

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
)
Application by Verizon Maryland, Inc.,)
Verizon Washington, D.C. Inc., and) WC Docket No. 02-384
Verizon West Virginia Inc., et al.,)
Pursuant to Section 271 of the)
Telecommunications Act of 1996)
For Authorization to Provide In-Region,)
InterLATA Services in Maryland,)
Washington, D.C., and West Virginia)

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

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COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. opposes the above-captioned application of Verizon for authorization to provide in-region, interLATA services in Maryland, Washington, D.C., and West Virginia.¹ The public interest requires that the application be denied unless the Commission is convinced that the local markets have been opened fully and irreversibly to competitive entry. In Sprint's view, this is not yet the case.

I. INTRODUCTION AND SUMMARY

A. Introduction

A key purpose of the 1996 amendments to the Communications Act of 1934 (the Act) was to open the local market to competition. To that end, Congress envisioned three avenues of local entry: resale, use of incumbent LEC unbundled network elements and

¹ Application by Verizon Maryland, Verizon Washington, D.C., and Verizon West Virginia for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C. and West Virginia, WC Docket No. 02-384 (filed December 19, 2002) (Application).

facilities-based competition; and it placed incumbent LECs in the rather unnatural role of assisting their would-be competitors by imposing the interconnection, resale, unbundling and collocation obligations of § 251(c).

To encourage the principal ILECs – the BOCs – to cooperate in this process, Congress enacted the “carrot” of § 271, giving the BOCs the right to enter the interLATA long distance market in-region once their local markets were truly open. The Commission recognized the importance of local market competition in one of the first applications it decided under this section.

Although Congress replaced the MFJ’s structural approach, Congress nonetheless acknowledged the principles underlying that approach that BOC entry into the long distance market would be anticompetitive unless the BOCs’ market power in the local market was first demonstrably eroded by eliminating barriers to local competition. *** In order to effectuate Congress’ intent, we must make certain that the BOCs have taken real, significant and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.²

If the BOCs are allowed to enjoy the § 271 “carrot” before local competition is fully and irreversibly established, they will have little incentive to cooperate with competitive LECs thereafter, unless they are subject to continuing regulation. Successfully maintaining such a regulatory structure and adapting it to changes in technology will require significant on-going resources of both the Commission and interested parties, with, at best, uncertain results. It would be far preferable to withhold the § 271 “carrot” until local competition is sufficiently entrenched that competitive forces can supplant the

² Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶18 (1997) (Michigan Order).

intensive regulation and enforcement that otherwise would be required. Sprint does not believe that point has yet been reached in the states of Maryland, Washington, D.C., and West Virginia for which Verizon is seeking § 271 authorization.

The public interest inquiry should focus on competition in the local market. In the decision of the Court of Appeals for the District of Columbia concerning the FCC's grant of SBC's 271 application for long distance service in Kansas and Oklahoma remanding the "price squeeze" issue,³ the court commented on the Commission's inadequate consideration of the appellants' claim that the low volume of residential customers in these states and SBC's pricing which does not provide enough margin to make competition profitable are evidence of a "price squeeze" that is inconsistent with the public interest. The court stated: "Here, as the Act aims directly at stimulating competition, the public interest criterion may weigh more heavily towards addressing potential 'price squeeze.'" *Id.* at 555. Clearly, the court considers the Act's goal of "stimulating competition" to refer to competition in the local market, the market adversely affected by a "price squeeze." Thus, it is appropriate to consider whether the dismal state of competition and the low volume of residential customers served by facilities-based competitors is in the public interest when evaluating a § 271 application.

B. Summary

As shown below, the CLEC industry remains under financial pressure. The past year has been marked by the collapse of several major CLECs and a severe tightening of capital to would-be entrants. Further, the regulatory environment is now in a state of

³ Joint Application by SBC for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 (2001), remanded, Sprint Communications Co. L.P. v. FCC, 274 F. 3d 549 (DC Cir. 2001).

uncertainty as a result of the recent decision of the D.C. Circuit Court of Appeals on UNE standards.⁴ Uncertainty now reigns concerning whether or not the Commission will reduce the RBOCs' UNE and line sharing obligations, creating even more business uncertainty for the competitive industry.

Further evidence of the dismal state of competition is the fact that the RBOCs have failed to establish themselves outside their territory. In Maryland, Washington, D.C., and West Virginia, the low market shares for CLEC residential customers indicate that competition has not been firmly established.

II. THE CLEC INDUSTRY REMAINS UNDER FINANCIAL PRESSURE (PUBLIC INTEREST)

The past two years have been marked by the bankruptcy of many of the CLECs that were in the vanguard of the industry: Adelphia Business Solutions, ART, Birch, Convergent, Covad, e-Spire, ICG Communications, Metropolitan Fiber Networks, McLeodUSA, Mpower, Net2000, Network Plus, NorthPoint, Rhythms, TeleGlobe, Teligent, Viatel Holding, Williams Communications Group, WinStar and XO Communications, to name a few.⁵ WorldCOM, which claims to be the largest CLEC in the U.S. in addition to providing long distance services,⁶ reported financial

⁴ United States Telecom Association v. Federal Communications Commission, 290 F.3d 415 (D.C.Cir. 2002)(petitions for rehearing pending).

⁵ Covad emerged from bankruptcy on December 20, 2001. McLeodUSA emerged from bankruptcy under a plan which eliminated approximately \$3 billion in debt and \$325 million in interest. Bankruptcy Court Approves Strategy for Reorganization, *The Wall Street Journal*, A19 (April 8, 2002).

⁶ See Statement of Victoria D. Harker before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, June 19, 2002.

misrepresentations and was forced into bankruptcy in July 2002. The number of CLECs has decreased from approximately 330 at the end of 2000 to fewer than 80 today.⁷

The bleak state of the industry is making it difficult for the surviving CLECs to obtain capital to expand their facilities. Given the current high risk associated with the CLEC industry, any financing that can be obtained comes at a high price. In the telecom industry, capital spending decreased by 25 percent in 2001 and was expected to be another 20 percent lower in 2002. *Id.*

In addition to these financial hurdles, CLECs now face regulatory uncertainty concerning the availability and pricing of UNEs. In its May 24, 2002 opinion, the D.C. Circuit addressed the RBOCs' appeals of the FCC's UNE Remand decision⁸ in which the FCC reviewed its definition of "impair" and other unbundling criteria and its list of UNEs in light of the Supreme Court's decision in *Iowa Utilities Board*. The court remanded the Commission's UNE Remand Order in an opinion that displayed some hostility towards UNE-based competition, despite the Supreme Court's recognition, just a few days earlier, that the Commission could set UNE rates so as to promote local competition broadly.⁹ The D.C. Circuit's decision, coming in the midst of the

⁷ Yochi J. Dreazen, FCC's Powell Says Telecom 'Crisis' May Allow a Bell to Buy WorldCom, *The Wall Street Journal*, A4 (July 15, 2002).

⁸ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (UNE Remand Order).

⁹ Verizon Communications Inc. v. Federal Communications Commission, Nos. 00-511 *et al.* (S. Ct. May 13, 2002).

Commission's own UNE Review proceeding,¹⁰ creates additional uncertainty for the already troubled competitive industry. At one extreme, the FCC could decide that the RBOCs are no longer required to provision many UNEs in metropolitan areas. Since a significant portion of the competitive industry relies on UNE components, CLEC investments likely will be scaled back until the regulatory environment becomes clearer. In the interim, funding for an industry already under severe financial pressure will be extremely scarce, and what is available will be high-priced.

At a minimum, until decisions are made concerning the availability of UNEs, the Commission must pay more attention to the market shares of the competition. It is highly unlikely that the percentage will increase at the same pace as it has in recent years, given the tumult recounted above. Indeed, it is more reasonable to expect that the market shares of competitors will shrink as the uncertainty about the availability and pricing of UNEs restricts further investments and sends additional competitors into bankruptcy.

III. OUT OF REGION RBOCs HAVE FAILED TO COMPETE AGAINST FELLOW RBOCs (PUBLIC INTEREST)

ILECs have chosen not to compete with each other for customers outside their territories. Why would this be the case? ILECs not only know the local market, but they come equipped with the complex back-office systems needed to provide service efficiently and economically. It is telling, then, that despite earlier assertions to the

¹⁰ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, released December 21, 2001.

contrary, the RBOCs have remained largely outside the local competition fray. If local competition were truly enabled, these RBOCs, who are high on the learning curve for the provision of local service, would have the incentive to enter the local markets outside their serving territories with bundles of local and long distance service.

In its order approving Verizon's Section 271 application for Rhode Island, the Commission found that the lack of entry by other carriers – either out-of-region RBOC or CLEC – can be explained by factors beyond the control of the applicant, “such as a weak economy, individual competing LEC and out-of-region BOC business plans, or poor business planning by potential competitors.”¹¹ This suggests that the Commission believes that the public interest considerations should only include factors within the control of the applicant. Sprint disagrees. In Sprint's view, consideration of the public interest should include all factors, whether or not they are within the applicant's control, that bear on whether the local market has indeed been irreversibly opened. The fact that the carriers which are best prepared to enter the local markets are not even attempting to do so in any market outside their local territories is indicative of some deterrent to entry and should give the Commission pause as it considers whether or not local competition is fully and irreversibly enabled.

¹¹ In the Matter of Application of Verizon New England, 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 Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, released February 22, 2002, ¶ 106 (Rhode Island Order).

**IV. COMPETITION IN MARYLAND, WASHINGTON, D.C.,
AND WEST VIRGINIA HAS NOT BEEN FIRMLY
ESTABLISHED (PUBLIC INTEREST)**

As noted above, the Act allows competitors to enter the local market via three entry strategies: resale of the incumbent's network, the use of unbundled network elements, or interconnection to the incumbent's network by pure facilities-based providers, or some combination thereof. The Commission has found that all three means of entry should be available:

Congress did not explicitly or implicitly express a preference for one particular strategy, but rather sought to ensure that all procompetitive entry strategies are available. Our public interest analysis of a section 271 application, consequently, must include an assessment of whether all procompetitive entry strategies are available to new entrants.

Michigan Order ¶387. In discussing how it would evaluate whether all strategies are available, the Commission made clear that there should be competition in each means of providing competitive local service and to both business and residential customers:

The 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.

In its Rhode Island Order, the Commission stated that the public interest standard does not require it to "consider the market share of each entry strategy for each type of

service.” ¶ 104. However, the public interest standard does require that local competition be healthy and sufficient to endure after RBOC entry. Low levels of facilities-based competition, particularly in the residential market, should signal that competitors are unwilling or unable to make a sizeable investment in the market. If competition is not fully and irreversibly enabled in that market, the RBOC will retain its monopoly control over residential customers, and its entry into the long distance market will not serve the public interest.

Although Verizon claims that meaningful competition exists, competition in the residential market is *de minimis*. In this application, Verizon estimates that competitors in Maryland, Washington, D.C., and West Virginia provide service to approximately 97,000, 29,000 and 4,200 residential lines, respectively.¹² This number equates to approximately 4.0 percent of the residential lines in Maryland, 9.4 percent in Washington, D.C., and 0.7 percent in West Virginia.¹³ While these percentages may

¹² Application, Declaration of John A. Torre, Attachment 1, Table 1, page 3; Attachment 2, Table 1, page 3; and Attachment 3, Table 1, page 3.

¹³ According to the most recent *2001/2002 Statistics of Communications Common Carriers*, approximately 63.4% of the lines in Maryland were residential (2,484,674 residential access lines/3,920,482 total switched access lines); approximately 29.1% of the lines in Washington, D.C. were residential (296,142 residential lines/1,017,492 total switched access lines); and 72.8% of the lines in West Virginia (624,333 residential lines/857,125 total switched access lines). Table 2.4. These percentages were multiplied by Verizon’s switched access lines in Maryland (3.7 million), Washington, D.C. (965,000) and West Virginia (825,000) to estimate Verizon’s residential access lines. Declaration of John A Torre, Attachment 1, page 1; Attachment 2, page 1; and Attachment 3, page 1. The percentages were calculated by dividing the number of residential lines provided by competitors by the estimated number of Verizon’s residential lines plus competitors’ residential lines.

exceed those in other states in which the RBOCs have received Section 271 approval, they nevertheless indicate that competitors are not willing to make a sizeable investment in the residential market. Further, in its category “Facilities-Based Lines,” Verizon does not identify the number of lines for which competitors use Verizon’s unbundled loops to provide service. This number would reveal the dependence of competing carriers on Verizon’s unbundled loops.¹⁴ Absent such information, it is not clear that competition in this market has been fully and irreversibly enabled.

The number of CLECs identified by Verizon in support of its application may be overstated. Sprint questioned the accuracy of Verizon’s count of CLECs providing service in Washington, D.C. in its Section 271 hearing before the Public Service Commission of the District of Columbia.¹⁵ In its Post-Hearing Comments, filed December 6, 2002, Sprint pointed out that Verizon identified Sprint as one of the 42 “Washington, DC Active CLECs – as of April 30, 2002” in Attachment 201 of its Checklist Declaration.¹⁶ However, Sprint does not currently provide local exchange service in Washington, D.C., nor did it as of April 30, 2002. Thus, CLEC competition may not be as robust as Verizon’s numbers suggest.

¹⁴ Verizon and other local exchange carriers argued in the UNE Triennial Review that unbundled loops should be removed from the UNE list. As noted above, the uncertainty about which UNE and line sharing obligations may change creates uncertainty for competing carriers, especially for those relying on unbundled loops.

¹⁵ *In the Matter of Verizon Washington DC, Inc.’s Compliance with the Conditions Established in Section 271 of the Federal Telecommunications Act of 1996*, Formal Case No. 1011.

¹⁶ See, Application, Appendix B (Washington, DC), Tab 0001-part b.

CLEC competition, particularly in the residential market, is jeopardized by the precarious financial state of several competitors. As noted in Section II above, many CLECs have filed for bankruptcy, and capital for expansion is severely restricted and high-priced. Thus, CLECs will be unlikely to invest in residential services in the future, and their market share is unlikely to grow. Moreover, the fact that the small competitive market shares are spread among many carriers suggests that individual market shares of some CLECs may simply be unsustainably small.¹⁷

The Commission has repeatedly stated that “factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.”¹⁸ However, small CLEC residential market shares are the norm, not the exception. Clearly, the reluctance of CLECs across the nation to enter the residential market is evidence of a widespread, systemic problem with the development of residential competition which cannot be explained away by “competitive LEC entry strategies.” Rather, the miniscule market shares indicate that factors within the BOCs’ control are preventing the full and irreversible entry of CLECs into the residential market.

¹⁷ For example, in his Declaration, Mr. Torre states that in Maryland through September 2002 Verizon had ported numbers to 20 CLECs, 23 CLECs had used 911/E911 trunks, 45 CLECs were reselling lines, and 9 CLECs were purchasing UNE platforms. Attachment 1, Exhibit A.

¹⁸ See, e.g., *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, at para. 168 (rel. June 24, 2002).

V. CONCLUSION

Because Verizon has failed to demonstrate that there is meaningful competition in the states here at issue, its application for § 271 relief should be denied.

Respectfully submitted,

Sprint Communications Company L.P.

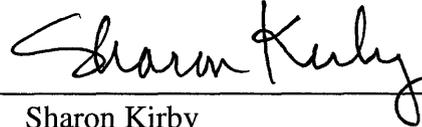


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CERTIFICATE OF SERVICE

I hereby certify that a copy of Sprint's Comments in the Matter of Application by Verizon Maryland, Verizon Washington, D.C., and Verizon West Virginia et al., pursuant to Section 271 of the Act, for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia, WC Docket No. 02-384, was sent electronically and/or by U.S. First Class Mail on this 9th day of January 2003 to the parties listed below.



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