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February 6, 2003

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

Attached for inclusion in the record of this proceeding is a compilation of statements by state commissions, most of which are already in the record, documenting the need for the continued availability of the platform of network elements.

In accordance with FCC Rule 1.49(f), this *ex parte* letter and the attachments are being filed electronically pursuant to FCC Rule 1.1206(b)(1).

Sincerely,

/s/

Christopher J. Wright
Counsel Z-Tel Communications, Inc.

Before the
Federal Communications Commission
Washington, D.C., 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Introduction and Summary

The New York State Department of Public Service (NYDPS) submits these comments in response to the Federal Communications Commission's (Commission) December 20, 2001 Notice of Proposed Rulemaking (NPRM) in the above captioned proceedings. The Commission seeks comments for the triennial review of its policies on unbundling network elements under § 251(c)(3) of the Act.[1] Comments are also requested on whether unbundling should be required for the deployment of broadband services; and, on what role, if any, the state commissions should play in implementing the Commission's unbundling rules.

The NYDPS supports the Commission's efforts to adopt an on-going process for reevaluating which unbundled network elements (UNEs) must be provided by incumbent local exchange carriers (ILECs) and shares the Commission's objective of encouraging facilities-based competition. In sum, the NYDPS believes that it is premature to remove the UNEs that make up

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (the Act).

the UNE-Platform (UNE-P)[2] because competing local exchange carriers (CLECs) will be "impaired"[3] in their ability to compete without the availability of the UNE-P.[4]

Moreover, the Commission should not limit the required unbundling of bottleneck facilities used for the provisioning of "advanced services" (i.e., high-speed Internet access) as long as the ILECs control these facilities. Finally, the Commission should continue to correctly implement § 251(d)(3) of the Act, which permits the states to add elements to the national list of UNEs and to adopt policies that reflect local market conditions provided state requirements are consistent with the Act.

Background

The NYDPS has a history of eliminating barriers to the development of a competitive local exchange market in New York State. New York's local competition policies date back to the 1980's.[5] Most recently, the NYDPS dramatically reduced wholesale UNE prices[6] and approved a new incentive plan (Plan) for Verizon New York, Inc. f/k/a Bell Atlantic-New York (Verizon).[7]

Among other things, the Plan provides an incentive to stimulate competition for small business customers (defined in New York as customers serving 18 lines or less) wherein Verizon agrees to offer UNE-P for the same period and at the same prices as are available to CLECs

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[2] The UNE-P consists of the network interface device (NID), the loop, the switch port, switching functionality and transport.

[3] Under the Commission's standard, a carrier is impaired if, "taking into consideration the availability of alternative elements outside the Incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." UNE Remand Order, 15 FCC Rcd at 3747-50, ¶¶ 107-16 (UNE Remand Order).

[4] The NYDPS is prepared to offer comments on markets in New York State, as opposed to nationwide markets.

[5] Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the state of New York, Memorandum, Opinion and Order, CC Docket No. 99-295 at n. 5 (rel. December 22, 1999).

[6] Case 98-C-1357, Order on Unbundled Network Element Rates, Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, (issued January 28, 2002). For example, the statewide average price of the UNE-P – a combination of loop switching and transport – is reduced to $19.14 from $27.24. In Manhattan, the monthly wholesale rate for UNE-P was reduced to $15.35 from $24.94.

[7] Case No. 00-C-1945, Order Instituting Verizon Incentive Plan, Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework, (issued February 27, 2002).

serving residential customers. Moreover, Verizon is permitted the flexibility to change retail rates to meet competitive pressures, provided service quality remains adequate. Finally, the NYDPS initiated an industry-wide task force to focus on migrating large volumes of customers from Verizon's switches to CLECs' switches more efficiently.[8]

I. It Is Premature to Eliminate the Unbundled Network Element Platform

The Commission seeks comments on whether it should retain, modify or eliminate any of its unbundling rules in light of the changing markets.[9] The NYDPS shares the Commission's goal of encouraging facilities-based competition. Ultimately, CLECs should rely on their own facilities, using only that portion of the ILECs' network that remains a monopoly. Although competition in New York is developing, it is premature to eliminate the UNE-P requirement until CLECs can migrate large volumes of customers to their own switches more efficiently.[10] There are still major issues that hamper the development of facilities-based competition. Until hot-cuts[11] can be performed in much greater volumes, CLECs' lack of access to the UNE-P will materially diminish their ability to provide local service.[12]

More specifically, the hot-cut process is labor-intensive and involves extensive coordination between Verizon and the CLECs. After an end-user contacts a CLEC to switch its existing service from Verizon, the CLEC sends a Local Service Request (LSR) to Verizon. Verizon either questions the request, or accepts it and issues a Local Service Request Completion (LSRC) notice. The order then goes to the Regional CLEC Control Center (RCCC) and the Recent Change Memory Administrative Center (RCMAC). The RCCC verifies the order with the CLEC, verifies an AM or PM dispatch and informs the CLEC of the facilities involved. The RCCC then sends the order to the Work Force Administration (WFA) who schedules a technician to work on the frame. If the customer is keeping his or her number (which will often be the case), Verizon sets a temporary "trigger" to initiate Local Number Portability (LNP) on

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[8] Verizon is required to report back to the NYDPS within six months on ways to improve the process.

[9] NPRM at ¶ 47.

[10] New York will continue to monitor the need for UNE-P and keep the Commission informed.

[11] "Hot-cut" refers to the process of transferring UNE-P customers from Verizon's switches to CLECs' switches.

[12] See footnote 3, *supra*.

the day the order is executed. Prior to the switch date, the frame technician verifies Verizon's and the CLEC's appearances on the Main Distribution Frame (MDF). On the switch date, the RCCC obtains a "go" from the CLEC and, accordingly, advises the frame technician. The frame technician completes the job and notifies the RCCC, which then advises the CLEC of the cut status. Verizon completes the order and removes the temporary LNP trigger.

Verizon provisioned an average of approximately 205,000 orders per month via UNE-P in years 2000 and 2001.[13] Those orders should increase in 2002 as the CLECs' UNE-P offering is expanded under the Plan.[14] Verizon performed approximately 56,000 hot-cut orders[15] in 2001 or an average of approximately 4,700 hot-cut orders per month.[16] Verizon would need to dramatically increase the number of hot-cut orders per month if UNE-P was terminated and CLEC customers were switched.[17] In fact, if all of the 205,000 UNE-P orders were to become UNE-Loop (UNE-L) orders, Verizon's hot-cut performance would have to improve approximately 4400 percent. Such an improvement would be unlikely absent major changes to streamline the hot-cut process.[18]

Moreover, there is no doubt that the local loop is an essential facility that the CLECs cannot economically self-provision or obtain from third-party vendors. Replacement of the local loop is prohibitively expensive and raises major land use problems. While wireless and cable alternatives are promising, they are not sufficiently available to constitute a substitute for the local loop.

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[13] Performance data from Verizon's monthly Performance Assurance Plan (C2C/PAP).

[14] Approximately 27% of Verizon's local access line market in New York are served by competitors (3.5 million access lines). Approximately 1.8 million of those lines are provided via UNE-P, with the vast majority being used to serve residential customers.

[15] An order could consist of multiple lines requiring multiple hot-cuts.

[16] C2C/PAP data.

[17] Moreover, the fact that the hot–cut process impairs the CLECs' ability to provide their own switching is reinforced by the failure of the CLECs to install their own switches during the period they were arguing that the unbundled switching rate was too high.

[18] There are currently 1.8 million lines being served via UNE-P. The 56,000 hot-cut orders in 2001 consisted of approximately 157,000 lines. At that rate, it would take Verizon over 11 years to switch all the existing UNE-P customers to UNE-L. In addition, Verizon would need to perform hot-cuts for new CLEC customers served via UNE-L.

Finally, High-capacity loops should not be eliminated as a UNE. Verizon continues to be the dominant provider of high-capacity loops used to provide service to large volume customers. Even in lower/midtown Manhattan, Verizon facilities (retail and wholesale) still serve over half of all special service circuits.[19] In fact, in upstate New York, Verizon facilities serve almost 90% of such circuits.[20]

II. The Commission Should Consider Eliminating UNEs in Specific Geographic Areas

The Commission also seeks comments on whether it should adopt a more refined unbundling analysis on the basis of specific services or geographic locations.[21] The NPRM suggests that competitive alternatives will be available in some areas before others. Consequently, it is likely that individual elements could be appropriately eliminated in some geographically discrete markets before others. Thus, the NYDPS recommends that the Commission establish criteria that contemplate eliminating individual UNEs in limited geographical markets, rather than on a nationwide basis. The metropolitan statistical area (MSA) may be an acceptable size area for certain elements. For other elements, like those that comprise the UNE-P, the Commission should consider smaller areas, such as individual wire centers.[22]

III. The Commission Should not Limit the Required Unbundling of Bottleneck Facilities Used in the Provisioning of Advanced Services

The Commission seeks comments on whether it should modify or limit the ILECs' unbundling obligations for wireline broadband services in light of the current markets.[23] The NYDPS has strived to ensure a competitive wireline advanced services market and convened an industry-wide digital subscriber line service (DSL) collaborative in August 1999, to resolve

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[19] Case 00-C-2051, Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc., at pp. 6-8 (issued June 15, 2001).

[20] Id.

[21] NPRM at ¶ 36.

[22] In Verizon's 1998 Pre-filing Statement, upstate and downstate were differentiated for purposes of sunsetting UNE-P pricing. Upstate UNE-P pricing will be available for an additional 2 years because there are fewer competitor owned switches and, competition has been slower to develop.

[23] NPRM at ¶¶ 22-30; 50-53.

numerous issues concerning the provision of DSL.[24] It is premature for the Commission to eliminate the unbundling requirements of the ILECs' bottleneck facilities (ie: the local loop/sub-loop) used in the provision of wireline broadband services, regardless of whether the technology being deployed is copper or fiber.

Notwithstanding the success of cable broadband and the increasing popularity of wireless broadband, wireline broadband remains an important and growing market.[25] While the face of the competitive DSL industry has changed significantly in the intervening 17 months, the NYDPS' basic assumption remains unchanged: our concern is to ensure that Verizon continues to deploy the bottleneck or monopoly segments of its local network in a manner that maximizes customers' access to new services and competitive choices. In New York, although many of the first-generation DSL competitors have failed, their assets have been purchased, and their customers continue to be served, in large part, by successor competitors. While the wireline ILECs are competing for broadband with cable offerings, CLECs – both old and new – continue to seek access to end-user customers for broadband using the ILECs' infrastructure over the last mile. Consequently, it is premature to relieve the ILECs of their current obligations to offer wholesale access to all the capabilities of the local loop for broadband purposes. Should the Commission withstand the legal challenges,[26] only the ILECs will be able to offer wireline-based broadband.

The NYDPS has not considered treatment of fiber to the curb.[27] However, we have given considerable attention to the treatment of fiber to the remote terminal. Our concern has been that while today roughly 20% of New York's customers are served using this technology, this proportion is likely to increase, perhaps sharply. Without unbundling requirements that realistically allow CLECs or potential competitors reasonable access to remote terminals, customers will have no choice of wireline broadband providers, their choice of voice providers

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[24] Case 00-C-0127, Provision of Digital Subscriber Line Services, Opinion No. 00-12 (issued October 31, 2000).

[25] Within that sector, competitive access to bottleneck facilities and the remote terminals that serve end-users, especially small business and residential customers, remains critical in New York.

[26] Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000). Moreover, the Commission's February 15, 2002 NPRM that tentatively concludes that access to the internet is an information service not subject to unbundling may be subject to challenge.

[27] NPRM at ¶ 50.

may be curtailed, and they may not be able to enjoy the benefits of wireline broadband at all, should Verizon choose not to provide that service. Accordingly, the NYDPS requires Verizon to provide CLECs the ability to serve their customers DSL where technically feasible.[28] The NYDPS found that in order for a data provider to serve customers whose service is carried in part over fiber optic cable, digital subscriber line access modules (DSLAMs) and splitters must be placed at the remote terminal. Requiring CLECs to construct collocation facilities adjacent to Verizon's remote terminals was, in many instances, impracticable and not commercially feasible, as it involved rights of way and extensive construction.[29] The NYDPS declined to select a particular method for Verizon to ensure competitors could reach customers, but required such accommodation on a case by case basis. The NYDPS also approved the option of Verizon allowing CLECs to place their line cards in next generation digital loop carrier (DLC) terminals, and making transport available. Finally, the NYDPS approved the option of a wholesale offering of end-to-end broadband resale.

With respect to continued competitor access to the high frequency portion of the loop, the NYDPS required Verizon to allow CLECs offering voice service using UNE-P to provide DSL over the loop – that is line-splitting.[30] It found that lack of access to line splitting impaired both voice and data CLECs' ability to provide customers with these desired services (now roughly 20% of the New York residential market). The alternative, providing DSL on a dedicated line basis, is more costly, more technically cumbersome, and more time-consuming to provision.

In sum, it is prohibitively expensive and burdensome for CLECs to provision DSL capabilities without access to Verizon's remote terminals and the ability to line-split. A CLECs ability to obtain these elements elsewhere on a reasonable, commercial basis is not practicable. Without these elements, a CLEC's ability to compete in the broadband market will be impaired.

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[28] Case 00-C-0127 at pp. 25-27

[29] Approximately 15% of Verizon's loops are served by DLC technology, entailing installation of fiber optic cable from the central office to the remote terminal (closer to the end-user) with copper facilities installed from the remote terminal to the end-users' premises.

[30] The NYDPS required Verizon to offer packet switching as a UNE when it is technically feasible to place line cards in Verizon's next generation DLC terminals and where this is the only commercially viable method for CLECs to provide end-users DSL.

IV. Congress has preserved the States' Ability to Add to the National List of UNEs and Adopt Consistent Policies that Reflect Local Market Conditions

The Commission also seeks comments on what role, if any, the states should play in the implementation of unbundling requirements for ILECs.[31] The NYDPS urges the Commission to continue to correctly implement § 251(d)(3) of the Act, which permits states, if they choose, to add to the minimum list of national UNEs and adopt policies that reflect local market conditions that are consistent with the Act. The level of competition in each state is directly affected by which UNEs are available in that state. The analysis to determine which UNEs should be unbundled in a state is fact specific and must consider conditions in each particular market. For example, in New York, we determined that small business customers (defined in New York as customers serving 18 lines or less) should be treated the same as residential customers. Consequently, the sunset date for small business and residential UNE-P is now the same.[32] Indeed, the Commission has previously recognized its intention to "... foster an interactive process by which a number of policies consistent with the 1996 Act are generated by the states."[33]

Conclusion

The NYDPS supports the Commission's continuing efforts to reexamine its rules for UNEs. The NYDPS opposes eliminating any of the elements that make up the UNE-P at this time. In addition, the Commission should not limit the required unbundling of facilities used in the provision of broadband wireline services. Finally, the Commission should continue to

[31] NPRM at ¶ 75.

[32] In contrast, the Commission found that in the top 50 MSAs local switching was not necessary to serve business customers with 4 or more lines.

[33] UNE Remand Order at ¶¶ 153-159.

correctly implement § 251(d)(3) of the Act, which permits states to add to the national list of UNEs and adopt policies to address their discrete geographic markets consistent with the Act.

Respectfully submitted,

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Dated: April 4, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Companies	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
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Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

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July 17, 2002

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT 2

THE NEW YORK STATE ATTORNEY GENERAL'S INTEREST 6

ARGUMENT 7

I. UNEs Are An Important Mode Of Entry For The Development Of Competitive Local Telecommunications Markets 7

A. New York Competitors Depend On The UNE Mode Of Entry To Serve Residential And Small To Medium Business Customers 9

1. Residential And Small Business Customers 9

2. Medium Business Customers 11

B. New York Competitors Have Used The Facilities-Based Mode Of Entry To Focus On Large Business Customers. 12

C. CLEC Use Of UNEs Can Lead To Greater Facilities-Based Competition Down The Road, Especially For Residential And Small Business Customers 13

II. State Regulators Should Retain Flexibility To Tailor UNE Options To Meet Local Conditions And Consumers' Needs 15

III. The Commission Should Continue To Require ILECs To Make The High-Frequency Portion Of Loops Available To Competitors Offering DSL Service To Consumers 16

A. Access To DSL UNEs Will Contribute To The Growth Of Facilities-Based Competition 18

B. The Commission Should Also Require ILECs To Allow Their DSL Customers To Choose Competitors' Voice Service Offerings 19

CONCLUSION 20

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1996 Telecommunications Act[1] ("the Act" or "the 1996 Act"), Congress sought "to open the local services market to competition and ultimately to permit all carriers, including those that had previously enjoyed a monopoly or competitive advantage in a particular market, to provide a variety of telecommunications offerings."[2] For six years, the Federal Communications Commission ("FCC" or "the Commission") has sought to carry out the goals of the Act by promoting policies to encourage competitive entry and break down monopoly barriers. The Commission's policies have begun to bear fruit in New York and other parts of the country.

However, in this pending Notice of Proposed Rulemaking ("NPRM") the FCC contemplates potentially radical changes in its policy with respect to the statutory requirement that incumbent local exchange carriers ("ILECs") provide competitors ("CLECs") with unbundled access to network elements.[3] That requirement is a critical component of the 1996 Act's competitive market strategy. The contemplated changes in regulatory policy and perspective, if adopted, would frustrate the key purpose of the Act, undermine the ability of

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[1] Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996), codified as 47 U.S.C. §151 *et seq.*

[2] *In the Matter of the Application of BellSouth Corporation et al., for Provision of In-region, InterLATA Services in Louisiana*, CC Docket No. 98-121, *Memorandum Opinion and Order*, 13 FCC Rcd. 20599,¶ 3 (October 13, 1998).

[3] *See* Sections 251, 252 and 271 of the Act. Section 153(29) of the Act defines "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

CLECs to compete and damage the prospects for competitive telecommunications markets.

In the 1996 Act, Congress required all ILECs to make their bottleneck facilities available to competitors through resale of local telephone service and through the wholesale provision of unbundled network elements ("UNEs"), which CLECs use to serve residential and business consumers.[4] The Act also sought to expand investment in modern telecommunications facilities by both CLECs and ILECs.[5]

Over the six years since passage of the Act, considerable groundwork has been laid at both the federal and state levels for the development of local telephone service competition. The Commission's orders established a basic list of UNEs that must be offered to CLECs, and allowed state regulators to refine these UNE requirements to better meet local circumstances.[6] The FCC rules provide the framework for state regulators to set specific wholesale rates using forward-looking cost principles that enable CLECs to compete while paying ILECs a fair price for the use of those network elements leased to serve CLEC customers.[7] Using the FCC's cost

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[4] The Act §§ 251, 252.

[5] The Act further provides that regional Bell operating companies ("RBOCs")--those ILECs that were formerly part of the Bell system--who took specific local market opening steps would be granted the right to offer long distance service to their in-region customers, thus lifting the 1984 market restrictions imposed as part of the AT&T divestiture. The Act § 271.

[6] *See, e.g.*, CC Docket Nos. 96-98 and 95-105, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, released November 5, 1999, 15 FCC Rcd 3696 ("*UNE Remand Order*").

[7] Total element long-run incremental cost ("TELRIC") pricing determines the forward-looking cost of building and operating a modern efficient network and apportions this cost for each component network element, or UNE. Recently, the United States Supreme Court upheld the FCC's decision that UNEs be offered at TELRIC rates, thereby settling some of the numerous

principles, the New York State Public Service Commission ("NYSPSC") recently ordered new, lower UNE rates to apply in New York.[8]

As a result of these coordinated federal and state regulatory policies, local service competition has progressed in New York and elsewhere.[9] Numerous CLECs have entered local markets in New York and now serve approximately 27% of access lines[10] within Verizon-NY's service territory.[11]

In this NPRM, the Commission seeks to review its unbundling policies in light of current conditions, and requests comment on whether changes to the requirements are appropriate. The

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challenges to the Act's constitutionality as well as the Commission's interpretations of the § 251 UNE requirements. The Court held, "[t]here is no evidence that the [FCC's] decision to adopt TELRIC was arbitrary, opportunistic, or undertaken with a confiscatory purpose." *Verizon v. FCC*, 535 U.S. ___, 122 S.Ct 1646, 13, syllabus point 1.(C), decided May 13, 2002. This ruling has reduced some of the uncertainty surrounding the viability of CLECs that, as the Act intended, have leased UNEs to enter local markets formerly controlled by ILEC monopolies.

[8] NYSPSC Case 98-C-1357, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements, Order on Unbundled Element Rates*, issued and effective January 28, 2002.

[9] In December 1999, the first RBOC was granted § 271 approval in New York and began offering in-region long distance service in January 2000. CC Docket No. 99-295, *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order,* adopted December 21, 1999.

[10] Within New York, Verizon's service territory contains approximately 12.2 million access lines (90% of the state's total telephone lines). Forty-four other ILEC service territories make up the remaining 10% of lines in New York. *See* NYSPSC *Analysis of Local Exchange Service Competition in New York State,* (as of December 31, 2000), *http://www.dps.state.ny.us/telecom/rankbyal.htm.*

[11] NYSPSC Case 00-C-1945, *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, February 2002 NYSPSC Staff testimony, p. 14, lines 15-19.

Commission seeks to examine how well its UNE rules have worked to date, and whether they should be continued, revised, limited or sunsetted in any respect. The Commission also seeks comment on whether it should continue to require ILECs to supply CLECs with access to the high-frequency portion of local loops, a UNE used to deliver digital subscriber line service ("DSL") to customers seeking high-speed Internet access over telephone lines.

The NPRM threatens to reduce or eliminate many of the statutorily-mandated unbundling obligations of the incumbent local exchange carriers and to create unwarranted exemptions to those obligations in the guise of expanding broadband deployment. The NPRM's analysis indicates that the FCC may move precipitately to minimize and to disfavor CLEC access to unbundled network elements, at the very moment when regulatory reaffirmance of a strong pro-competition policy is called for. The NPRM appears to ignore the fact that local telecommunications competition is still in its early stages, and that residential and small business customers, in particular, have yet to enjoy the benefits of fully competitive local markets.

Eighty-six parties filed initial comments with the Commission. Some of the commenters recommended that the FCC scale back or set time limits on UNE availability, while others sought expansion of UNE offerings.

In these reply comments, the New York State Attorney General ("NYSAG") urges the Commission to stay the course, to keep the current list of available UNEs, and not to limit, restrict or sunset any UNEs at this time. State regulators should continue to be able to expand the UNE list to meet local market needs and conditions. Additionally, the FCC should continue

to make the high-frequency portion of the local loop available to competitors providing DSL.[12]

To tamper significantly with UNE availability at this time would impair CLECs, cripple local competition and be contrary to the goals and requirements of the Act.

THE NEW YORK STATE ATTORNEY GENERAL'S INTEREST

The NYSAG is an advocate before federal and state regulatory agencies on behalf of New York consumers, especially residential and small business telecommunications customers. The NYSAG also enforces federal and state antitrust and consumer protection laws. The NYSAG has been an active party in proceedings relevant to the subject of this NPRM before the FCC and the NYSPSC, including, Bell Atlantic-New York's § 271 filing before the FCC[13] and the NYSPSC § 271 proceedings,[14] as well as related NYSPSC proceedings which developed UNE rates,[15] line-

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[12] Since the NPRM was released and initial comments filed, the U.S. Court of Appeals for the District of Columbia Circuit has remanded to the FCC two relevant prior Commission orders. *USTA v. FCC*, 290 F.3d 415 (D.C. Circuit, May 24, 2002). The NYSAG concurs in the government's recent decision to seek a rehearing and agrees that the court's ruling is fundamentally "in tension" with *Verizon v. FCC, supra. See Brief of U.S. Department of Justice and Federal Communications Commission on Petition for Rehearing or Rehearing En Banc (USTA v. FCC, Docket Nos. 00-1012, 0-1015, D.C. Cir.)*, dated July 8, 2002.

[13] *See, e.g.,* NYSAG October 19, 1999 *Initial Comments* (*http://www.oag.state.ny.us/telecommunications/filings/bell_atlantic/comments/index.html*) and November 8, 1999 *Reply Comments (http://www.oag.state.ny.us/telecommunications/filings/bell_atlantic/reply/index.html*) filed in CC Docket 99-295, *supra.*

[14] *See, e.g.*, NYSAG July 23, 1999 *Comments On Bell Atlantic-NY's Proposed Performance Assurance Plan and Change Control Assurance Plan*, NYSPSC Case 97-C-0271. *See also,* NYSAG February 10, 2000 *Comments On Bell Atlantic-NY's Revised Proposed Performance Assurance Plan*, NYSPSC Case 99-C-0494.

[15] *See* NYSAG June 18, 2001 *Brief On Exceptions To Recommended Decision,* (*http://www.oag.state.ny.us/telecommunications/filings/psc_on_ wholesale_une_rates.html*), and July 12, 2001 *Exceptions Reply Brief (http://www.oag.state.ny.us/telecommunications/filings /pricing_une.html*) filed in NYSPSC Case 98-C-1357, *supra.*

sharing[16] and line-splitting[17] requirements for Verizon-New York.[18]

Transforming monopoly markets into competitive markets, with their accompanying innovation, efficiencies and opportunities for customer choice, is important to consumers, businesses, and the New York State and New York City economies. For this reason, the Attorney General has consistently advocated for pro-competition policies in numerous state and federal telecommunications regulatory proceedings.

ARGUMENT

I. UNEs Are An Important Mode Of Entry For The Development Of Competitive Local Telecommunications Markets.

In reviewing its policies and requirements regarding UNEs, the Commission's NPRM seeks "evidence regarding actual marketplace conditions" to inform its "understanding of how the Commission's unbundling rules have shaped the market to date."[19] In this regard, it is instructive to review the experience of New York's local markets since the 1996 Act was passed.

According to NYSPSC Staff, "[a]s of January 1, 2002, there were approximately 3.3 million local access lines served by [CLECs] operating in Verizon's territory . . . represent[ing]

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[16] Line-sharing involves CLEC provision of DSL on an ILEC voice line.

[17] Line-splitting involves CLEC provision of DSL on a CLEC voice line.

[18] *See, e.g.,* NYSPSC Case 00-C-0127, *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*, August 15, 2000 NYSAG *Brief On Issues Consolidated For Litigation Track.* The New York PSC proceeding convened an industry-consumer-government collaborative process to address issues capable of reaching a consensus and also provided for litigation of other issues, resulting in Opinion No. 00-12, *Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities*, issued October 31, 2000.

[19] NPRM, *supra,* ¶ 17.

about 27% of Verizon's local access line market."[20] Because local competition has developed further in New York than elsewhere in the nation,[21] the Commission should carefully consider New York's experience in the local telecommunications arena. That experience demonstrates the critical importance of UNEs in fostering competition, both directly and as a foundation for facilities-based services.[22]

At the outset, it must be stressed that local competition in New York is still at an early stage. While progress towards competitive markets has been made, Verizon-NY is still the overwhelmingly dominant provider of local services, serving three-fourths of all access lines within its service territory.[23] The remaining one-fourth market share is divided among a number of far smaller CLECs that have not yet demonstrated an ability to affect Verizon-NY's retail

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[20] NYSPSC Case 00-C-1945, *supra*, February 2002 NYSPSC Staff testimony, p. 14, lines 15-19.

[21] Nationally, CLECs served 17.3 million of approximately 194 million total telephone lines (8.76%). FCC Report, *Local Telephone Competition Status as of June 30, 2001*, Industry Analysis Division, Common Carrier Bureau, February 2002, *http://www.fcc.gov/Bureaus/ Common_Carrier/Reports/FCC-State_Link/IAD/ lcom0202.pdf.*

[22] The Act authorizes three ways for CLECs to enter local telephone markets: resale (in which CLECs merely rebrand existing ILEC services), UNEs (in which CLECs combine a range of network elements leased from ILECs with other CLEC-provisioned elements) and facilities-based services (in which CLECs supply their own switching and trunks, but may or may not lease ILECs' local loops connecting to customer premises). The New York experience to date has shown that competitors have relied on the resale mode only to a very limited degree. As of January 2002, resale represents only 320,000 lines out of Verizon's 12.2 million lines, a reduction from 405,000 lines a year earlier. NYSPSC Case 00-C-1945, *supra*, NYSPSC Staff testimony, p. 15, lines 13-16. The NYSPSC Staff has found that in New York, "no major carrier uses resale as its sole entry strategy; rather, resale is used to fill in limited market gaps where competitors may have no other viable manner in which to serve customers." *Ibid.*, lines 16-20. It appears that CLECs cannot compete effectively using the resale mode of entry alone.

[23] NYSPSC Case 00-C-1945, *supra*, Staff testimony, p. 14, lines 15-19.

prices.[24]

A. New York Competitors Depend On The UNE Mode Of Entry To Serve Residential And Small To Medium Business Customers.

1. Residential And Small Business Customers.

The UNE mode of entry is currently of greatest importance in opening New York's local telecommunications markets for the benefit of residential and small business customers. Four CLECs (AT&T, MCI, MetTel and Z-Tel) are the major users of the UNE-platform ("UNE-P"), and together they currently serve 1.8 million lines in New York, mostly used by residential customers.[25] According to the competitors, at present, UNE-P is the only entry strategy that enables competitors to reach mass market customers at an acceptable cost.[26] For example, Z-Tel states that it "can provide these services on a broad and ubiquitous basis only because of the availability of the unbundled network element platform in New York and the other 37 states where it does business."[27]

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[24] This is demonstrated by Verizon-NY's recent decision to increase residential dial tone monthly rates 30% (from $6.11 to $7.96). *See* February 27, 2002 Verizon press release, *Company Announces First Basic Rate Increase In 11 Years, http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=71254&PROACTIVE_ID=cecfc8cfcacbc9cccdc5cecfcfcfc5cecfc7c6c6cecdcbcec8c5cf.*

[25] NYSPSC Case 00-C-1945, Staff testimony, *supra,* pp. 15-16. The UNE-platform is a packaged group of network elements offered by Verizon in New York that is chosen by CLECs who primarily rely on the incumbent's network for the facilities necessary to provide basic local service.

[26] *See, e.g.*, WorldCom April 4, 2002 initial comments, pp. 26-7, 32.

[27] Z-Tel April 5, 2002 initial comments, p. 2.

As a direct result of the availability of the UNE mode of entry, in combination with the NYSPSC's recent TELRIC pricing decision to significantly lower wholesale rates for UNEs, New York residential and small business consumers throughout Verizon's service area can now choose from a number of competing local telephone service offerings.[28] For example, AT&T now offers residential consumers unlimited local calls for $19.95/month.[29] MCI recently launched "The Neighborhood" plan offering New Yorkers unlimited local and long distance, voice mail plus three calling features for $49.99.[30] Z-Tel's $29.99 monthly basic plan includes 1500 local and 30 long distance minutes, call waiting and call forwarding.[31] MetTel offers NYC residents a message rate of $5.94/month plus 9.5¢/local call. Verizon and various CLECs offer additional residential plans designed to meet the calling needs of various types of consumers.[32]

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[28] In a decision on January 28, 2002, the NYSPSC significantly lowered the wholesale rates Verizon-NY can charge CLECs. In that proceeding, the NYSPSC Staff found that the initial UNE wholesale rates (which governed CLEC UNE competition from 1999 through January 2002) "would not sustain a reasonable business plan" and resulted in a "setback" to CLECs' marketing activities in New York and that lower rates would provide competitors "the ability to do business successfully in New York." NYSPSC Case00-C-1945, *supra*, Staff testimony, pp. 18-19.

[29] *See, http://www.consumer.att.com/local_service/ny/.*

[30] *See, http://www.TheNeighborhood.com/res_local_service/jsps/join_plans.jsp?state=NY&Bus_Ind=RES&wireSolution=Y&group=010&cos=NoCos&ANI=2124168320.*

[31] *See, http://www.z-tel.com/portal/ztel/purchase/i/standard_NewYork.jsp. See also,* Z-Tel April 5, 2002 initial comments, pp. 1-2.

[32] Additionally, while not state-wide, Cablevision is also "very active" with respect to telephony on Long Island within its cable footprint (*http://www.lightpath.net/inside/news/nr_azznara.html*), as is RCN in serving residential customers in New York City multiple dwellings (*http://www.rcn.com/new_york/ phone/index.htm*), and there are three other localized carriers serving residential markets. NYSPSC Case 00-C-1945, Staff testimony, *supra*, pp. 20-21.

The larger CLECs have also committed to serving small business customers in the wake of the NYSPSC's TELRIC pricing decision.[33]

2. Medium Business Customers.

In New York, a number of small CLECs have established niches serving medium-sized businesses through innovative use of UNEs.[34] Customers can choose from a range of offerings including local and toll voice, data, centrex, Internet access, networking, and special calling features. Z-Tel notes that the NYSPSC's decision, first made in 1998 and extended in 2002, that Verizon-NY must offer UNE-P to customers using up to 18 lines is especially important for CLECs seeking to serve small to medium business customers.[35] The variety of these telecommunications offerings demonstrates the fertile nature of competition fostered by UNEs, which would not be possible if CLECs were forced to depend purely on resale of ILEC wholesale services. Competitors note that through UNE availability, consumer choice is expanded "by allowing [CLECs] to concentrate on areas where they can differentiate themselves from the incumbents (*e.g.*, customer service and product differentiation) while leasing underlying facilities

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[33] NYSPSC Case 00-C-1945, *supra*, Staff testimony, p. 22, lines 7-12.

[34] *See, e.g.*, Focal Communications, *http://www.focal.com/prod_serv/access_serv.html*, Broadview Networks, *http://www.Broadviewnet.com/Products_Services/Business/VoiceServices.asp?scenario=0*, InfoHighway Communications, *http://www.infohighway.com/serv_local.html*, Z-Tel, *http://www.z-tel.com/portal/ztel/learn/i/zlinebusiness.jsp*, MetTel, *http://www.mettel.net/business.html*, Time Warner Telecom, *http://www.twtelecom.com/Default.aspx?pageId=34*, and Cablevision Lightpath, *http://www.lightpath.net/solutions/index.html*.

[35] Z-Tel April 5, 2002 initial comments, p. IV. Verizon-NY's agreement to the February 27, 2002 Verizon Incentive Plan extended its April 6, 1998 commitment (made in the Section 271 *Pre-Filing Statement Of Bell Atlantic-New York*) to permit CLECs to use UNE-P in serving multi-line business customers using less than 18 access lines until the end of 2003.

from incumbent LECs."[36]

The major CLECs competing in New York are beginning to show that they are able to and intend to actively compete statewide using New York's recently adopted UNE rates.[37] Thus, UNEs should not be restricted, narrowed, limited or sunsetted at this time.

B. New York Competitors Have Used The Facilities-Based Mode Of Entry To Focus On Large Business Customers.

Medium and large New York businesses have more competitive telecommunications options than do residential and small business customers, especially because they can choose facilities-based CLEC providers.[38] In the NYC metropolitan area, twelve CLECs offer business telephone services, while six CLECs compete with Verizon in Albany, Buffalo and Syracuse.[39] Smaller-sized markets (*e.g.*, Poughkeepsie) generally have three business CLECs.[40] While CLECs now use their own switching facilities to serve 1.2 million New York access lines, this mode of entry still primarily serves large business customers.[41]

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[36] WorldCom April 4, 2002 initial comments, p. 49.

[37] *See, e.g*, the recent statement by AT&T chief Michael Armstrong, "[c]ompetition is beginning to heat up in the local market, at least in some states [referring to New York, Michigan, Illinois, Indiana and Ohio]." *Multichannel News, Armstrong Higher on Phone Competition*, June 17, 2002.

[38] Facilities-based CLECs deploy their own switches, trunks, fiber rings and other equipment to serve customers. Some may connect directly to customer premises with their own lines, while others lease "stand alone loops" (without use of other UNEs) from the ILEC or another CLEC.

[39] NYSPSC Case 00-C-1945, *supra*, Staff testimony, p. 22, lines 1-6.

[40] *Id.*

[41] *Ibid.*, p. 17, lines 7-9.

C. CLEC Use Of UNEs Can Lead To Greater Facilities-Based Competition Down The Road, Especially For Residential And Small Business Customers.

Continued UNE availability can play a significant role in enabling CLECs to offer facilities-based services to wider market segments. As growing UNE-based customer volumes increase the number of mass-market customers a CLEC serves in a given area, expansion of facilities-based service to serve these consumers becomes more economically feasible.[42]

The Commission has embraced the goal of advancing the development of facilities-based competition, which can lead to more innovation and the availability of new products and services at different prices.[43] Residential and small business customers would benefit greatly from facilities-based competition if it were able to expand so as to serve them as it now serves larger business customers. So long as CLEC mass market customers are served primarily by UNEs, they will remain dependent upon ILECs' network maintenance practices and repair service

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[42] In this regard, the argument put forward by some commenters that CLEC reliance on UNEs prevents them from investing in their own facilities, and also discourages ILECs from making investments in equipment it must lease to competitors is not consistent with the facts. *See, e.g.*, April 5, 2002 initial comments by Progress & Freedom Foundation, pp. 15-30; April 5 initial comments by the Verizon Telephone Companies, pp. 25-37. The $56 billion in facilities investment by CLECs (*The State of Local Competition 2001*, The Association for Local Telecommunications Services, February 2001, p. 20) and $100 billion by ILECs since the Act's passage (FCC ARMIS Report 43-07, 1996-2000) demonstrates that "a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities." *Verizon v. FCC, supra*, at 1676, *fn.* 33. CLECs have made considerable investment in local switching facilities. *See* AT&T April 5, 2002 comments, pp. vii, 66-67. UNE availability has not prevented ILEC investment in new facilities. For example, in New York, Verizon invested approximately $2.1 billion in its telecommunications network during 2000 and its network investment since 1995 now totals more than $10.2 billion.

[43] *UNE Remand Order, supra*, ¶ 110.

quality (since ILEC facilities and crews are responsible for the switches, trunks and loop distribution plant leased by CLECs). CLECs using their own switch, fiber rings and trunking facilities would be able to offer more competitive pricing and service performance, increasing consumer value.

The CLECs have argued convincingly that they desire to avoid dependence upon their ILEC competitor's facilities wherever it is possible to do so economically.[44] In addition, the Supreme Court recently recognized that "the desirability of independence from an incumbent's management and maintenance of network elements" are "incentives for competitors to build their own network elements."[45] Before CLECs will consider migrating UNE-served customers to their own switches, there must be sufficient volume and density of customers to make the change cost effective. Without the UNE mode of entry, CLECs will not be able to gather sufficient mass market customers to justify the cost of installing switches to serve residential and small business markets. Thus, continued availability of UNEs promotes the growth of facilities-based competition.

If the FCC decides to curtail its UNE requirements now, local service competition will be severely undermined, especially for residential and small business customers who rely heavily on UNEs to reap the benefits of competition. It would be worse than ironic if the new wholesale

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[44] "To serve residential customers, AT&T has invested billions of dollars in alternative facilities ... to avoid complete dependence on ILEC facilities." AT&T April 5, 2002 initial comments, p. v. *See also* WorldCom April 4, 2002 initial comments, p. 6: "Because companies prefer the control and flexibility that come with owning their own facilities, they can be expected to build, rather than buy, as long as they earn a reasonable return on their investment."

[45] *Verizon v. FCC, supra,* at 1670.

UNE rates recently set by the NYSPSC and other state commissions[46] were *de facto* nullified by a FCC policy decision that ILECs need not continue to make UNEs available. All of the labor that went into the various state UNE ratemaking proceedings would be for nought, and the prospects for sustainable local competition would be set back dramatically.

The New York experience since passage of the Act indicates that UNEs remain important to the process of transforming monopoly markets, especially for residential and small business customers. Continued availability of UNEs is necessary to establish strong roots from which robust local competition can grow.

II. State Regulators Should Retain Flexibility To Tailor UNE Options To Meet Local Conditions And Consumers' Needs.

The NPRM asks what role state regulators should have in determining the list of UNEs that ILECs must make available to CLECs.[47] Currently, FCC interprets § 251(d)(3) of the Act to permit it to establish a minimum list of nationally available UNEs, which can be added to by individual state regulatory bodies. This policy recognizes that local conditions vary from state to state, and even within individual states, and allows a flexible approach to take these differences

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[46] *See, e.g.*, NYSPSC Case 98-C-1357, *supra, Order On Unbundled Network Element Rates*, issued January 28, 2002. *See also* Massachusetts D.T.E. 01-20, *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts= Resale Services in the Commonwealth of Massachusetts*, commenced January 12, 2001 and New Jersey Board of Public Utilities, Docket TO00060356 -*In the matter of the Board's review of unbundled network elements rates, terms and conditions of Bell Atlantic-New Jersey , Inc., Decision and Order* issued November 20, 2001.

[47] NPRM at ¶¶ 75-76.

into account. This has proven to be very useful and effective in moving local telecommunications markets towards competition. For example, as noted, the NYSPSC has determined that small businesses using up to 18 lines should be treated in the same way as residential customers for the purpose of making UNEs available to CLECs,[48] thus helping to jumpstart competition aimed at small business customers.

In light of the major role that small businesses play in local, state and national economies, New York's experience demonstrates the wisdom of the Commission's policy allowing state-level modifications of the national UNEs list. State regulators are often best positioned to take local and regional conditions into account. Therefore, the NYSAG supports the initial comments of NYSPSC and other state regulators and consumer advocates who call for preservation of this effective federal-state partnership.[49]

III. The Commission Should Continue To Require ILECs To Make The High-Frequency Portion Of Loops Available To Competitors Offering DSL Service To Consumers.

The NPRM seeks comments on whether current UNE requirements regarding the provision of DSL[50] advanced services by CLECs using ILEC facilities should be continued.[51] As

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[48] *See* NYSPSC April 4, 2002 comments, p. 2. *See also* NYSPSC Case 00-C-1945, *Order Instituting Verizon Incentive Plan, supra,* p.15.

[49] *See, e.g.*, April 4, 2002 NYSPSC initial comments, p. 8; April 5, 2002 initial comments of Illinois Commerce Commission, pp. 3-4; and April 5, 2002 joint initial comments of Pennsylvania Office of Consumer Advocate, Ohio Consumers' Counsel, New Hampshire Office of Consumer Advocate, West Virginia Consumer Advocate Division and Maryland Office of People's Counsel, pp. 4-15.

[50] DSL technology allows high-speed Internet data transfer to be provided over the local copper loops connecting end users with the ILEC central office switch. While it is available in several versions, the asynchronous ("ADSL") one is used primarily by residential customers.

discussed more specifically in NYSAG's comments filed in the Commission's companion wireline broadband proceeding,[52] widespread broadband Internet access is important to the economic future of New York communities, large and small.

The NYSAG supports policies that encourage deployment of facilities to bring high-speed Internet access to all consumers and businesses at the earliest possible time. Policies promoting competition in the market for broadband access will speed such deployment and enhance the growth and development of competitive local voice markets as well. The Commission has correctly found that competitors seeking to offer DSL services are "impaired" within the meaning of § 251(d)(2) of the 1996 Act without access to line sharing arrangements with ILECs' local loops,[53] and that ILECs should be directed to provide CLECs with access to the high-frequency portion of these loops.[54] The Commission should not now alter this DSL

ADSL uses the high-frequency bandwidth of the line for data traffic while the low frequency bandwidth simultaneously delivers voice communications. Thus, residential customers can get both telephone service and Internet broadband using a single telephone line.

[51] NPRM, ¶¶ 22-30, 53-54.

[52] CC Docket 02-33, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, July 1, 2002 Reply Comments of NYS Attorney General Eliot Spitzer.

[53] *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Fourth Report and Order on Reconsideration in CC Docket 96-96*, 16 FCC Rcd 2101.

[54] *Line Sharing Order, supra*, 14 FCC Rcd at 20926, ¶ 25. Because simple voice communication uses only a small portion of the bandwidth that a copper loop can carry, use of electronic devices called "splitters" allow a single loop serving a customer to be used simultaneously for voice service (using the low frequency spectrum) and for Internet access and other data transmission (over the higher frequency spectrum).

policy, which serves the goals and requirements of the Act to promote competitive markets for all telecommunications services.

A. Access To DSL UNEs Will Contribute To The Growth Of Facilities-Based Competition.

In addition to being required by the 1996 Act, CLEC access to DSL UNEs can be of critical importance to the continued growth of facilities-based local telephone competition.

Many consumers are responsive to providers able to offer "one-stop shopping" with multiple services bundled together at attractive rates and paid for with a single bill.[55] This is demonstrated by Verizon-NY's rapid success in gaining the largest share of New York long distance lines in a mere two years through offers which combine local, regional and long distance services.[56] CLECs hoping to progress to switch-based competition will be better able to do so if they can increase their customer base by bundling local, long distance and DSL services, just as New York ILECs can do.

CLEC ability to offer bundled voice and DSL services would increase economies of scale and operating margins. By increasing the number of potential customers and their resulting revenues per-switch, CLEC entry into DSL will potentially accelerate switch-based facilities investment by CLECs.[57]

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[55] *See, e.g.,* Verizon November 5, 2001 release, *Verizon and Verizon Wireless Team Up to Offer the Convenience of Single Bill for All Services: New York and Massachusetts Customers Can Now Receive Consolidated Bill for Local, Long-Distance and Wireless , http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=64954.*

[56] Since first offering long distance to New York customers in January 2000, Verizon has gained "nearly a third of the market." *Crain's New York Business*, January 17, 2002.

[57] *See, e.g.*, AT&T April 5, 2002 initial comments, p. v.

B. The Commission Should Also Require ILECs To Allow Their DSL Customers To Choose Competitors' Voice Service Offerings.

The Commission should require that ILEC DSL offerings be available to customers who choose CLEC voice services.[58] Currently, ILECs tie their DSL offerings to their voice service, so that customers seeking an ILEC's DSL offering cannot obtain voice service from a CLEC on the same shared line. This limitation will likely inhibit the growth of local voice competition and should not be allowed to continue.

Many consumers may not wish to give up their existing ILEC-provided DSL service in order to select a competitor's voice service; they will therefore reluctantly stay with the ILEC for voice as well as DLS services. As ILEC DSL customers grow in numbers, customers' inability to keep their ILEC DSL service would become a significant barrier to local voice competition.[59]

ILECs' current dominance in both local voice and DSL markets thus threatens to become a barrier to developing robust competition in local telephone markets. To ensure that local voice competition can continue to grow, the Commission should remove this impediment to customer

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[58] Substantial regulatory progress has been made in New York towards opening Verizon-NY's network to permit DSL competition. The NYSPSC has thus far implemented the 1996 Act and FCC rulings by requiring Verizon-NY to unbundle the high-frequency portion of the loop so that CLECs can provide DSL service to ILEC voice customers (line-sharing) or to CLEC voice customers (line-splitting). The NYSPSC has also required Verizon-NY to permit CLECs to provide DSL service to customers served from Verizon-NY's remote terminals that are connected to Verizon-NY's central office by fiber optic cable instead of copper wire. The NYSPSC accomplished this by mandating that CLEC-owned digital subscriber line access modules (DSLAMs) and splitters may be located in Verizon-NY's remote terminals upon CLEC request. NYSPSC April 4, 2002 initial comments, p. 7.

[59] It should also be noted that early users of new DSL services are more likely than the population at large to be innovation seekers who would also be interested in CLECs' new voice service options.

choice and should no longer permit ILECs to wield their market power by precluding their DSL customers from choosing alternate voice service providers.

CONCLUSION

For all the reasons stated herein, the Commission should stay the present course regarding UNEs. Local market competition is only beginning to be established, and even in places like New York where CLECs have gained the greatest foothold, their share is tenuous, especially for residential and small business customers.

Any policy decision that would narrow or terminate UNE availability or prolong uncertainty in this industry is likely to severely damage these nascent markets and thereby hurt consumers. By continuing to make available the current list of voice and DSL UNEs for at least several more years, the Commission would strengthen local competition and lay the necessary economic foundation upon which CLECs will be able to expand with network facilities of their own.

Finally, the Act's goals of robust local competition, maximization of facilities investment and broadband deployment can best be accomplished through continued cooperative policies that enlist state regulators in applying local conditions to fine-tune national UNE policies.

July 17, 2002

Respectfully submitted
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Jennifer M. Granholm
GOVERNOR

STATE OF MICHIGAN
PUBLIC SERVICE COMMISSION
DEPARTMENT OF CONSUMER & INDUSTRY SERVICES

January 13, 2003

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Commissioners:

The Michigan Public Service Commission is pleased to notify you that today we issued an affirmative recommendation that SBC be authorized to provide interLATA communication services in Michigan. As will be demonstrated in our consultative report, we conclude that SBC has complied with the provisions of section 271 of the Federal Telecommunications Act. This report states that while some third party testing and issue resolution will continue under the supervision of this commission, the evidence demonstrates that the SBC network is irreversibly open to competitors on a non-discriminatory basis.

In addition, we are pleased to submit that competitive market share in SBC's Michigan service territory exceeds 20% and is growing, a clear signal that competition is flourishing in Michigan.

We believe that this significant competitive market share, pre-271, is attributable to hard work by this commission over the last several years and a firm commitment to competition consistent with the 1996 Federal Act and the Michigan Telecommunications Act. Michigan was among the first states to establish wholesale network prices that CLECs found acceptable for mass-market entry, and to adopt a wholesale performance measurement system. We also issued an order in February of 2000 which clearly set forth a 271 blueprint for Michigan. We have worked for nearly three years with an independent third party and the CLEC community to evaluate and improve SBC's OSS.

Some may suggest that it is premature to recommend 271-approval because some elements of testing are ongoing. We firmly believe that the overwhelming evidence shows that the competitive market is thriving. To ensure that no backsliding occurs after 271 approval and to further improve the interfaces between SBC and competitors, we also issued an order today requiring SBC to develop a supplemental compliance plan for selected issues which will be implemented with the full scrutiny of this commission.

Laura Chappelle, Chairman • David A. Svanda, Commissioner • Robert B. Nelson, Commissioner

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We do issue one caveat, the Michigan competitive market is significantly dependent on availability of the Unbundled Network Element-Platform (UNE-P). We believe that the elimination or severe curtailment of UNE-P would adversely impact our competitive market. Our recommendation is predicated on the FCC's continuation of policies and rules that allow competitors access to UNE-P for the foreseeable future and throughout an orderly transition to facilities-based competition. In fact, we support UNE-P as consistent with the methods of competition specified in the 1996 Federal Act, including resale, facilities-based and unbundled network elements.

We urge the FCC to issue a reasoned and practical set of network unbundling rules that will assure the vitality of competitive providers by allowing them a viable business model based upon continued access to all necessary network elements, and under the continued supervision of the state commissioners.

With that concern expressed, we look forward to the benefits for Michigan citizens of vigorous competition in both local and long distance communications markets that will be advanced upon FCC approval of SBC's application, which we expect to be filed this week.

We are prepared to answer any of your questions about the long and rigorous road that has taken us to this point, the voluminous record that has been established and the conclusions we have reached.

Sincerely,

Chairman Laura Chappelle

Commissioner David A. Svanda

Commissioner Robert B. Nelson

December 16, 2002

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

Re: In the Matter of the 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. Roberts:

On April 12, 2002, Verizon Maryland Inc. ("Verizon") filed its request in Maryland for the Maryland Public Service Commission ("Commission") to consider the facts regarding Verizon's decision to enter the long distance market via a §271 application at the Federal Communications Commission ("FCC"). This request followed two years of testing of Verizon's wholesale operations support systems ("OSS") in Virginia and related corrective actions to those systems. The April 12th filing also reflected the fact that Verizon had requested the Maryland Public Service Commission to refrain from implementing Maryland specific OSS testing and await the outcome of the Virginia test results.[1]

The Maryland Commission's agreement with the above request 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 Verizon 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 the anchor state, provided the FCC has already approved the anchor state's §271 Application, or is given the opportunity to review the anchor state'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 Verizon's assertion that the Maryland and Virginia wholesale OSS are comparable, and in so doing would avoid duplicative testing and unnecessary cost to Verizon. Other parties disagreed with this position.

Telecommunications Act of 1996 ("1996 Act"). 47 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 Commission 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 1700 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 the status of local competition which updated the number of end-user switched access lines served by CLECs in Maryland to 6% and 11% nationally as of June 2002.

acceptable in Maryland after 8 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 competition is sustainable into the future, the Commission directs Verizon 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 Verizon's provisioning of high capacity unbundled local loops. Several parties to this proceeding argued that Verizon improperly rejects CLEC orders for high capacity loops[3] 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-1 and DS-3 facilities for use by CLECs creates a barrier to local competition 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 Verizon 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 Commission 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 Verizon's policy has the effect 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

[3] 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 Commission ("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 Verizon'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 GRIP/VGRIP 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 bills. The Commission notes that the negative effects of incorrect billings falls more heavily on CLECs in a developing competitive market. The updated version of the Maryland Carrier-to-Carrier Guidelines, which enforces Verizon's performance, will become effective January 2003. They include metrics to measure important aspects of the billing process. These metrics require 95% of all billing claims to be acknowledged within two business days 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 required by the 1996 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 Verizon'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 feasible, 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 form 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 Commission 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 Performance 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 file exception reports refiling those metrics found to be in error. The metrics 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 Guidelines and shall cooperate with Staff to provide the data required to allow Staff to conduct replication as necessary to confirm the accuracy of Verizon'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 pre-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, Verizon 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, Verizon 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 Commission 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 Verizon 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 competition 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 Commission 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 Verizon'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 competition 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,

/s/*Catherine I. Riley*
Catherine I. Riley, Chairman

/s/J. *Joseph Curran, III*
J. Joseph Curran, III, Commissioner

/s/*Gail C. McDonald*
Gail C. McDonald, Commissioner

/s/*Harold D. Williams*
Harold D. Williams, Commissioner

cc: All Parties and Interested Persons of Record

COPY

Brett A. Perlman
Commissioner

Public Utility Commission of Texas

January 28, 2003

The Honorable Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dear Kevin:

I want to congratulate you on your very thoughtful speech to the 20th Annual PLI/FCBA conference last month. You accomplished your goal of clearly articulating your position on the historic proceedings currently pending before the Commission.

I appreciate your interest in hearing from state commissioners on the impact of the FCC's pending telecommunications proceedings. As you and I have previously discussed, state commissions can provide a valuable perspective on such issues since we are closest to the local conditions in our jurisdictions. Consequently, I wanted to provide you some of my own impressions of your position and how they will impact telecommunications competition in Texas.

As you are aware, Texas was the second state to certify that a RBOC had completed the 14 point checklist. As a consequence, Texas provides perhaps one of the best barometers of the potential impact of the FCC's pending rulemakings. In addition, we have just completed a comprehensive review of telecommunications competition in Texas and therefore can provide you with specific information that may help you refine your analysis. While this letter incorporates the Texas PUC's recent data, the conclusions are my own.

I will frame my comments around two central questions: (1) How should the Commission deal with unbundling questions related to voice services; and (2) What regulatory framework should the Commission apply in its pending Broadband proceedings?

I. Triennial Review

In the PLI/FCBA speech, you indicate your preference for a simple test to determine when unbundled local switching is no longer necessary: (1) alternative facilities based providers exist and (2) no impairment associated with physical provisioning. You also indicate that unbundled switching may need to stay in place in rural and underserved areas that lack alternative facilities-based providers. Finally, you mention the role that state commissions must play in these decisions.

In fact, the Texas Commission has recently performed exactly the type of analysis that you discussed in your speech. Last year, the Texas Commission reviewed the necessity for local switching by examining the robustness of the local switching market and whether CLECs would be impaired should switching be removed as an unbundled network element.[1] In applying the FCC's existing test, the Texas Commission found, based on the specific circumstances in our market, that SBC was not offering nondiscriminatory access to the enhanced extended loop (EEL) in urban areas (Zone 1), such that CLECs would be able to utilize their own switching. The Texas Commission, based on a review of an extensive factual record, also found impairment in suburban and rural markets. The Texas Commission left the door open for removal of switching as an unbundled element when SBC can demonstrate that it provides nondiscriminatory access to the EEL to its CLEC customers.

In addition to the MCI arbitration, the Texas Commission's recent report on competition may provide insight as to the impact of the Commission's proceedings.[2] This Report, which contains exchange level data from local exchange providers, is the most in-depth and recent analysis of local telecommunications competition available.

The Report shows that CLEC market penetration (both in terms of revenues and access lines) has remained essentially flat since January 2001, due in large part to industry conditions (during the last two years 47 Texas CLECs declared bankruptcy and 42 relinquished certifications to serve).[3]

At the same time, the method of entry for CLECs continues to change, with some form of facilities-based service (UNE-L or carrier-owner facilities) comprising 45 % of CLEC revenues, followed by UNE-P (44%) and resale (12%). On the other hand, the data shows that UNE-P is the primary means of serving residential customers in urban and suburban areas. UNE-P accounts for 76% of CLEC urban residential lines and 67 % of CLEC suburban residential lines in Texas.[4]

These statistics lead me to conclude that while the Texas market is transitioning to facilities-based competition, UNE-P is important for serving Texas residential customers. This data shows, as you indicated, that "States are best positioned to make [these] highly fact intensive and local determinations."

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[1] *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, Mcleod USA Telecommunications Services, Inc., and AT&T Communications of Texas, LP for Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996*, Docket No. 24542, Final Order (date). ("MCI Arbitration").

[2] *Report to the 78th Texas Legislature, Scope of Competition in Telecommunications Markets of Texas(Jan 2003)* ("Texas Report"). The Report is available at www.puc.state.tx.us/telecomm/reports/index.cfm.

[3] *Id.* at 30.

[4] *Id.* at 25.

II. Broadband Proceedings

A. Texas Broadband Market

In several proceedings, the Commission has expressed a preference for facilities-based competition and, as you indicate, the D.C. Circuit required that the Commission consider alternative facility providers before reinstating line sharing requirements.

Our data shows that facilities-based competition is already a reality in the Texas broadband marketplace. Recent data indicates that cable and DSL are the dominant forms of broadband competition with other forms (such as wireless or satellite) accounting for 10 percent of the market.[5]

Of the DSL providers, the Texas data indicates that incumbent's providers have just over 85% of the lines (317,774) to the CLECs' 15% (56,879).[6] Clearly, the dominant form of broadband competition is between cable companies and incumbent telecommunications carriers.

While intermodal competition dominates the Texas broadband market, I nonetheless believe that intramodal competition will play an important role, particularly in suburban and rural markets. It has been our experience in Texas that competitive DSL providers offer different products (i.e., SDSL and IDSL).

They also serve customers unserved by the dominant providers, because they are beyond the reach of SBC's ADSL product offering or live in suburban or rural communities unserved by the incumbent telecommunications providers. A PUC staff analysis shows that there are 95 rural Texas exchanges, representing about 10 percent of all Texas exchanges, that are served by a data CLEC in which no incumbent telecommunications carrier provides broadband service.

I continue to believe that CLECs perform an important role in providing Texas customers with broadband service. As I discuss below, I believe that the Commission can balance the need for investment incentives with the intramodal competition provided by data CLECs.

B. Achieving a Balanced Broadband Regulatory Framework

In your PLI speech, you indicate that your primary goal is encouraging new investment in broadband. Your speech indicates that regulating DSL and cable services similarly would be the best way to achieve this goal.

I believe that the Commission could accomplish the goal of encouraging new investment while ensuring that the broadband competition occurs through both intermodal and intramodal providers. The Commission could accomplish these goals if it were to apply a "layered model" to broadband

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[5] *Id.* at 35.

[6] Texas PUC Staff Analysis, available upon request.

infrastructure. The "layered model" has been discussed in several recent legal and technical articles and is consistent with the underlying protocols governing the Internet.[7]

Unlike service-based regulation, the "layered model" separates content and applications from the provision of access and transport services and applies a consistent policy to each layer. In this model, the Commission would treat content and applications as information services and, in essence, eliminate the requirement that an incumbent telecommunications provider offer access and transport services to competitors where there is a showing that no provider has *market power*. The Commission would thus remove restrictions not on the basis of network type, but rather on the basis of a "market power" test.

Treating broadband networks in this fashion would focus the inquiry on whether the Commission and state regulators can rely on competition, instead of regulation, to discipline prices, rather than focus on network type. This model would be also similar to the European Commission's new telecommunications framework.[8]

If the Commission were to adopt this framework, it would apply a similar regulatory framework to all broadband infrastructure and could easily accommodate your top priority of stimulating investment and deployment of advanced network infrastructure. Under this framework, if no broadband provider has market power, then no unbundling requirements apply to an incumbent's investment in new infrastructure. If market power does exist, then access requirements would apply, but could be modified to ensure that ILECs maintain an incentive to invest as follows:

- **Modified TELRIC pricing**: As you suggest in the PLI/FCBA speech, the Commission could adjust the TELRIC pricing formula to account for the risk of the investment.

- **Broadband Service**: Instead of requiring physical unbundling, the Commission could require access in the form of a broadband service offering which would minimize the incumbent's obligation to physically unbundle the network. The Texas Commission's arbitrators have already ruled that line sharing should be provided in the form of a service, a decision which has been adopted by the Illinois and Wisconsin Commissions.[9]

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[7] See, Werbach, "A Layered Model for Internet Policy, __ Colo. J. on Telecommunications and High Technology Law__ (2002)(forthcoming)(available on the web at www.edventure.com/conversation); Frieden, Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach (available on the web at http://www.personal.psu.edu/faculty/r/m/rmf5/newregime.doc); Sicker, Further Defining a Layered Model for Telecommunications Policy (http://intel.si.umich.edu/tprc/papers/2002/95/LayeredTelecomPolicy.pdf).

[8] Marcus, "The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications", July 2002(FCC Office of Policy and Plans) (available on the web at http://www.fcc.gov/opp/workingp.html)

[9] Petition of Covad Communications Company against Southwestern Bell Telephone Company for Post-Interconnection dispute resolution and Arbitration (http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/313365.DOC)

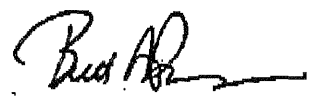
The D.C Circuit's concern regarding the Commission's line sharing obligations would be addressed by this framework because the market power analysis would take into account the ability of alternative facility providers (cable, wireless and satellite) to provide broadband service. This framework would also be consistent with the Computer Science and Telecommunications Board's framework in their recent report entitled "Bringing Home the Bits."[10]

A broadband framework such as the one suggested promote new investment in facilities-based competition while assuring that adequate competition exists to discipline prices. It is also consistent with the way that the broadband market appears to be evolving in Texas.

III. Conclusion

As the title of your PLI presentation indicated, the Commission is at the "Crossroads" of many important decisions. I look forward to partnering with you in our common goal of creating a competitive, facilities based telecommunications marketplace.

Sincerely,



Brett A. Perlman

cc: The Honorable Micheal K. Powell
The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein

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[10] Computer Science and Telecommunications Board, "Broadband: Bringing Home the Bits" (2002) (available on the web at http://www7.nationalacademies.org/cstb/pub_broadband.html)

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P.O. BOX 304260
MONTGOMERY, ALABAMA 36130-4260

JIM SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C. WALLACE, JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS, JR.
SECRETARY

GENERIC PROCEEDING TO ESTABLISH PRICES FOR INTERCONNECTION SERVICES AND UNBUNDLED NETWORK ELEMENTS.

DOCKET 27821

ORDER

BY THE COMMISSION:

The Commission's May 31, 2002 Order in this cause deferred numerous issues to further proceedings. Chief among the issues deferred were:

(1) the question of whether a model which prices all elements and combinations in a single scenario can be developed;

(2) The most appropriate termination technology for non-integrated lines; and

(3) All outstanding issues concerning line sharing and line splitting including the reasonableness of requiring BellSouth to provide line sharing using digital loop carrier, voice and data service using digital loop carrier, loop service using GR-303 DS-1 service level as well as DS-0 service level, the appropriateness of a recurring charge for the high frequency portion of a loop, and the merits of requiring BellSouth to hand off up to 24 voice grade lines simultaneously using DS-1.

Pursuant to Order entered on August 31, 2002, the Commission sought comments from interested parties concerning additional issues which should be considered by the Commission in the future proceedings contemplated by the

Commission's May 31, 2002 Order. The Commission noted that comments on additional issues reasonably related to those set forth above, as well as recommendations concerning a procedural schedule for the investigation of such issues, would be considered by the Commission if received within thirty (30) days of the August 31, 2002 Order.

By filing of September 30, 2002, ITC DeltaCom Communications, Inc. ("ITC DeltaCom") and Access Integrated Networks, Inc. ("Access Integrated") urged the Commission to clarify that switching is an unrestricted, unbundled network element in Alabama and to establish a policy allowing consumers to choose their preferred local exchange carrier and their preferred broadband data carrier. ITC DeltaCom and Access Integrated maintained that the Commission had long ago established an unrestricted, statewide local switching UNE at cost-based rates. ITC DeltaCom and Access Integrated urged the Commission to reaffirm that conclusion with regard to local switching given the importance of local switching to the continued development of local competition. ITC DeltaCom and Access Integrated represented that such clarification by the Commission was necessary given the FCC's impending ruling concerning the status of unbundled local switching as a UNE in its *Triennial UNE Review.*[1]

With respect to broadband service, ITC DeltaCom and Access Integrated asserted that BellSouth's policy of not offering DSL service to Alabama consumers that do not also purchase BellSouth's voice service is discriminatory. They urged the

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[1] *In the Matter of Review of the §251 Unbundling Obligations and Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 ("*Triennial UNE Review*").

Commission to order BellSouth to provide its broadband DSL service to customers served by CLECs using UNE-P for voice service.

BellSouth also filed initial comments with the Commission on September 30, 2002. In those initial comments, BellSouth indicated that it was unaware of any issues reasonably related to those specifically identified in the Commission's August 31, 2002 Order that should be taken up for further consideration. BellSouth urged the Commission to allow adequate time for the filing of direct and rebuttal testimony in the event that the issues to be considered in the future proceedings contemplated were expanded beyond those originally noted.

On October 28, 2002, BellSouth filed Reply Comments in response to the initial comments filed by ITC DeltaCom and Access Integrated. In those Reply Comments, BellSouth asserted that the interest of judicial economy would best be served by considering the three issues originally deferred by the Commission, as well as the issues concerning local switching and DSL raised by ITC DeltaCom and Access Integrated, in the same proceeding. BellSouth recommended, however, that such proceedings be deferred until the Federal Communications Commission ("FCC") issues its anticipated ruling in its *Triennial UNE Review*. BellSouth noted that the aforementioned ruling of the FCC was expected in early 2003 and would likely address the issues that the Commission seeks to address with its future proceedings in this cause.

Having considered in detail the arguments raised in the foregoing pleadings, we conclude that the public interest will best be served by deferring the further proceedings anticipated in this cause until after the FCC renders its ruling in the *Triennial UNE Review*. The FCC's ruling is expected in early 2003 and will certainly impact our consideration of the various issues discussed herein. We note that we will consider in those future proceedings the issues specifically deferred by our May 31, 2002 Order in this cause, as well as the issues concerning local switching and DSL service, raised by ITC DeltaCom and Access Integrated.

We further note that our recent approval of BellSouth's §271 application demonstrates that local competition in Alabama has made strides since the passage of the Telecommunications Act of 1996. We are aware that these advances in local competition are largely attributable to the development of UNE-P. The Commission fully understands that without the continued availability of local switching and, therefore, UNE-P, the continued development of local competition in Alabama will likely sustain a serious blow. It is for that reason that we will closely monitor the proceedings of the FCC with respect to UNE-P, and in particular, local switching. For that same reason, we hereby reaffirm our previous policies requiring that local switching be provided as an unbundled network element.[2] Any alleged irregularities with regard to the continued availability of local switching as a UNE should be brought to the prompt attention of the Commission.

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[2] See *Local Competition and Price Regulation Order*, Alabama Public Service Commission, September 20, 1995, §21.01; See also the May 31, 2002 Order in this cause at §§B and C of Appendix A.

DOCKET 27821 - #5

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That the further proceedings anticipated in this cause will be deferred until the Federal Communications Commission issues its ruling in its *Triennial UNE Review* or the Commission otherwise determines that further action is timely and necessary.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 31st day of December, 2002.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary