II. ARGUMENT

A. The State Of Local Competition In Maryland--Especially For Residential Customers—Is So Dismal That Verizon's Application Must Be Rejected

1. Summary

If one thing can be said to be certain after listening to five days of testimony in this proceeding, it is that Verizon's Section 271 Application fails to show that local service is competitively available to all classes of consumers throughout all parts of the State of Maryland. On the other hand, it has been conclusively shown that Verizon's representations regarding the actual level of competition in the Maryland local service market are extraordinarily inflated because they are based on Verizon's flawed analysis of the E911 data base and a flawed measurement of the number of completed collocation arrangements. These flaws in Verizon's analysis could lead to the mistaken impression that there is vigorous CLEC penetration in all areas of Maryland and for all types of services. Furthermore, the analysis by Verizon fails to take into account that opportunities for further CLEC competition have been substantially constricted due to a number of CLEC bankruptcies and a less than ideal economic situation.

People's Counsel recognizes that the Commission may feel that it cannot stand in the way of the advancing avalanche of approved Section 271 applications throughout the Verizon service territory. However, People's Counsel believes that this proceeding provides an ideal set of facts for the Maryland Commission to hold up the big STOP sign. The Commission should avail itself of the opportunity to say to Verizon that it has failed to meet the intent of the Telecommunications Act of 1996 that local service competitive options be available to all consumers throughout all parts of the State.

Notice of Procedural Schedule, Case No. 8921, p. 2-3 (June 11, 2002).

As an alternative to outright rejection of Verizon's 271 application, People's Counsel urges the Commission to consider whether it should order that the Application should be approved only for business services as distinguished from residential services. This would acknowledge that competition for residential services has utterly failed to materialize in the Verizon/Maryland territory.

2. Requirements Of The Telecommunications Act

Although People's Counsel does not intend in this Brief to go into the requirements of the Telecommunications Act of 1996 at length because the Commission has been very well acquainted with the provisions of the Act, it is important to refresh the Commission's recollection of the requirements contained in Section 271 of the Act. Section 271(d)(2)(B) of the Act requires the FCC to consult with the state commission for the state in which Section 271 approval is sought to verify the incumbent's compliance with the requirements of Section 271(c). Section 271(c) requires the incumbent to show that it has one or more state-approved interconnection agreements with a facilities-based competitor providing telephone exchange service, or a Statement of Generally Available Terms (SGAT) and that either the interconnection agreements or the SGAT satisfies the 14 point "competitive checklist" set forth in Section 271(c)(2)(B)(i)-(xiv).[3]

The Act also imposes other duties upon the incumbent. For example, the incumbent must show that the authority to provide long-distance service it is requesting will be carried out in accordance with the requirements of Section 272 of the Act

[3] See Selwyn Direct Testimony, p. 11, Table 1 for the checklist items and the cross-reference to the Act for those items.

regarding the provision of long-distance service through a separate affiliate or affiliates.[4] Finally. the incumbent must show that its entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity" under Section 271(d)(3)(C).

The FCC has also acknowledged that apart "from determining whether a BOC satisfies the competitive checklist and will comply with Section 272, Congress directed the FCC to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity." *See Application of Verizon New England. Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Verizon Global Network's Inc., for authorization to provide in-region interLATA services in Massachusetts*, FCC 01-130, CC Docket No. 01-9, para. 232 (April 16, 2001). The FCC views the public interest requirement as an opportunity to review the circumstances presented by the applications "to ensure that no other relevant factors exist that would frustrate the Congressional intent that markets be open, as required by the competitive checklist. and that entry will therefore serve the public interest as Congress expected. Among other things. 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 circumstances of the application at issue. Another factor that could be relevant to the analysis is whether the Commission has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition." *See Re Application of Verizon Virginia. Inc., et al. for*

[4] For a more in-depth discussion of this Section of the Act, please see Section H *supra.*

Authorization To Provide In-Region, InterLATA Services In Virginia, FCC 02-297 (WC Docket No. 02-214), p. (October 30, 2002)

As Dr. Selwyn has testified, the public interest requirement of the Act should be interpreted very broadly to include an analysis of the impact on competition in both the Maryland local and long-distance markets.[5]

As will be more fully explained *supra*, although Verizon currently has a few localized competitors, if it is authorized to offer in-region interLATA service while still maintaining what is effectively a monopoly in the local market, giving it the requested authorization would clearly not be "consistent with the public interest, convenience and necessity" as required by the Act. There is sufficient evidence in this proceeding to show that the level of local competition is significantly overstated. Given the evidence, People's Counsel believes that this Commission would be well within its rights if it rejected Verizon's application. As an alternative, People's Counsel believes that this Commission could grant Verizon's application in part as it relates to business service and reject it as it relates to residential service. Finally, People's Counsel believes that the Commission could also, along the lines of the California Public Utilities Commission, grant Verizon's application but impose certain conditions to ensure that Verizon does not abuse its monopoly position to any great extent.[6]

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[5] See Selwyn Direct, p. 10.

[6] The California Public Utilities Commission voiced its misgivings about granting Pacific Bell's § 271 Application. The Commission stated:

> While Pacific largely satisfies the technical requirements of § 271 ..., we cannot state unequivocally that we find Pacific's imminent entry into the long-distance market in California will primarily enhance the public interest. Local telephone competition exists in the technical and quantitative data; but it has yet to find its way into the residences of the majority of California's ratepayers. Only time and regulatory vigilance will determine if it ever arrives. We expect that the public interest will be positively served in California by the addition of another experienced,

B. Verizon Has Failed To Establish That There Are Competitive Choices Available To All Consumers In All Parts of Maryland

It is clear from the Testimony that to the extent there is any local competition in Maryland, it is exceedingly small in percentage terms. In fact, Verizon's application provides "scant evidence that there is any facilities-based competitive entry outside of a few core urban-wire centers in Maryland."[7]

Dr. Selwyn provided an extensive critique of the information provided by Verizon regarding the extent of competition geographically in Maryland.[8] Dr. Selwyn pointed out that more than half of Verizon's central offices have no CLEC collocation arrangements and that given the current crisis in the telecommunications industry, it appears that facilities based expansion to the unserved central offices will not occur any time soon. As Dr. Selwyn testified, "absent evidence that each and every geographic area in Maryland is sufficiently open to competition, approval of this Application runs the risk of ignoring the vital interests of those Maryland ratepayers who have no choice but to take their local exchange service only from Verizon."[9]

Throughout the proceeding, there has been much disagreement among the parties on the best way to measure CLEC market penetration. In People's Counsel's view, the

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> formidable competitor in the intrastate interexchange market. At the same time, we foresee the harm to the public interest if actual competition in California maintains its current anemic pace, and Pacific gains intrastate long-distance dominance to match its local influence.

Re: Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a framework for Network Architecture Development of Dominant Carrier Networks, et al. R93-04-003 *et al. Decision Granting Bell Telephone Company's Renewed Motion For An Order That It Has Substantially Satisfied The Requirements of the 14 Point Checklist in Section 271 of the Telecommunications Act of 1996 and Denying That It Has satisfied Section 709.2 of the Public Utilities Code; Decision 02-09-050 (September 19, 2002, p. 271-272).*

[8] Selwyn, p. 8

[9] See Selwyn, p. 10, 25

clearest and most direct way to measure such market penetration is to count the access lines that CLECs are actually serving.[10] To that end, Dr. Selwyn relied upon publicly available information reported by the FCC in its Local Telephone Competition Reports. The most recent FCC Local Telephone Competition Report issued in July 2002, indicates that CLECs in Maryland serve only 4.2 percent of the *total* market (well below the 10.2% national average). In a disturbing development, the most recent FCC report indicates that Maryland CLEC penetration has actually decreased from the prior reporting period.[11] As was pointed out by Dr. Selwyn and throughout the hearings in this case, the only other two states in the country which have actually experienced a decline in competitive activity are South Carolina and Mississippi. According to Dr. Selwyn's testimony (garnered from the FCC reports), CLEC market share for residential and small business customers is "at a miniscule 1.6% - down from 2.1% for the period ending June 30, 2001."[12]

Even Verizon witness Roberts agrees that the best measure of CLEC market penetration is to count their actual access lines.[13] Using this best measure, it is clear the level of local competition in Maryland is extremely small and that the level of local competition in the residential and small business market is nearly non-existent. Certainly such a low level of local competition in the State of Maryland should be enough to give the Commission pause in determining whether Verizon's application can meet the public interest test of Section 271.

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[10] *Id.* [illegible]

[11] *Id.* This is particularly disheartening because nationally CLEC penetration has increased over the same time period.

[12] [illegible] (fnt. 3)

[13] [illegible]

C. Dr. Selwyn Has Conclusively Shown That Verizon's Reliance On Information From The E911 Data Base Inaccurately Overstates The Level Of Local Competition In Maryland

Both in his Direct Testimony and on the witness stand, Dr. Selwyn provided an extensive critique of Verizon's reliance upon E911 data base as an indicator of the amount of CLEC provided facilities in the Maryland market. The E911 database provides an inaccurate and unreliable picture of the extent of local competition. As Dr. Selwyn explained

> Verizon's assessment of the count of facilities-bused lines based on information obtained from E911 databases is likely in error due to common business communications arrangements such Direct Inward Dialing (DID), where each station line "behind" a PBX is assigned its own unique 7-digit telephone riunibcr. A DID customer will obtain a block of numbers from its local carrier. ILEC or CLEC. and that quantity of individual numbers will typically be a multiple of the quantity of physical access lines (PBX trunks) that are being provided to that customer. For example, FCC rules relating to surcharges for Local Number portability (LNP) allow an ILEC to apply nine (9) LNP charges for each PBX trunk or equivalent; thus, in the case of a T-1 trunk containing 24 individual voice channels, the FCC LNP rules contemplate 24 x 9, or 216 PBX stations "behind" the single T-1 facility.[14]
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> * * * * *
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> More importantly, while Mr. Roberts ultimately contends that the E911 database is a listing of telephone numbers from which outgoing calls can be made, Verizon-Maryland's own E911 data base entries BEGIN PROPRIETARY XXXXXX
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> XXXXXXXXXXXXXXXXXXXXXXXXX
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[14] [illegible]

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XXXXXXXXXXXXXXXXXXXXXXXXX

[footnote omitted] **END PROPRIETARY** [15]

As a practical example of how use of rhe E911 data base overstates the actual number of CLEC access lines in service, Dr. Selwyn explained how a firm that purchases only one T-1 line could. by Verizon's use of the information, result in an overstatement of the actual number of access lines. As Dr. Sclwyn testified:

> ..many if not all CLECs haw as a practice to populate the E911 data base with all oftlic DID numbers in a block. So for example, my firm has a block of 100 DID numbers. Therefore, it is my understanding, and we happen *to* have our local service provided by AT&T, it's my understanding then that we would have 100 entries in the E911 database.
>
> Q: But yet you have how many access lines?
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> A: Well we have T-1, which is the equivalent of 24 voice grade lines. although we aren't actually using all of those channels. But in our simply case, that T-1 for example would be capable. if we're using all the channels, to support as many as 3 to 400 station lines, which means that there might be other customers with a T-1 with 24 voice channels that could have as many as 300 or 400 entries.
>
> Q: So instead of counting the 100 as you suggest would the number be 24?
>
> A: That would be a more realistic way to count. In this particular instance.[16]

Furthermore, Dr. Selwyn has also pointed out that there is a fundamental flaw in Verizon's analysis related to the fact that Verizon excluded special access lines from its analysis. Dr. Selwyn noted that Verizon appeared to assume that "facilities-based

[illegible]

CLECs consisted of either UNE loops or facilities that were self-provisioned." Verizon apparently would take its own E911 estimate for the CLEC lines and then subtract from that estimate the number of UNE loops that Veriron was providing. Verizon believed that the difference between those two numbers equaled facilities that were provisioned and owned by the CLECs themselves.[18] Dr Sclwyn pointed out that that assumption is incorrect because of the use bv CLECs of special access lines. As Dr. Selwyn testified, FCC rules require that when a facility is used for both local and toll service, the CLEC must obtain a special access line rather than a UNE line. Using once again the example of his own firm, Dr. Selwyn testified:

> We have business, local business service provided by AT&T. We have a T-1 facility that AT&T is obtaining from Verizon in Boston. Because we use, we have more than five lines, and are mixing local and toll service on that facility, AT&T is required to obtain a special access line rather than an UNE facility from Verizon.
>
> So here we have a situation where our service would not even come up in Mr. Roberts' count of UNE loops because it isn't UNE loop, and yet there would be 100 entries E911 data base associated with our service. So, therefore, under his reasoning, he would conclude that the CLEC that is providing service to us is actually providing 100 lines to us.[19]

Based upon all those deficiencies, Dr. Selwyn concluded that "I don't think that any weight can be given to the E911 numbers as a matter of fact, separate and apart from the legal matter that I raised earlier."[20]

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16 T. 1607-08.
17 T. 1610.
18 T. 1610-1611
19 T. 1612.
20 T. 1613. (referring to a possible violation of Section 222(b) of the Telecommunications Act).

Finally, to further illustrate the point, Dr. Selwyn provided some calculations to debunk Verizon's attempt to explain away the difference between its calculation of CLEC line penetration in Maryland and the FCC's calculation of CLEC lines. The disparity between the number of CLEC lines identified by Verizon witness Roberts and the 4 percent of CLEC lines identified by the FCC in its report is very easily explained. As Dr. Selwyn testified, Verizon witness Roberts testified that the difference was the result of the fact that there was underreporting in the FCC data because the CLECs with less than 10,000 were not included.[21] Using a simple mathematical calculation, Dr. Selwyn was able to show that at best, the underreporting relied upon by Mr. Roberts to explain the difference between his E911 database results and the FCC report amounts to a little over 43,000 lines.[22] As Dr. Selwyn testified:

> You cannot attribute 300,000 lines as Mr. Robert's was attempting to do, to the small CLECs that weren't reporting to the FCC. You can at best attribute about 43,000 lines."[23]

The point of all these mathematical exercise is of course to show that "if you add up these numbers, [the Commission should] conclude that there is almost no actual facilities- based activity in Maryland where the carrier is providing the loop... .[24] Therefore, as Verizon's reliance on the E911 database as an indicator of local competition has been totally discredited, the Commission must decide whether the paltry level of local exchange competition identified in the FCC report is of a sufficient nature upon which the Commission can rest a decision that granting Verizon's Section 271 approval is in the public interest. People's Counsel believes that the exceedingly low

[21] T. 1615.
[22] See T. 1616 through 1618
[23] T. 1618

level of actual competition shown in that report should provide a warning that local competition in Maryland is neither economically viable, sustainable nor irreversible. This does not bode well for competition in general, for so long as Verizon continues to control the lion's share of the <u>local</u> market. it is well positioned, once it receives long distance authority, to remonopolize the long distance market in Maryland, undoubtedly resulting in higher prices to future Marvland long distance consumers. Surely, this result is contrary to the public interest.

D. Verizon's Use Of the E911 Data Base To Bolster Its 271 Application Should Be Rejected As Bad <u>Public Policy</u>

Verizon's use of the E911 database is suspect for an entirely independent reason. Using the E911 database for the purpose of determining the level of competition in Maryland, may violate Section 222(b) of the Telecommunications Act.

As administrator of the E911 data base, Verizon is in a unique position vis-à-vis its competitors. Because Verizon administers the data base and can view its contents through a secure interface, Verizon has the ability to access data about its competitors regarding not only the number of their lines, but the specific geographic location of their lines. It can be argued that Verizon's use of the database to extract such important market information may be evidence of an abuse by Verizon of its monopoly position.

Section 222(b) of the Telecommunications Act provides that "a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunication service shall use such information *only for such purpose* and not use such information for its own marketing

[illegible]

purpose."[24] In this instance, carriers provide Verizon the number of access lines being provided by them as well as the geographic location of each line for purposes of inclusion in the E911 database -- the purpose of which is to provide emergency response agencies with the ability to identify the physical location of an individual who dials 911.[25] For Verizon to use that CLEC E911 information in this proceeding, for the purpose of bolstering its own competitive position, seems to be a prohibited use of the information under Section 222(b) because the provided information is not being used by Verizon for the purpose for which it was provided by the CLECs. As Dr. Selwyn testified, "the very fact that Verizon, for example, in Mr. Roberts' testimony is actually citing E911 results on a carrier-by-carrier basis, is in itself a demonstration that you have a unique situation where Verizon is basically, in my opinion, abusing its role as administrator by obtaining information about its competitors that it is able to use for reasons having nothing whatever to do with E911."[26] Such abuse should not be countenanced. People's Counsel recommends that the Commission reject Verizon's use of the E911 information as a result.

E. The Number Of Completed Collocation Arrangements Is Not An Accurate Indicator of CLEC Competitiveness

While Verizon claims that it has a significant number of existing in-service collocation arrangements as an indicator of the existence of and potential for facilities-based competition, Dr. Selwyn was able to point out that this measurement misrepresents the actual number of CLEC's providing telecommunication services in Maryland. First, reliance upon collocation arrangements to show the strength of potential competition is

[26] See Tr. 1000; Selwyn Direct, p. 26, fnt. 32

unreliable as an indicator in the face of a telecommunications market where CLECs *are* failing in large numbers. As Dr. Selwyn testified, "of the 460 traditional physical collocation arrangements in existence in January 2002, only 283, or 62 percent were still in use in April 2002. Similarly, of the 559 cageless collocation arrangements in existence in January 2002, only 213, or 38 percent, were in use in April."[27] Given the turmoil in the telecommunications industry and the fact that significant carriers are either in bankruptcy or contemplating bankruptcy, it is unreasonable to continue to believe that collocation arrangements will provide a reliable indicator of competitive providers in Maryland.

Additionally, Dr. Selwyn pointed out that many of the collocation arrangements cited to by Verizon are probably being used by data CLECs providing digital subscriber line (DSL) services.[28]

Furthermore, additional opportunities for CLEC expansion or growth have been limited due to mergers among the ILECs.[29] Dr. Selwyn testified that these mergers have "done nothing but create larger, better financed fortress bottleneck monopolies" which cannot help but impede the ability of less well financed new entrants to get a toe hold in the market.[30]

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[26] T. 1603.
[27] Selwyn Direct, p. 32.
[28] *Id.*, p. 33.
[29] See e.g., Selwyn, pps. 36-43
[30] See Selwyn Direct, p. 40.

F. Verizon Cannot Show That Its Entrance Into The InterLATA Long-Distance Market Will Provide Benefits To Consumers Such That Its Application Could Be Viewed As Being In The Public Interest

Verizon has engaged in a public relations campaign to bolster its Section 271 Application. For example, as part of its press release announcing the filing of its Application, Verizon referenced a study issued by the Telecommunications Research and Action Center (TRAC) which claims that consumers in Maryland will benefit from long-distance entry. Dr. Selwyn showed that this study, as well as other studies that are available in Maryland, "grossly exaggerates the savings consumers might plausibly obtain from RBOC's long-distance entry."[31] Additionally, Dr. Selwyn, discovered, using publicly available information, that TRAC is not the independent "consumer advocate" group it portrays itself as but rather is closely associated with a Washington D.C. public relations firm whose clients include Verizon, Qwest, SBC, Bell South and the United States Telephone Association.[32]

The TRAC study purporting to show benefits to Maryland consumers, is seriously flawed because TRAC compares *specific* Verizon long-distance pricing plans with *averages* of prices being offered by other non-BOC carriers. As Dr. Selwyn testified:

> The correct comparison-and one that TRAC did not perform- would be to compare the best Verizon pricing plan with the best non-Verizon plan applicable to the particular customer's calling volume and other attributes. Instead, what TRAC did was to determine a "range" of savings based upon "low-end" "high-end" estimates of what customers might have been paying to carriers other than Verizon.[33]

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[31] Selwyn, p. 16.
[32] *Id.* p. 17.
[33] *Id.* p. [illegible]

Instead, Dr. Selwyn demonstrated that "Verizon's pricing plans, when appropriately applied to consumers based upon their actual calling requirements and assuming reasonable rational and informed customer behavior, indicate that Verizon's entry into the long-distance market provides consumers with *no competitive gain whatsoever*."[34]

Furthermore, the Progress and Freedom Foundation (PFF) paper **referenced by** Dr. Selwyn does not support the view that consumers stand to benefit by Verizon's entrance into the long-distance market. First, as with **TRAC,** the Progress and Freedom Foundation is a beneficiary of financial support from Verizon as well as from SBC and Bell South. Dr. Selwyn criticizes the **PFF** paper as naïve and superficial for its reliance on industry trends identified by Trade Association press releases and CLEC marketing materials. In Dr. Selwyn's view, the Commission should place no reliance on PFF's predictions as a basis for decision in this proceeding. Dr. Selwyn recommends that the Commission base its decision on what is known or knowable at present. As Dr. Selwyn put it, "if the growth trends for CLEC's were very stable and secure, it might be reasonable to make limited projections into the future. However, as the events of recent months highlight, it is very hard to know how various competitors or industry segments will perform prospectively. Since well before the 1996 Act, RBOC economists and other spokespersons have been overstating the pace of growth in local competition."[35] Therefore, as with the TRAC study, the Progress and Freedom Foundation study is of

[34] *Id. p. 55. Dr. Selwyn provided many examples in his testimony to demonstrate the flaws in the TRAC* study. People's Counsel urges the Commission to review Dr. Selwyn's testimony at pps. 52 through 58 for those particular examples.

[35] *Id.*, p. 62.

little reliable use to the Commission in making a determination of whether consumers will benefit by Verizon's entrance into the long-distance market.

G. **The Potential For Remonopolization Of** The Long **Distance Market If Verizon** Receives Section **271 Authority Is** Further **Evidence That** Veriron's **<u>Application Should Be Rejected</u>**

It does not take a great leap in logic to conclude that the larger Verizon's share of the local market, the greater would be its opportunity to preemptively market its affiliate's long distance service to its local service customers. This is particularly true when customers have no choice but to contact Vcrizon for local service and Verizon retains the right to market long distance service to its customers. This in effect blocks other long distance providers from marketing and obtaining those customers.[36]

Dr. Selwyn conducted a study to actually quantify the impact of Verizon's joint marketing advantage. The methodology of Dr. Selwyn's study is described in his testimony at pps. 66-76. The results of the analysis are interesting. For example, Dr. Selwyn's "Scenario 1" demonstrates that "if the current Verizon *local service* market share of 96.7% is maintained throughout the five-year period covered by the model, at the end of that time Verizon Long Distance will have captured some 71.1% of all Maryland residential subscribers in Verizon service territory."[37] Under his Scenario 3 (in which CLECs are relatively successful in capturing local customers) at the end of the 5th year,

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36 See, e.g., Dr. Selwyn direct, p. 64-76

37 *Id.*, p. 68

"Verizon's local market share would then be 66.7%, but its long distance market share would be comparable to that of the largest IXC today, at 59.5%."[38]

In response to questions from Commissioner McDonald, Dr. Selwyn pointed to results from Connecticut to show that when there are large segments of a state in which customers do not have competitive choice and the incumbent enjoyed a joint marketing opportunity, then customers find themselves "in the situation where they will face pre-empted marketing effort by the incumbent... ."[39] Dr. Selwyn went on to testify that:

> ...reported figures that are coming now from the, from both Verizon and SBC, indicate enormous success in achieving market share, particularly in the residential segment, based upon that joint marketing, and the opportunity to exploit the inbound channel.
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> SBC, for example, just within the past several weeks reported that their market share in Connecticut, which has had long-distance entry for the longest time because Connecticut was not, is not a state that required a 271 approval for SBC... . has now indicated that they have 62% share of the long-distance market. And suggested that that was probably the sort of target level that they were expecting nationwide once their service was rolled out over time. In my view, the fact that they've been able to amass that kind of market share is precisely due to the combination of their extremely high share of the local market which exists particularly in the residential sector everywhere in the country, and in the fact that they have the ability to jointly market long-distance before the customer has an opportunity to shop around for an alternate provider.[40]

Such remonopolization clearly cannot be viewed as in the public interest. As Dr. Selwyn noted,

> As long as Verizon is permitted to exploit its captive relationship with the vast majority of local service

38 *Id.*, p. 69.
39 T. 1627
40 T. 1627-1629.

> customers to market and sell its affiliate's long-distance services. Verizon long distance shares will grow rapidly and nonBOC IXCs will suffer a precipitous decline in customers and demand. Faced with such losses, IXC costs will rise and at least some IXCs will be forced to exit the business. Further exacerbating the situation and affording the BOCs an even greater opportunity to remonopolize the nation's long-distance market. [41]

In or r to combat this situation, People's Counsel recommends that i e Commission does recommend approval of Verizon's Section 271 Application, the Commission should include restrictions on Verizon's use of the inbound channel to market its long distance service. A fuller discussion of recommended restrictions will be found in Section H *Supra.*

II. Verizon Has Failed To Comply With The Section 272 Separate Affiliate Requirements

People's Counsel acknowledges that this Commission is under no specific obligation to review Verizon's compliance with the requirements of Section 272. However. People's Counsel believes that as part of its public interest analysis, and consistent with State Law, the Commission should review Verizon's compliance with that Section.[42]

The purpose of the Section 272 Separate Affiliate Requirement and code of conduct is to forestall the potential for discriminatory and anticompetitive conduct that could arise out of Verizon's ability to extend its market power in the local

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[41] Selwyn, p. 73-74.

[42] Legislation that became effective on October 1 of this year bolsters the Commission's authority to adopt and implement policies governing the development of competition in the Maryland telecommunications market. House Bill 1164 modified Section 8-501 of the PUC Article to allow the Commission to "adopt policies and regulations governing the development of competition." These policies should include adopting measures to prevent affiliate abuse by Verizon.

telecommunications market into the adjacent long-distance market. To ensure that Verizon, once it receives Section 271 authority in the state, maintains the appropriate competitive safeguards, the Act sets out various structural and procedural requirements in Section 272. For example, Section 272 requires that Verizon establish a separate affiliate to provide interLATA service, limits how Verizon and its affiliates can conduct joint marketing, sets requirements for use of employees among affiliates and requires a joint state federal biennial audit. The Act specifically requires that, when reviewing that audit, the *State* consider "particularly whether such company has complied with the separate accounting requirements under subsection (b)."[43]

The FCC anticipated a broad role for state commissions in that audit process. The FCC noted that "the Commission and the State need to oversee the scope, terms and conditions of the biennial audit Without such oversight, it would be uncertain whether the audits would achieve their primary objective of ensuring that the carriers, have, in fact, complied with Section 272 of the Act... ."[44] Because the Maryland Public Service Commission will be involved in that audit process if Verizon obtains Section 271 authority, People's Counsel recommends that the Commission consider at this time whether Verizon has provided sufficient plans for compliance with the requirements of Section 272. An examination of the requirement of Section 272 either at this time or in the very near future, will prevent Verizon from being allowed a "free ride" during the critical first years of its interLATA operation. Unless requirements compliant with Section 272 are examined and put in place shortly, Verizon will have an opportunity in the time before the audit to engage in cross-subsidization and discriminatory activities.

[43] See 47 U.S.C. 272(d)(1).

As Dr. Selwyn testified in response to questions from Chairman Riley, the Commission has a number of options regarding how it would ensure that Verizon complies with Section 272(b) requirements. For example, the Commission could adopt and enforce cost allocation rules.[45] Additionally, the Commission could adopt various imputation rules and consider them as part of any ratesetting requirement.[46] As Dr. Selwyn testified:

> You could consider it [cost allocation or imputation] in review of the Price Cap Plan for Maryland and other things of that sort, separate and apart from the existence of a separate affiliate or what the FCC ultimately does with respect to any audits or sunsets or whatever.
>
> So I think the Commission not only has that authority, I think the Commission has an obligation to address those issues, and to focus on that. I think one of the things you can do in this case is to consider, when you issue your order and consultative report is to identify specific things that you think Verizon should be required to do as part of the conditions for approval, and if nothing else, simply identify to Verizon if they go into the long distance business you are going to require them to do these things in Maryland.[47]

In fact, the FCC has found that State Commissions may impose any requirements on BOCs seeking Section 271 authority they deem necessary short of denial of entry into the interLATA market.[48]

The importance of putting in place and enforcing safeguards can be determined by an examination of what has already happened in the market. As Dr. Selwyn noted, "empirical evidence from states with Section 271 Approval indicates that, as currently

[45] See Re Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, para. 197 (1996).
[46] See e.g. T. 1639.
[47] See e.g. 1639-40.
[48] T. 1640

applied. Section 272 fails to prevent discrimination and anti-competitive conduct by the BOC on behalf of its long-distance affiliate."[49]

It is instructive to review what has occurred in other Verizon states. For example, Dr. Selwyn noted that, based upon Verizon's various Section 272(b)(5) Affiliate transaction postings on the Company's website and its first Section 272 audit report in New York, it has become apparent that the interactions between Verizon and its long-distance affiliates raise serious questions as to the actual extent of "separation" that actually exists between these two supposedly separate corporate entities. The New York audit points to a significant portion of interactions related to "joint marketing," joint account administration, and combined billing of Verizon's local and long-distance services. As Dr. Selwyn testified "each of these activities is undertaken by the BOC (Verizon) and its affiliate as if, for all practical purposes, Section 272 did not exist." [50]

1. Evidence From New York Indicates That Verizon May Fail To Comply With The Specific Requirements Of Section 272(b) Regarding Joint Marketing Of Local And Long Distance Services

While the Telecommunications Act does not prohibit Verizon jointly marketing its long-distance service with local service, the Act does make such joint marketing subject to all of the separate affiliate provisions set forth in Section 272(b). Therefore, any joint marketing must be performed on an "arm's length" basis, and the long-distance affiliate must pay Verizon the fair market value for all joint marketing services. Dr. Selwyn's analysis shows that Verizon Long-Distance has not been paying the Verizon

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[49] See 11 FCC Rcd 21929 (Non-Accounting Safeguards Orders)
[50] Selwyn Direct, p. 85-86.
[51] Selwyn, p. 89.

BOCs the fair market value for joint marketing services in other states. One example is Verizon Long-Distance payments to Verizon-New York for customer acquisition/joint marketing services. Verizon Long-Distance pays only $7.71 per contact. As Dr. Selwyn testified: the magnitude of such payments is woefully short of the fair market value of these services and of the customer information that is being beneficially furnished by the BOCs to their affiliates."[51] Under questioning by the Commissioners, Dr. Selwyn noted that the actual fair market value of those customer acquisitions and joint marketing services are " in the hundreds of dollars on a per customer basis when you include these promotions and advertising and direct mail and divide that by the number of successes that they [the long-distance companies] achieve. And yet Verizon prices this supposedly arms length price, fair market value price at $7."[52] Clearly, such unequal treatment has the potential to adversely affect the development of competition in Maryland

The marketing advantage enjoyed by Verizon from use of its "inbound channel" to sell their affiliate's long distance service to its local service customers allows Verizon the ability to crush its competitors. Dr. Selwyn quoted a Credit Suisse First Boston (CSFB) report which noted this dominance:

> We've been watching the industry for almost 20 years and we have never seen consumer share gained at the rate of Verizon in New York and SBC in Texas (the former 20% share in 17 months and the latter 18% share in 6 months)."

[51] Selwyn, p. 92.
[52] T. 1637; see also Selwyn Direct, p. 94-96 (Dr. Selwyn noted that the extensive advertising, telemarketing, direct mail and special promotion pursued by long-distance companies as marketing strategies amounts of hundreds of dollars per customer acquired. In fact, Dr. Selwyn noted at least one analysis that put the cost at between $300 and $600 in sales support, marketing and commissions per customer acquired).
[53] Selwyn, p. 97 (quoting CSFB February 8, 2001 Report).

2. Verizon's Long-Distance Affiliate Could Receive An Unfair Advantage Due To The Pricing Of <u>Billing And Collection Services</u>

Verizon's provision of joint local and long-distance billing as well as tie-in discounts for purchases of combinations of local and long-distance services provides another example of how its affiliate benefits vis-à-vis its competitors. The Verizon BOC is going to print and mail a local service bill and process the payments it receives. However, it can include the Verizon Long-Distance charges on its own billing statements at little or no cost because such inclusion would not require additional envelopes and rarely would require additional postage. Additionally, the cost of processing the payment is not affected by the inclusion of long-distance charges. If this transaction were truly at "arms length" Verizon Long-Distance would be recording the cost of this billing and collection on its own books. However, as Dr. Selwyn testified, it appears that Verizon Long-Distance actually was recording the lower costs of the consolidated billing on its books. On the other hand, long-distance providers that are not affiliated with Verizon, incur real out-of-pocket costs for billing and collection functions.[54]

3. The Commission Should be Concerned That Verizon's Long Distance Affiliate Will Have The Ability To Shift The Costs Of Recruiting And Hiring Qualified Employees By Merely Recruiting Verizon's Local <u>Service Employees</u>

Section 272(b)(5) requires that all goods and services offered by the local company to the Section 272 Affiliate must be reduced to writing, compensated according to the FCC's Affiliate Transaction rules, and made available to all competitors on the same terms and conditions. However, there is a distinct possibility that employees may be transferred from Verizon operating companies to Verizon Long-Distance affiliates and that none of those requirements will be followed. As Dr. Selwyn testified, "by an outright transfer of employees from rhe Verizon BOC to Verizon Long-Distance, Verizon Long-Distance also has access to a highly trained and experienced workforce it obtains without recruitment or training coats."[55] This Commission could avoid such a result by following the lead of the California Public Utility Commission which required that for any Bell Operating Company employee transferred to an affiliate, the affiliate gains intangible value from the BOC and tlic BOC is therefore entitled to compensation for that value.[56] The California PUC adopted a 25% "cmployee transfer fee" to be applied against the annual salary of any Pacific Bell Employee that transferred to an affiliate. Such on approach should be considered in Maryland

4. Summary of Recommendations Regarding The Consumer And Competitive Safeguards of <u>Section 272</u>

In order to avoid some of the abuses identified above, People's Counsel recommends that the Commission should. at a minimum, consider directing Verizon-Maryland to implement the following Section 272 practices.

- The Commission should prohibit improper self-dealing by requiring that Verizon Marvland file with the Cornmission and make available for public inspection all fair market value studies undertaken, including a study estimating the fair market value of joint marketing and customer acquisition services, and the complete process and data used to determine

[55] See Selwyn, p. 102
[56] Selwyn, p. 107.

the fully distributed cost for services priced under either of these two methods. If Verizon fails to make such a filing, it should not be permitted to provide the service in question. In addition, the Commission should direct the auditor, during the joint federal-state biennial Section 272 audit proceeding, to examine all of these filings, not just a random sample.

- The Commission should apply non-solicitation rules to the transferring or movement of employees from Verizon Maryland to Verizon Long Distance. While employed at Verizon, no employee of any Verizon entity should request or solicit an employee of Verizon Maryland, or cause another employee of Verizon Maryland to be solicited, to transfer or move employment from Verizon Maryland to Verizon Long Distance. Verizon should not post in Verizon Maryland Offices or on Verizon electronic medium, or allow Verizon Long Distance to post in Verizon offices or on Verizon intranets or other electronic media, advertisements for or notices of availability of Verizon Long Distance positions.
- The Commission should find that, as long as Verizon Maryland has market power in the local market, it is able to artificially inflate the "Prevailing Market Price" of billing and collection services offered to competing IXCs. The Commission should require that Verizon Maryland price billing and collection services provided to Verizon Long Distance at the lesser of fully distributed cost or fair market value, and made available to competitors at the same price.

[?] See Selwyn, p. 107

- The Commission should strengthen the affiliate transaction rules by directing the affiliates to operate such that the management of each entity (Verizon Maryland and Verizon Long Distance) each make all affiliate transaction, service offering, and pricing decision only with respect to the bottom line of each respective entity. For example, Verizon Long Distance should not be permitted to ignore the per-account billing fees it pays to Vcrizon Maryland when offering service plans that do not include fixed or minimum monthly charges. Such plans, ifoffered by Verizon, would effectively negate the "arm's length" relationship by substituting the actual out-of-pocket costa to the parent Verizon Corporation for the incremental long distance billing (which are minimal) for the "payments" that Verizon Long Distancc is nominally required to make to Verizon Maryland for tlic billing services. Where the apparent corporation balance sheet is the only consideration, Verizon Maryland and Verizon Long Distance will continue to cost-shift wherever possible so as to establish false competitive prices or prevent Verizon Maryland from earning income from affiliate transactions that could ultimately be used as a basis for Vcrizon Maryland *to* seek rate increases for its regulated monopoly services either by revising its price cap structure or by some other "extraordinary" form of "relief."

I. Since Local Competition For Residential Services Has Failed To Materialize In Maryland, The Commission Should Approve Verizon's Application Only For Business Services

It is clear from the evidence provided in this proceeding that the state of local competition in Maryland in general is less than desirable. However, the state of local competition for residential services can only be characterized as dismal. As noted previously, CLEC market share for residential and small business customers is "at a miniscule 1.6% down from 2.1% for the period ending June 30, 2001."[57] There may be any number of reasons why, despite legislative and regulatory efforts at both the federal and state levels to encourage the development of effective competition in the local residential market, Verizon Maryland still maintains overwhelming dominance in that market. As Dr. Selwyn testified, even this extremely limited amount of local residential competition may be in serious jeopardy due to the downturn in CLECs' stock performance, the ever increasing number of CLEC bankruptcies and a failing economy. This is serious cause for concern as noted throughout this brief.

Since competition for local residential service in Maryland ranks near the bottom of all states, People's Counsel proposes that this serious problem deserves a radical solution. Therefore, People's Counsel urges the Commission to seriously consider recommending to the Federal Communications Commission that Verizon receive Section 271 authority for business services only.

On its face, Section 271 does not appear to prohibit such an approach. In fact, Section 271 provides that "a Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region

[57] Selwyn, p. 25

states (as defined in subsection (i)) if the Commission approves the application of such company for such state under subsection (d)(3)." By its terms, the statute references only the "operating company;" however, the statute makes no distinction between or among services provided by that company. Because the statute on its face does not distinguish among services, this leave open the possibility that the Commission could recommend Section 271 authority for Verizon Maryland but limit that authority to the provision of long-distance for business customers only. Such a restriction would allow extra time for local competition to attempt to take hold in the residential market. Section 271 does not affirmatively appear to prohibit such a separate service analysis; therefore, People's Counsel recommends that the Commission consider this approach.[58]

III. CONCLUSION

Given the acknowledged dismal level of local competition in Maryland (especially among residential customers) along with the marketing advantages that Verizon will have in selling its long-distance services to captive residential and small business subscribers, the Commission should conclude that granting Verizon Maryland authority to enter the Maryland long-distance market is not in the public interest. However, should the Commission decide that there is a sufficient level ofcompetition for business services, People's Counsel recommends that the Commission grant Verizon its section 271 authority for those business services only and withhold such an authority for

[58] For example, in *Competitive Telecommunication Association v. Federal Communications Commission et. al.*, recently decided by the United States Court of Appeals for the District of Columbia Circuit, the Court noted that "in *United States Telecom Association v. Federal Communications Commission* (citations omitted), we clearly found in the FCC an authority to make distinctions that were based on regional differences or on customer markets....if these are permissible, it is hard to understand why the Act would not allow restrictions keyed to a specific "service" of the requesting carriers." *Competitive*

the residential market. Allowing Verizon Maryland full access to the long-distance market in Maryland will lead to the inevitable remonopolization of the Maryland long-distance inarkct. That failure of competition will ultimately lead to higher prices and fewer choices for Maryland consumers.

Furthermore, should the Commission recommend full Section 271 approval, the Commission should recognize the ability of Verizon to operate its local and long-distance operations in an effectively integrated way. Although Section 272 of the Telecommunications Act requires structural separation of Verizon and its Section 272 long-distance affiliate for the first three years following its Section 271 approval, the Commission should keep in mind that in those regions where Verizon has been granted interLATA authority, the Company "consistently operates in a manner that simulates full integration while purporting to "coniply," albeit facially, with the separate affiliate requirement. Through cross subsidies and predatory pricing in the form ofjoint marketing, billing, and product tie-ins. Verizon Long-Distance is able to leverage the Verizon Maryland 96.7% *local* market share into pricing plans that cannot be possibly matched by its IXC competitors, even by competitors offering a bundle of local and long-distance service."[59] Therefore, the Maryland Commission must ensure that Verizon Maryland agrees to comply in a meaningful way with the Section 272 Code of Conduct. The Commission should also consider directing Verizon Maryland to implement the consumer and competitive safeguards listed in Section H.4 of this brief. Adoption of those safeguards will help to prevent exploitation of Verizon's affiliate relationships to the detriment of its competitors and customers alike

Telecommunications Association. No. 00-1272, 2002 U.S. App. LEXIS 22407 at 22410 (decided October 25, 2002).

Continued for signatures:

Respectfully submitted.

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[79] Selwyn Direct, p. 119.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 18th day of November, 2002, that a copy of the Brief of the Maryland Office of People's Counsel has been either hand-delivered or sent by overnight delivery to all parties of record.

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STATE OF MARYLAND

PUBLIC SERVICE COMMISSION

December 16, 2002

Mr. William R. Roberts
Presi'dent
Verizon Maryland Inc.
Floor 8-E
1 East Pratt Street
Baltimore, Maryland 21202

Rc: In the Matter of thc Review By the Commission Into Verizon Maryland Inc.'s Compliance with the Conditions of 47 U.S.C. §271(c), Case No. 8921

Dear Mr. Robens:

On April 12, 2002, Vcriron Maryland Inc. ("Verizon") filed its rcquest in Maryland for the Maryland Public Sen-icc Commission ("Commission") to consider the facts rcgarding Verizon's decision to enter the long distance market via a §271 application ai the Federal Communications Conimission ("FCC"). This request followed two years of testing of Vcrizon's wholesale operations support systems ("OSS") in Virginia and relaicd corrcctive actions to thosc systems. The April 12th filing also reflected the fact thal Vcriron had requested the Maryland Public Service Commission to refrain from implementing Maryland specific OSS testing and await the outcome of the Virginia test rcsults.[1]

The Maryland Commission's agreement with thc above rcquest ensured that any §271 consideration here would of necessity follow Virginia's consideration as our anchor state, Verizon Virginia's application to the FCC and FCC approval. Thus. this process ensured, as well. that Maryland would be one of the last Venzon states to consider a §271 application. The FCC has permitted applicants for §271 authority to rely upon OSS evidence from another state, referred to as thc anchor state, provided the FCC has already approved the anchor statc's §271 Application, or is given the opportunity to review the anchor statc's OSS simultaneously, such as in a multi-state filing.

During the past several months, the Maryland Commission has conducted a detailed examination to determine the status of Verizon's compliance with §271(c) of the

[1] Maryland agreed to do so based upon Vcrizon's assertion that the Maryland and Virginia wholesale OSS art. comparable. and in so doing would avoid duplicative testing and unnecessary cost to Verizon. Other parties disagreed with this position.

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Telecommunications Act of 1996 ("1996 Act"). 37 U.S.C. §271(c). In the course of this examination, the Commission received into evidence thousands of pages of documents regarding checklist compliance, testing, validation. the Virginia consultative report, transcripts from the Virginia proceeding and other issues, as well as testimony and briefs from the parties, including several competitive local exchange carriers ("CLECs") and the Office of People's Counsel. The Commission conducted five days of evidentiary hearings from October 28 through November 1, 2002. In addition, on November 4, 2002 the Commission heard live surrebuttal regarding the FCC's October 30, 2002 approval of the Verizon Virginia §271 application. Since Virginia was the anchor state for OSS testing for Maryland, the Maryland Cornmission was unable to act prior to such approval being received. Now with the FCC approval of Virginia's OSS having been granted, the hearings in this proceeding concluded, over 200 pages oF post-hearing briefs received and a transcript in excess of I700 pages reviewed, this Commission can now complete its expeditious review of this matter.

This Commission has a long history of fostering competition in the local market. At one time, Maryland was considered a national leader in the opening of telecommunications' markets to competition. Today, this Commission is greatly concerned about the State of Maryland's inability to build upon the initial gains achieved in opening the local market to competition and the apparent sluggish nature of local competition growth.

Maryland began opening the local telephone service market to competition in 1994. In *Re MFS Intelenet of Maryland, Inc.*, 85 Md. PSC 38 (April 25, 1994), this Commission granted MFS authority to provide telephone services in Maryland, approved the unbundling of links and ports and required Verizon (then Bell Atlantic-Maryland, Inc.) to provide for interconnection with MFS. In Phase II of that proceeding, the Commission set the rates, terms and conditions for interconnection between the carriers. *Re MFS Intelenet of Maryland, Inc. Phase II*, 86 Md. PSC 467 (Dec. 28. 1995).

The passage of the 1996 Act interrupted Maryland's course of action as it imposed new duties and new processes on state agencies with regulatory responsibilities over telecommunications carriers. Enactment of the 1996 Act required the Commission to reexamine previously resolved issues to ensure compliance with new FCC directives. Further. the new process removed this Commission's autonomy and forced the Commission to constantly revise its vision of how competition can and should be achieved in Maryland to reflect federal regulatory and judicial decisions.

The State of Maryland is no longer a national leader in telecommunications competition. To the contrary, according to the FCC Report on the status of local competition in the nation referenced in the record of this proceeding, CLECs in Maryland serve **4%** of the end-user switched access lines. while the national figure Is 10%.[2] Indeed, as of December 2001, the level of competition in Maryland had receded by a third from 6% to 4% and appeared to be regressing, joining South Carolina and Mississippi. Such a condition is not

[2] On December 9. 2002, following the conclusion of the hearings in this proceeding. the FCC issued an updated report on rhe **status** of local competition which updated the number of end-user switched access tines served by CLECs in Maryland to 6% and 11% nationally **as** of June 2002.

acceptable in Maryland after S years of effort. This situation no doubt results from federal actions but also from various Verizon operational issues, CLEC issues – financial and otherwise. and this Commission's delay in resolving our recent proceeding into the rates Verizon charges for wholesale unbundled network elements in Maryland.

Thus. Commission's consideration of the record developed in this proceeding shows the obvious need to improve the local competitive environment in Maryland. In order to ensure that local conipetition is sustainable into the future, the Commission directs Vcrizon to implement the requirements discussed below. The Commission finds that subject to Verizon complying with the conditions identified below, Verizon is technically in compliance with the §271 checklist as defined by the FCC. Furthermore, the Commission notes a number of concerns that must be addressed before the Commission can say that Verizon's entry into the Maryland long distance market is in the public interest. The Commission hereby conditions its recommendation to the FCC that Verizon's entry into the long distance market is in the public interest on Verizon addressing the concerns listed below in the manner ordered by the Commission.

1. Verizon's No Build Policy

This issue involves Vcrizon's provisioning of high capacity unbundled local loops. Several parties to this proceeding argued that Verizon improperly rejects CLEC orders for high capacity loops' when Verizon claims no facilities are available and construction is required. (hereinafter referred to as Verizon's "no build" policy). Based on the evidence in this case, the Commission believes that the impact of Verizon's "no build" policy pertaining to the availability of DS-I and DS-3 facilities for use by CLECs creates a bamer to local conipetition in Maryland.

Verizon contends that its policy is based on a decision of the United States Court of Appeals for the Eighth Circuit holding that unbundling only applies to the incumbent local exchange carrier's ("ILEC") existing network. Verizon also notes that the FCC is considering whether to modify these rules. Finally, Verizon claims that CLECs can cause Venzon to build new facilities if CLECs order them as special access facilities and pay the minimum term of two months' worth of charges for special access DS-1s and one year's worth of charges for DS-3s before converting them to UNEs. The CLECs contend that Verizon's policy results in new facilities costing CLECs more than if these facilities were provisioned at UNE rates.

The Commission does not dispute the effect of the Eighth Circuit decision, and the Coinmission is cognizant of the fact that the FCC has previously found that similar Verizon policies in other states do not violate the competitive checklist. In this proceeding, however, the evidence supports the claim that Veriron's policy has the effecr of increasing CLEC costs and provisioning intervals which delay the CLECs provision of service to the end user. and as such creates a barrier to competition. The record suggests that a number of CLECs are

E.g.. DS-1 and DS-3 loops or other high capacity facilities. including interoffice facilities or entrance facilities.

unaware that the special access facilities which are ordered because of the lack of available facilities may be converted to UNEs after two months for DS-1s and one year for DS-3s. This conversion policy enables the CLECs to have access to the high capacity facility without the excessive cost of maintaining the facility at the higher special access rates indefinitely.

Therefore, as a temporary measure, the Commission finds that if a CLEC orders a DS-1 as a UNE with a request for automatic conversion, and Verizon does not provision it because of lack of facilities, Verizon shall convert the UNE order to a special access order and then convert the newly-built special access facility to a UNE automatically after the tariffed time has elapsed. This automatic conversion will only occur in those situations where the CLEC originally requested UNE facilities, and this request was denied by Verizon. Moreover, the FCC rules and limitations on converting special access to UNEs shall be followed for each conversion. Verizon shall put this revised ordering arrangement in place within four months.

The Commission's concerns pertaining to the effect of Verizon's "no build" policy on competition have been echoed in other Verizon jurisdictions, including Virginia. There, the Virginia State Corporation Cornmission ("VSCC") has instituted a proceeding to consider this issue, and the practice is also under consideration in the FCC's Triennial Review. This Commission will actively monitor both proceedings and upon their conclusion take further action as may be necessary.

Finally, the Commission is concerned about the limited amount of information Verizon provides a CLEC when no facilities are available. Verizon is directed to identify to the CLEC the reason for each no facilities finding.

2. Dark Fiber

Dark fiber, analogous to unused copper loop or transport facilities, is fiber that is in place but has not been activated through the connection of the electronics/photonics to carry communications services. Dark fiber is useful to local exchange carriers in a variety of ways including the provision of advanced services or services offered over high bandwidth. Dark fiber can also be cost effective and can result in economies of scale being achieved by CLECs. In accordance with the FCC's rules and regulations, ILECs must make dark fiber available to CLECs pursuant to section 251(c)(3) of the Act. The Commission believes that the record in this case suggests the lack of accessible information from Verizon to CLECs prevents CLECs from identifying and locating existing dark fiber within Verizon's Maryland network. Further, it appears that the CLEC's inability *to* reserve or order dark fiber while a request for collocation arrangement is pending creates an additional barrier to the development of local competition in Maryland.

According to Verizon, the FCC addressed the second issue noted above in its recent Virginia Consolidated Arbitration Order. **As** a result, Verizon is now required in Virginia to permit CLECs to order the desired dark fiber ten business days after the CLEC requests a collocation arrangement. The Commission hereby directs Verizon to implement this policy in Maryland. Thus, CLECs will be permitted to order dark fiber and collocation arrangements in this manner. The Commission believes that this new requirement will advance the development of competition for advanced services in Maryland, such as high speed data access.

With regard to the issue of whether Verizon provides adequate information to CLECs so that they might locate dark fiber, Verizon contends that the Company has improved this process by providing alternative routing to a requesting CLEC. While this change is a step in the right direction, it represents only a minimal improvement at best. The Commission hereby directs Verizon to continue to provide this alternative routing. Furthermore, the Commission directs Verizon to provide to a CLEC upon request, central office and all related termination points for all fiber facilities for any office or group of offices at which the CLEC is considering ordering dark fiber. This will enable CLECs to have access to more accurate information pertaining to the availability of dark fiber on routes where fiber is actually installed and **will** operate to remove a barrier to competition by improving access to UNEs and the quality of information available to CLECs.

3. Geographically Relevant Interconnection Points ("GRIPS")

Verizon has entered as evidence in this proceeding a Model Interconnection Agreement containing terms which require CLECs to establish with Verizon one or more GRIPs or virtual geographically relevant interconnection points ("VGRIPs") at designated or agreed upon points within each Local Access and Transport Area ("LATA") of Venzon's network. This Commission previously considered this proposal in Case No. 8887, the Sprint Communications Co., L.P./Verizon Arbitration, wherein the Commission rejected Verizon's GRIPNGRIP proposals. The proposed language in the Model Interconnection Agreement is substantially the same as the language proposed by Verizon during the Sprint Arbitration as well as the language rejected by the FCC in the Virginia Consolidated Arbitration. This Commission's position on this issue remains unchanged. The Commission does not accept Verizon's GRIPs or VGRIPs proposals.

According to Verizon, its Model Interconnection Agreement has been modified to reflect the results of the FCC's Virginia Consolidated Arbitration Order. However, the Model Interconnection Agreement, which was dated prior to the issuance of the Virginia Consolidated Arbitration Order, was submitted as evidence in this proceeding. It does not reflect that change. The Commission hereby directs that Verizon shall not include GRIPs or VGRIPs provisions in any Model Interconnection Agreement in use in Maryland unless expressly authorized by this Commission or the FCC.

4. Billing

The Virginia State Corporation Commission's testing of Verizon Virginia's OSS did not separately test the accuracy of the Billing Output Specification/Bill Data Tape ("BOS/BDT") electronic billing system used by Verizon to generate bills for some CLECs.

The evidence in this proceeding demonstrates the importance of having a means of ensuring that Verizon provides CLECs with timely and accurate paper and electronic hills. The Commission notes that the negative effects of incorrect billings falls more heavilv on CLECs in a developing competitive market. The updated version of the Maryland Carrier-to-Carrier Guidelines, which enforces Verizon's perforniance, will become effective January 2003. They include metrics to measure important aspects of the billing process. These nietrics require 95% of all hilling claims to be acknowledged within two busincss davs and also require that 95% of these billing claims be resolved within 28 days after acknowledgement.

This Commission has concerns that, under the stress of high commercial volumes electronic billing may experience unanticipated difficulties. Therefore, in order for this Commission to monitor whether Verizon's electronic billing is working successfully under commercial applications and volumes, the Commission directs Verizon to alter the report dimensions to include CLEC aggregate, CLEC specific, Verizon affiliate aggregate and Verizon affiliate specific information on the billing metrics. Furthermore. the Commission directs the Maryland Carrier-to-Carrier Collaborative ("Collaborative") to examine whether different metrics adopted in New Jersey or other jurisdictions are appropriate for use in Maryland.

5. Entrance Facilities

Verizon Maryland is rcquircd by the I996 Act and the FCC to provide interconnection using all technically feasible means, including loop facilities. Verizon indicates that it will provide the types of interconnection such as that requested by Core Communications subject to appropriate amendments to the parties' interconnection agreement. According to Verizon. Core and some other CLECs are requesting **a** lesser form of interconnection which is not usually included in the interconnection agreements. The CLECs contend that this form of interconnection is necessary due to cost and provisioning time considerations. However. the Commission is pleased to note Venzon's willingness in Salisbury, Maryland to modify their previous policy by agreeing to interconnect with Core using its existing retail facilities in shared arrangement. This appears to remove a barrier to competition.

The FCC. in its interpretation of §251(c)(2), requires ILECs to provide interconnection that is "at least" equal in quality to that enjoyed by the ILEC itself. The FCC also requires ILECs to provide interconnection arrangements when the request is technically fcasible. subject to the terms of the parties' interconnection agreements. The Commission finds that it is technically feasible in some instances for Verizon to provide entrance facility interconnection to requesting carriers over loop facilities that are shared with Verizon's retail customers. rather than over conventional interoffice facilities.

Furthermore, Verizon shall be required to provide entrance facilities to requesting CLECs over existing loop facilities that are shared with Verizon's retail customers when capacity exists. The fact that a CLEC has requested the shared facilities demonstrates that the CLEC is willing to accept a lesser quality fomi of interconnection, and the performance limitations that such lesser quality interconnection may entail. In order to accommodate

CLECs seeking this form of interconnection, Verizon is directed to provide within thirty (30) days of accepting the conditions in this letter, a Model Interconnection Agreement amendment that can be adopted by CLECs seeking this form of interconnection with Verizon. This amendment shall be filed with and must be approved by the Commission. In addition, the Collaborative shall consider the issue of what metrics and **PAP** will apply in this situation. The Commission intends to monitor Verizon's provision of these facilities while the Collaborative is considering this issue.

The Commission is aware that many issues pertaining to interconnection trunking over loop facilities are under consideration in a separate Cornmission proceeding, Case No. 8881. The "Commission believes that this proceeding will resolve the majority of the issues pertaining to this aspect of entrance facilities, and determine if any barriers to competition exist.

6. Enhanced Extend Loops

An Enhanced Extended Loop ("EEL") consists of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport. The record in this proceeding suggests that Verizon's requirement that CLECs order the component parts of EELs in a sequential, rather than a coordinated, manner requires CLECs to pay for facilities before they are assembled in useful form. Thus, the process by which Verizon requires CLECs to order EELs creates unwarranted delay and additional costs.

Evidence presented in this proceeding demonstrates that **a** different ordering process currently is being used in Massachusetts. The Commission hereby requires that Verizon adopt in Maryland the tariffed Massachusetts EEL ordering and billing process. In order to accommodate CLECs seeking EELs, Verizon is directed to provide to the Commission, within thirty (30) days of accepting the condition in this letter, **a** Model Interconnection Agreement amendment that can be adopted by any CLEC seeking this form of UNE. This amendment shall be filed with and must be approved by the Commission.

7. Line Sharing

Line sharing occurs when an incumbent is providing, and continues to provide, voice service on a particular loop to which a CLEC provides or seeks access in order to provide xDSL service. According to the evidence presented. where an end user formerly was provided voice and data services by Verizon and chooses to receive its voice services from a CLEC, the end user will lose its data or DSL services from Verizon. The Commission is extremely concerned about this potential side effect on a consumer's decision to engage in choice – that is that the customer has to weigh its desire *to* maintain its DSL service against *its* decision to select a competitive local exchange provider. The Commission is pleased that Verizon has indicated that it is willing to enter into technical and business discussions with CLECs to attempt to arrange the relationships necessary to make such a consumer decision unnecessary. Such an offer addresses the Commission's public interest concerns pertaining to this issue. The Commission directs that Verizon make the offer available to all CLECs.

8. Metrics Replication

The Commission recognizes the need to ensure that Verizon's performance in providing service to CLECs continues and improves after Verizon enters the long distance market in Maryland. For this reason. the Commission approved both the Carrier-to-Carrier Guidelines and the Perforniance Assurance Plan (**"PAP"**). The Commission relies upon Verizon to provide the metrics reports that measure Verizon's performance and trigger the payments applicable under the **PAP.**

In order to better ensure the accuracy of these reports, Verizon is directed to tile exception reports refiling those metrics found to be in error. The metncs are to be corrected where the discovered error has an effect on the aggregate calculation of **PAP** remedies in excess of $1,000. This refiling shall occur in any instance where an error has been noted and corrected, regardless of what party discovers the error. After **six** months experience, the Commission will evaluate the need to continue this refiling requirement.

Furthermore, an ability to replicate the metrics reports provided by Verizon will allow the Commission to verify the accuracy of the metrics measuring Verizon's performance. The Commission shall require that Verizon, upon request of the Commission, hire a consultant who shall report directly to the Commission and shall train the Commission Staff on how to set up Maryland Performance Metrics replication. After the consultant is hired, Verizon shall provide Staff access to the Metrics Hotline to answer questions that may arise concerning the complementation of the Guidclines and shall cooperate with Staff to provide the data required to allow Staff to conduct replication as necessary to confirm the accuracy of Venzon's performance reports.

9. Directory Listing and Related Charges

The Virginia State Corporation Commission's OSS test did not include a meaningful examination of the accuracy of directory listings. The Commission is concerned that directory errors, both white and yellow pages, cause disruption to CLECs disproportionately. Thus, this Commission will be carefully monitoring directory listing errors, and will. if necessary, institute a special proceeding to address any concerns.

Further, testimony in this proceeding indicates that Verizon encourages CLECs to use the Directory Listing Inquiry prc-order query in order to ensure the accuracy of White Pages Listings. Verizon expressly stated that the Company currently does not charge for this inquiry. However. Verizon's Model Interconnection Agreement includes a charge for pre-order queries that includes the Directory Listing Inquiry. Since Verizon does not charge for this inquiry in Maryland, Veriron is hereby directed to amend its Model Interconnection Agreement used in Maryland within thirty (30) days of accepting the condition in this letter to indicate that no charges apply Furthermore, Venzon is hereby prohibited from instituting such a charge unless the Company first obtains the approval of this Commission.

10. Unbundled Network Element ("UNE") Pricing

The record in this proceeding supports a finding that establishing an appropriate level of UNE rates, in particular UNE-P, is essential in encouraging competitive entry into the Maryland market. In Case No. 8879, the Commission currently is completing a comprehensive resetting of UNE rates. The Commission intends to complete that case and issue a final order soon.

The Cornmission concludes that permitting Verizon to continue charging the currently effective UNE rates will not adequately promote full-scale market entry in Maryland. The Commission is particularly concerned about the loop rate and the unbundled switching rate. Accordingly, Verizon is directed to reduce these rates in the manner described below.

With regard to the UNE loop rate, the Commission requires Verizon to agree to reduce this rate from the current statewide average of $14.50 to a statewide average of $12.00. Additionally, Verizon is required to reduce its end-office per minute-of-use switching element 56% from $0.003800 per minute to $0.001676 per minute. Finally, for the other rates previously instituted in Case No. 8731, Phase II, Verizon is directed to adopt an interim rate-setting approach similar to that the Company employed and the FCC approved in Verizon Virginia's § **271** filing. The Commission directs Verizon to file a list of these rates with the Commission at the same time that the Company accepts this condition.

Moreover, the Commission also requires that Venzon commit to make the rates adopted in Case No. 8879 retroactive to the effective date of the reduced rates discussed above. The effective date of these reduced rates shall be within five days of the date of this letter.

Finally, in the event that the Order issued in Case No. 8879 is subsequently overturned an appeal, Verizon shall commit to reinstituting the rates set forth above until such time as the Commission reconsiders the decision rendered in Case No. 8879 to the extent required by the court.

11. Additional Policy Concerns

In addition to the conditions contained in numbered paragraphs 1 through 10 of this letter to which Verizon must respond, the Commission also has several policy concerns pertaining to competition within the State of Maryland.

A. Retention of the UNE-Platform

The Commission is extremely concerned that the FCC is considering modifications to the list of Unbundled Network Elements ("UNEs") and the availability of UNE-Platform ("UNE-P"). On November 20, 2002, this Commission, along 75 other State Commissioners from 33 other states, signed a letter to the FCC indicating support for continued State flexibility to maintain the UNE-P. The evidence in this proceeding demonstrates that increased competition in Maryland exists in large measure because of the availability of UNE-P. With very limited UNE-P and resale, Maryland achieved a local competition level of only 4% as of December 2001. In six months time, according to the FCC's most recent report on the status of local competition, Maryland went from 4% to 6% in the level of cornpetition due primarily to UNE-P. It appears that without UNE-P that growth vector will clearly be reduced. The Commission believes that any alteration from UNE-P as presently constituted would have significant adverse effects on the competitive market in Maryland. However, the Commission continues to assert that a FCC determination on these matters will not preempt further consideration by this Commission of the appropriate list of UNEs in Maryland.

B. §272/Affiliates

The Commission is concerned that Verizon's interactions with its affiliates are conducted on the same arms-length basis as its interactions with any unrelated CLEC, in order to ensure that local exchange customers do not subsidize the long distance customers. Consequently, the Cornmission intends to closely and actively monitor Verizon's compliance with the separate affiliate requirements and associated safeguards contained in §272 of the 1996 Act. In particular, the Commission will carefully review the biennial audit that Verizon is required to obtain and pay for under §272(d)(1), which audit must be submitted to this Commission in accordance with §272(d)(2). Furthermore, the Commission will participate fully in the biennial audit proceedings conducted by the FCC, and institute its own proceeding, if necessary

C. E911

The Commission has reservations about Venzon's use of the information contained in the E911 database, which does not appear to be consistent with the purposes envisioned by the legislature when the E911 program was established. The E911 database was developed for a very specific purpose, to enable law enforcement and emergency service workers to locate people in emergency, and sometimes life threatening, situations. The E911 database was not developed for use in the manner Verizon has attempted to use it in this proceeding. Because the E911 database was not developed to provide local exchange carrier line counts, its use for this purpose is questionable, as are the results obtained through the database. Furthermore, these results are not verifiable. The Commission encourages Verizon to develop a more transparent and verifiable source of statistics to estimate the level of competition.

CONCLUSION

Upon implementation of these various operational enhancements, the Commission believes that continued development of a competitive market will occur in Maryland. That outcome is surely the intent of the 1996 Act and the FCC's goal as well. Thus, the envisioned reward of long distance entry to Verizon Maryland should be afforded them. To move Maryland more toward the national average in local cornpetition is an outcome that will also surely benefit Maryland customers, both business customers and individual citizens alike.

Verizon is directed to respond to this letter with a written confirmation that Verizon will comply with the conditions set forth in items 1 through 10 above **prior** *to* filing its §271 application with the FCC.

By Direction of the Commission,

Catherine I. Riley, Chairman

J. Joseph Curran, III, Commissioner

Gail C. McDonald, Commissioner/

Harold D. Williams, Commissioner

cc: **All** Parties and Interested Persons of Record