a cost-adjusted basis.[10] And the prices for unbundled Verizon switching adopted two months ago by the New Jersey Board of Public Utilities are comparable to those in New York:[11]

	Delaware	New York	New Jersey
Originating MOU	$0.003634	$0.001147	$0.001203
Terminating MOU	$0.001927	$0.001111	$0.001171

Under the circumstances, Verizon's 11th-hour rate reductions are clearly an attempt to stave off Commission denial of Verizon's 271 application without giving the PSC enough time to consider their reasonableness—and, particularly, to consider whether even deeper reductions are warranted.[12] Verizon's gambit, however, comes too late.

As noted in AT&T's supplemental comments, Delaware law does not allow a proposed rate change to take effect without advance notice and publication and, upon the request of an interested party, a hearing on the record.[13] Moreover, when the proposed rate change involves the price of a UNE set forth in a statement of generally available terms and conditions ("SGAT"), the PSC may not approve the change without finding that the changed price terms are just and reasonable under the 1996 Act and the Commission's standards—i.e., are TELRIC-compliant.[14] The same is true of proposed changes in price terms set through arbitrations.[15]

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[9] *Id.* at 11. The Delaware PSC ultimately limited the Phase II UNE proceeding to two matters: establishment of prices for UNEs newly prescribed as a result of the Commission's *UNE Remand Order*; and reconsideration of the PSC's previously-established nonrecurring charges in response to the remand order of the District Court in *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F.Supp.2d 218 (D. Del. 2000).

[10] AT&T Comments (July 17, 2002) at 4.

[11] *See New Jersey BPU Docket No. To00060356, In The Matter Of The Board's Review Of Unbundled Network Elements Rates, Terms And Conditions Of Bell Atlantic-New Jersey, Inc.*, Order On Reconsideration adopted July 15, 2002.

[12] *See* Sept. 10 PSC Hearing Tr., *supra*, at 2456 (PSC Vice-Chairman Twilley) ("it would suggest to me that if we looked at them [the switching rates] again, we might find that the New Jersey rates were more appropriate.")

[13] *See* AT&T Supplemental Comments (Sept. 10, 2002) at 2-3 (discussing Delaware law).

[14] 47 U.S.C. § 252(f)(2) (incorporating § 252(d) and Commission pricing rules); *see also* Sept. 10 PSC Hearing Tr. 2459 (PSC Commissioner Puglisi) ("The rates we approved are specific

To state these procedural requirements is to make obvious that Verizon has not met them. The PSC has not approved the rate reductions, let alone found that they are just and reasonable. Nor is there any record that would allow the PSC to make such findings.

These shortcomings cannot be excused on the theory that the price of a UNE can be modified without the PSC's approval because it incorporated as a price term in Verizon's interconnection agreements with AT&T and other CLECs. An interconnection agreement is a contract. Nothing in the interconnection agreement between Verizon and AT&T authorizes Verizon to change the price of switching, in the absence of a PSC rate order specifically requiring the change, without AT&T's consent (which AT&T has not provided). Indeed, the first notices AT&T received of the price change were Verizon's August 30 letters to the PSC and the Commission informing both bodies that Verizon had decided to reduce its switching rates.[16] Likewise, there is no indication that any of the other CLECs in Delaware have consented to Verizon's rate change. As the PSC recognized, Verizon's rate reduction was a unilateral act, not the result of a bilateral agreement with CLECs.[17] In any event, even an agreed-to change in an agreement cannot take effect until the state commission affirmatively approves it (which the PSC has not).[18]

Finally, in the absence of PSC order affirmatively approving Verizon's rate "reduction," this Commission has no authority to approve the rate change on its own initiative. The division of power prescribed the 1996 Act is clear in this regard: State commissions have exclusive jurisdiction to adjudicate UNE prices and approve rate changes under Section 252 (unless they waive their authority pursuant to Section 252(e)(5)). The federal courts have exclusive jurisdiction to review such decisions. *Id*., § 252(e)(6). The only remedy available to the Commission upon finding that a state commission has approved unlawfully high rates under section 252 is to deny the section 271 application of the BOC that charges those rates.

AT&T appreciates the Commission's apparent concern with the level of Verizon's switching rates, and sympathizes with the Commission's desire to find a creative shortcut. Sections 252 and 271, however, require the Commission to take Verizon's switching prices in Delaware as the PSC left them. Until the PSC has a meaningful opportunity to

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rates. They are not maximum rates.").

[15] 47 U.S.C. §§ 252(c)(2), (d)(1) and (e)(2)(B).

[16] Ex Parte Letter dated August 30, 2002, from Richard T. Ellis (Verizon) to Marlene H. Dortch (FCC Secretary), WC Docket No. 02-157 (attaching August 30 letter from Julia A. Conover (Verizon) to Karen Nickerson (Delaware PSC).

[17] Sept. 10 PSC Hearing Tr. 2460 (Vice-Chairman Twilley) ("this is a unilateral decision"); *accord*, Aug. 30 Verizon letter to Karen Nickerson, *supra*, at 1 ("All CLECs will be notified of this change by a change management notice that will be distributed via E-MAIL.").

[18] 47 U.S.C. § 252(e)(1) (the state commission to which an interconnection agreement is submitted "shall approve or reject the agreement").

determine TELRIC-compliant UNE prices based on up-to-date cost data—and exercises that authority by actually prescribing TELRIC-compliant rates after giving interested parties adequate notice and opportunity to be heard—there is nothing that Verizon or the Commission can do to make Verizon's 271 application pass muster.

Sincerely,

/s/ David M. Levy
David M. Levy

cc: Scott Bergman
Matt Brill
Jeffrey Carlisle
Jordan Goldstein
Dan Gonzalez
Rich Lerner
Chris Libertelli
William Maher
Tamara Preiss
Jessica Rosenworcel
Julie Saulnier
Victoria Schlesinger
Henry Thaggert