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Federal Communications Commission
Office of Secretary

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October 3, 2002

Mr. David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
455 12th Street, S.W.
Washington, DC 20554

Re: Bell Atlantic Corp. and GTE Corp., CC Docket No. 98-184

Dear Mr. Solomon:

This supplements my letter of September 20, 2002, which outlined why the Commission should adopt the same interpretation of how to calculate measurements expressed as averages or means for Verizon's carrier-to-carrier performance plan as it adopted for SBC's plan, on which Verizon's was modeled. There is no reasonable basis for treating Verizon differently than SBC, since Verizon and SBC are similarly situated with regard to the application of these measurements in their respective performance plans.

In both Verizon's and SBC's carrier-to-carrier performance plans, the relevant payments under Condition V are specified as amounts "per occurrence." ***See Bell Atlantic/GTE Merger Order***, 15 FCC Rcd 14032, Appendix C, Attachments A-5a, A-5b (2000); *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, Appendix C, Attachments A-5a, A-5b (1999). When calculating such payments for measurements expressed as means or averages, the merger conditions require Verizon and SBC to apply a process that compares the company's performance for itself to its performance for the competitive local exchange carriers. ***See*** id., Attachment A-3-4. Because the payment amounts are specified "per occurrence," Verizon and SBC cap the percentage difference to 100 percent so that the payment resulting for that measure does not exceed the total number of actual occurrences times the per-occurrence dollar value specified in Attachments A-5a and A5b for that measure.

In its February 6, 2002 letter to SBC, the Bureau decided to approve the 100 percent cap in the formula for SBC's carrier-to-carrier performance plan, because the Texas state commission had previously imposed such a cap for a similar performance plan it had adopted for SBC in that state.[1] The Bureau reasoned that since the federal plan was modeled on the Texas plan, considerations of comity and administrative efficiency would be served if SBC were permitted to apply the payment calculation in a fashion that mirrored the Texas plan. However, the Bureau did not limit this interpretation to measurements for the state of Texas. Rather, it allowed SBC to apply this interpretation to all states of the former Southwestern Bell Telephone, Ameritech, and Southern New England Telephone local exchange carriers. ***See*** *SBC/Ameritech Merger Order*, Appendix C, Attachment A, ¶ 4.

In states other than Texas, SBC is not in a unique position that distinguishes it in any way from Verizon with regard to issues of comity and administrative efficiency. In any state, regardless of whether it is served by SBC or by Verizon, payments under the federal plan are offset by amounts paid by the company under any state-approved performance plan. ***See*** id.,¶ 12; *Bell Atlantic/GTE Merger Order*, Appendix C, Attachment A, ¶ 12. In states other than Texas, there may be a state performance plan similar to the Texas plan, a state plan different from the Texas plan, or no plan at all. Therefore, there is no unique advantage in terms of comity or administrative efficiency in applying the Texas ruling to the other SBC states. As Verizon demonstrated in its September 20 letter, following the Texas ruling is simply the right thing to do to ensure that the carrier-to-carrier performance plan is consistent with the original intent of the Commission's orders.

For this reason, the Bureau cannot distinguish Verizon's plan from SBC's simply on the basis that it wished to achieve comity with the Texas state commission or administrative efficiency in applying the performance measurements.[2] Accordingly, it would be unreasonable for the Bureau to deny Verizon the same interpretation of this merger condition that it granted to SBC. As the courts have made it abundantly clear, "an agency cannot make arbitrary distinctions that have the effect of "treat[ing] similarly situated parties differently." *Petroleum Communications, Inc., v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994). For example, in *McElroy Electronics v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993), the court reversed a Commission decision dismissing the appellant's

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[1] ***See*** Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, Federal Communications Commission, to Caryn Moir, Vice President – Federal Regulatory, SBC Telecommunications, Inc., CC Docket No. 98-141, ASD File No. 99-49, pp. 3-4 (Feb. 6, 2002).

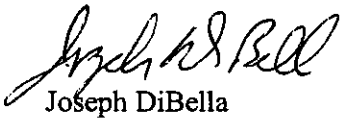
[2] By the time the Bureau issued its ruling, SBC had already obtained section 271 authority for the state of Texas, which terminated its federal performance plan payments for that state. ***See*** *SBC/Ameritech Merger Order*, Appendix C, ¶ 24; *Application by SBC Communications Inc., et. al, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354 (2000).

application while granting other carriers' applications under the same circumstances, reminding the Commission "of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment." Id., 1365.

For the reasons described above and in my September 20 letter, there is no basis on which to apply different requirements to SBC and Verizon in essentially identical conditions. Therefore, the Bureau should allow Verizon to calculate measurements expressed as averages or means in Verizon's carrier-to-carrier performance plan in the same way as the Bureau allowed SBC.

If you have any questions, please do not hesitate to call me.

Sincerely,



Joseph DiBella

cc: Maureen Del Duca
Carol Mattey