

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

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In the Matter of)	
)	
Application for Consent to Transfer Control of)	
Domestic and International Sections 214 and)	CC Docket No. 98-184
310 Authorizations and Application to Transfer)	
Control of a Submarine Cable Landing License)	
from)	
)	
CTE Corporation,)	
Transferor)	
)	
To)	
)	
Bell Atlantic Corporation.)	
Transferee)	

ORDER

Adopted: March 24,2003

Released: March 26,2003

By the Commission:

1. INTRODUCTION

1. In this Order, we grant Verizon's request to remove merger conditions relating to Verizon's relationship to Genuity, Inc. (Genuity). In its motion filed November 27, 2002, Verizon stated that because it had relinquished its right to convert its equity into a controlling interest in Genuity, "the predicate for these conditions no longer exists."¹ Moreover, on December 23,2002, Verizon informed the Commission that it had taken the additional step of selling all of its Class A shares of Genuity.² In light of these events, we are persuaded that Verizon's ability to control Genuity no longer exists. Accordingly, because the *BA/GTE Merger Order's* compliance and auditing requirements relating to Genuity would no longer serve their

¹ *Motion to Remove Merger Conditions Relating to Verizon's Relationship with Genuity, Inc.*, CC Docket No. 98-184 (filed Nov. 27, 2002) (*Verizon Motion*).

² *See* Letter from Kathleen Grillo, Regulatory Counsel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 98-184 (Dec. 23, 2002) (*Verizon Dec. 23 Letter*).

intended purpose, we grant Verizon's motion to terminate the remaining conditions applicable to Verizon's relationship to Genuity.⁵ As discussed more fully below, the conditions, listed in Appendix B of the *BA/GTE Merger Order* (Genuity Conditions), are removed as of December 18, 2002.⁶

II. BACKGROUND

2. Section 271 of the Communications Act prohibits a Bell Operating Company (BOC) from providing in-region interLATA services in any of its in-region states until the Commission determines that the BOC has taken certain steps to open its local exchange market to competition.⁷ At the time that Bell Atlantic and GTE filed their joint application for transfer of control, GTE and its subsidiaries provided, among other things, wireless, local and long distance services, as well as Internet access service in the Bell Atlantic region.⁸ Although GTE was not a BOC, and thus not subject to the section 271 restrictions, the post-merger entity would have been in violation of section 271 of the Act.⁹ Subsequently, in order to persuade the Commission to grant the application, Bell Atlantic and GTE agreed that, prior to the merger, GTE would exit its various interLATA businesses in the section 271-restricted areas, as well as transfer the Internet and related assets to an independently-owned public corporation (Genuity), over which the merged entity would have no control.⁸

3. The proposed conditions also included terms to strengthen the newly merged firm's (Verizon's) incentives to achieve section 271 approval quickly. Bell Atlantic and GTE proposed that the merged firm would retain a class of Genuity stock, designated as Class B shares, which

⁵ See *In the Matter of Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferor, for Consent to Transfer Control*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14241 (rel. June 16, 2000) (*BA/GTE Merger Order*), Appendix B (Conditions for Establishment of Genuity as a Separate Corporation; hereinafter Genuity Conditions). We note that our decision to remove the Genuity Conditions is based, in part, upon Verizon's representation in the Verizon Motion that it holds no other controlling interest in Genuity, and that Verizon does not hold, directly or indirectly, the right to reacquire its relinquished ownership interests.

⁶ Verizon also requested in its motion that the conditions found in Paragraph 53 of Appendix D be deemed removed as of July 24, 2002. Paragraph 53 of Appendix D requires Verizon to provide to the Commission and to an independent auditor certain service quality reports concerning special access services Verizon provided to Genuity and its non-affiliates. We note that paragraph 53 of Appendix D states that "the requirements of this paragraph shall cease to apply once Bell Atlantic/GTE . . . no longer has the right to convert its Genuity Class B shares into greater than a 10 percent interest." *BA/GTE Merger Order*, Appendix D, 15 FCC Rcd at 14325, para. 53. Thus, this particular condition expired by its own terms on July 24, 2002, when Verizon converted all but one of its Genuity Class B shares into Class A capital stock and thus relinquished its right to convert its equity into a controlling Genuity interest.

⁷ 47 U.S.C. § 271

⁸ *BA/GTE Merger Order*, 15 FCC Rcd at 14040, para. 7
Id. at 14035-36, para. 2

⁹ *Id.* at 14035, 14048-50, paras. 1, 26-29.

would comprise less than 10 percent of Genuity's voting, dividend and distribution rights." The Class B shares carried a contingent right that enabled Verizon to convert the shares for up to 82 percent of Genuity Class A stock, but only after the merged company obtained section 271 authority with respect to 95 percent of Bell Atlantic's in-region access lines within five years of the merger's closing." On June 16, 2000, the Commission granted consent to transfer of control of certain licenses and lines from GTE to Bell Atlantic Corporation, but expressly conditioned consummation of the merger upon these agreed upon requirements."

4. On November 27, 2002, Genuity filed for Chapter 11 bankruptcy protection." Also on that date, Verizon filed a motion with the Commission stating that on July 24, 2002, it had "exercised its right to convert all but one of its Class B shares, into Class A capital stock," giving Verizon an approximate 9.99 percent equity interest in Genuity.¹³ Verizon subsequently sold these Genuity Class A shares.¹⁴ Moreover, Verizon stated in its motion that immediately prior to

⁹ *Id.* at 14036-37, para. 5

¹⁰ Section 271 of the Act states that "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services" except as set forth in that section. 47 U.S.C. § 271. The Commission concluded that the conditional conversion right was not an equity interest within the meaning of the Act, and did not create an "affiliate" of the merged entity in violation of section 271's restriction. See *BA/GTE Merger Order*, 15 FCC Rcd 14065, 14066, 14070, paras. 59, 62, 66. The term "affiliate" is not defined in section 271, but is defined generally in section 3(1) of the Act: "The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." Section 3(1) further states that the term "own" means to own an equity interest of more than 10 percent. 47 U.S.C. § 153(1).

¹¹ *BA/GTE Merger Order*, 15 FCC Rcd at 14035, para. 1

¹² See *Verizon Motion, Exhibit A*. Press Release of Verizon Communications Inc., (Nov. 27, 2002):

Earlier today Genuity Inc. filed for Chapter 11 bankruptcy protection. Immediately prior to the filing, Level 3 Communications Inc. agreed to purchase, subject to regulatory and bankruptcy court approval, certain of Genuity's assets and operations, including certain of Genuity's commercial contracts with Verizon . . .

[According to] Lawrence T. Babbio Jr., Verizon vice chairman and president

"As a significant creditor and customer of Genuity, we fully support this transaction. We are delighted that we've been able to resolve many complex issues in a way that benefits both the customers of Verizon and Genuity, and Genuity's creditors.

"We are also pleased that Verizon's willingness to continue existing commercial arrangements with Level 3 enabled Genuity to agree to this transaction.

"We look forward to using the services of an existing network provider like Level 3 to supplement and extend our product offerings to our customers."

¹³ *Verizon Motion, Declaration of Stephen E. Bozzo*, para. 3; *Verizon Motion* at 3.

¹⁴ On December 18, 2002, Verizon sold all of its Class A shares of Genuity, leaving Verizon holding one Class B share, and entitling Verizon to one vote. See *Verizon Dec. 23 Letter*. Verizon also states that it is entitled to convert its one Class B share into a maximum of two Class A shares or two Class C shares. See Letter from Kathleen Grillo, Regulatory Counsel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docker No. 98- (continued ..)

filing for bankruptcy protection, Genuity reached an agreement with Level 3 Communications, Inc. (Level 3) to sell Genuity's assets to Level 3, subject to regulatory and Bankruptcy Court approvals." On December 4, 2002, in response to Verizon's motion, the Commission issued a notice seeking public comment on removal of the Genuity Conditions.¹⁶ The Commission received no third-party comments.

III. DISCUSSION

5. We grant Verizon's request to eliminate the **BA/GTE Merger Order** conditions concerning Verizon's relationship to the spun-off firm, Genuity. During the period that Verizon held contingent interests in Genuity, the conditions included in the **BA/GTE Merger Order** served an important purpose by ensuring strict compliance with section 271's prohibitions on the provision of in-region, interLATA service. The conditions ensured that Verizon would have limited involvement, influence or control over, the corporate governance of Genuity. The conditions also sought to ensure arms-length transactions that did not discriminate against third parties." The conditions required Verizon, among other things, to hire an independent auditor to monitor ongoing compliance with the merger conditions; to file an annual report on compliance; as well as meet certain other auditing requirements."

6. We agree with Verizon that the Genuity Conditions would no longer serve their intended purpose because Verizon has relinquished its right to acquire a controlling interest in Genuity, and it has sold its Genuity Class A shares. Thus, assuming Verizon holds no other interest that would violate the intended purpose of the original conditions, we find that the Genuity Conditions in Appendix B are deemed removed as of December 18, 2002, the date that Verizon divested its substantial converted equity interest in Genuity.

7. We are not persuaded, however, that we should terminate the Genuity Conditions retroactive to July 24, 2002. Although Verizon argues that the effective date for removing the Genuity Conditions should be the actual date that Verizon relinquished its conversion rights, we

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184 (Jan. 22, 2002) (Verizon Jan. 22 Letter). According to Verizon, Genuity's Articles of Incorporation provide that under current circumstances, "each holder of Class A Common Stock is entitled to one vote per share and, if Verizon convert[s] its remaining Class B share into two Class C shares, Verizon would be entitled to five votes per share." However, Verizon notes that "at most," Verizon would be entitled to "ten votes total, an infinitesimal number given Genuity's current outstanding share base of [more than] 11.4 million shares." *Id.*

¹⁵ Genuity filed for bankruptcy after it reached separate agreements with Level 3 and Verizon, whereby Level 3 would purchase Genuity's assets, and Verizon would purchase interLATA services from Level 3. Verizon states that it "does not hold an equity interest in Level 3 Communications." See *Verizon Motion*, Declaration of Steven E. Bozzo, para. 5.

¹⁶ See *Pleading Cycle Established for Comments on Verizon's Motion to Remove Merger Conditions Relating To Genuity*, Public Notice, DA 02-3355 (rel. Dec. 4, 2002).

¹⁷ *Id.* at 14086, 14151-52, 14155, paras. Y6, 263, 270; and footnote 579.

¹⁸ See **BA/GTE Merger Order**, 15 FCC Rcd at 14188-195, paras. 332-348; see also **BA/GTE Merger Order**, Appendix B, 15 FCC Rcd at 14241

disagree.” Contrary to the assertion in Verizon’s motion,” the contingent controlling interest, or potential for *de jure* control, was not the Commission’s only concern. The Commission recognized that *de facto*, or actual, control of Genuity by Verizon also required close scrutiny.²¹ Although the Commission stated that there was no evidence that the merged firm had the power to dominate Genuity’s corporate affairs, the Commission expressly based its conclusions “on representations made by the Applicants regarding the relationship between the merged firm and Genuity after the spin-off.” Verizon’s status vis-à-vis Genuity since has evolved from customer-shareholder to customer-shareholder and “significant creditor.” According to the *BA/GTE Merger Order*, “[s]hould the actual relationship between [Verizon] and Genuity deviate from or extend beyond those [original] representations, the Commission would be compelled to reevaluate its assessment of whether the merged ~~firm~~ controls Genuity.”²⁴ Accordingly, we disagree with Verizon that there is “no ‘regulatory reason’” to maintain the conditions past July 24, 2002. The actual relationship between Verizon and Genuity changed in a manner that may have enabled Verizon to control or influence Genuity **up** until December **18, 2002**.

8. In the *BA/GTE Merger Order*, the Commission concluded that Verizon did not exercise *de jure* or *de facto* control because “the merged firm [would] not be in a position to dominate the management of Genuity, or control its business decisions, **personnel practices or finances**.”²⁵ Here, by Verizon’s own admission, Verizon and Genuity, immediately before Genuity filed for bankruptcy protection, had to “resolve many complex issues in a way that benefits both the customers of Verizon and Genuity, and Genuity’s creditors.”²⁶ Without prejudging whether Verizon exerted only limited and legitimate influence in its various roles as a customer-shareholder and “significant creditor” of Genuity, we note that such a determination can only be made after a consideration of all relevant factors and the totality of the circumstances.” Truncating the audit period as Verizon requests would deprive the auditor, the Commission and potential commenters of information concerning Verizon’s relationship with Genuity during a period in which that relationship continued to operate on a number of levels. Therefore, it is appropriate for the Genuity Conditions to cover the period through December **18**,

¹⁹ See *Verizon Motion* at 3, 5-6; Verizon Dei.. 23 Letter.

²⁰ *Verizon Motion* at 2-3

²¹ See *BA/GTE Merger Order*, 15 FCC Rcd at 14075, para. 76

²² *Id.* at 14075, para. 76

²³ *Verizon Motion*, Exhibit A

²⁴ *BA/GTE Merger Order*, 15 FCC Rcd at 14075, para. 16

²⁵ *Id.* at 14076, para. 78 (emphasis added).

²⁶ *Verizon Motion*, Exhibit A

²⁷ See *BA/GTE Merger Order*, 15 FCC Rcd at 14075, para. 77 (Because the determination of where actual control resides “is inherently factual and not subject to a precise formula, the Commission must **look** at all relevant factors and the totality of the circumstances.”)

2002. the date Verizon relinquished its Genuity Class A shares, ending its equity interest in Genuity that arose as a result of the divestiture ordered in *BA/GTE Merger Order*.²⁸

9. Furthermore, we disagree with Verizon that terminating the Genuity Conditions on December 18, 2002, burdens Verizon, particularly since Verizon already has in place the internal controls and mechanisms to facilitate compliance.²⁹ Verizon states that the Genuity Conditions require it “to hire an independent auditor to monitor ongoing compliance . . . and to prepare and file an annual report [as well as] comply with various onerous reporting requirements during the annual audit including outlining the terms of any agreements with Genuity.”³⁰ Verizon also points out that it is required to “provide to the Commission and to the independent auditor service quality reports concerning special access services Verizon provides to Genuity and to other nonaffiliates.”³¹ Regardless of whether the conditions terminate on July 24, 2002, or December 18, 2002, Verizon will be required to hire an auditor to monitor its compliance over some portion of the calendar year. The Genuity Conditions’ annual audit covers the period ending on December 31, 2002. Since Verizon did not even make its request to terminate the Genuity Conditions until November 27, 2002, about one month before the scheduled close of the auditing period, presumably the procedures for conducting the annual audit were well under way.” Therefore, terminating the Genuity Conditions on December 18, 2002, the date Verizon says it sold all of its Genuity Class A stock, should not create any appreciable incremental burden over what Verizon would be required to do in any event. Thus, we will require Verizon to demonstrate compliance with the Genuity Conditions through December 18, 2002.

10. Finally, we require Verizon to maintain all records it has currently in its possession that are related to its compliance with the Genuity Conditions for a period of at least two years and six months following the effective date of this Order. This will enable the Commission to investigate and resolve any complaints, which generally must be commenced within two years from the time the cause of action accrues.”

²⁸ *Id.* at 14036-37, para. 5.

²⁹ *Verizon Motion* at 5-6

³⁰ *Id.* at 5; *BA/GTE Merger Order*, Appendix D, 15 FCC Rcd at 14324, para. 53

³¹ *Verizon Motion* at 5-6; *see also BA/GTE Merger Order*, Appendix D, 15 FCC Rcd at 14324-25, para. 52. These measures served to ensure the Commission that Verizon does not use its control over the bottleneck assets to the detriment of Genuity’s competitors. *BA/GTE Merger Order*, 15 FCC Rcd 14072-74, paras. 70-74. Notwithstanding the fact that this obligation terminated by its own terms on July 24, 2002, Verizon submitted one such report as recently as January 16, 2003, demonstrating that the mechanisms to monitor and detect anticompetitive conduct are already in place and do not create any new burden on Verizon. In any case, Verizon’s obligation to report these special access performance measurements ended on July 24, 2002, further diminishing Verizon’s compliance burden. *See Letter from Gordon R. Evans, Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission*, CC Docket No. 98-184 (Jan. 16, 2003).

³² *See, e.g., BA/GTE Merger Order*, 15 FCC Rcd at 14189, para. 334

³³ 47 U.S.C. § 415. In the event that a complaint is actually filed against a carrier, we require the carrier to retain documents relating to the complaint until the complaint is resolved.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant *to* sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, and 310(d), that the merger conditions imposed in Appendix B *of* the *BA/GTE Merger Order* ARE REMOVED effective December 18, 2002.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary