ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Forbearance From the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a) of the Commission's Rules	)	**CC Docket No. 96-149**

SPRINT CORPORATION'S OPPOSITION TO PETITION FOR FORBEARANCE

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I. Introduction and Summary

Verizon has filed a petition[1] asking that the Commission forbear from enforcing its rule that prevents Bell operating companies ("BOCs") from sharing operating, installation, and maintenance services ("OI&M") with their section 272 long distance affiliates. See 47 C.F.R. § 53.203(a)(2). Sprint Corporation -- on behalf of its incumbent local exchange, competitive local exchange ("CLEC")/long distance, and wireless divisions -- opposes Verizon's petition.

Verizon filed its OI&M petition concurrent with its comments in response to the Notice of Proposed Rulemaking ("NPRM") on section 272(f)(1) issues and BOCs'

[1] Petition for Forbearance (filed Aug. 5, 2002). In its comments filed August 5, SBC voiced its support for Verizon's plea for the Commission to "eliminate immediately" the OI&M rule. Verizon Comments at 15-16; SBC Comments at 9-10.

separate affiliate requirements.[2] Verizon's petition is certainly premature.[3] Comments submitted in that proceeding showed that nearly all non-BOC parties -- including all participating state commissions and state utility consumer advocates -- agreed that the BOCs, including Verizon, remain virtually as dominant today in the local exchange and special access markets as they were when the Non-Accounting Safeguards Order was adopted just three years ago.[4]

Regardless of what the Commission ultimately determines there, however, Verizon's petition must be denied. The OI&M restriction is mandated by the Act's requirement that section 272 affiliates "operate independently" from their BOC parents, Verizon's "efficiency" and cost claims are wholly unsubstantiated, and the OI&M

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[2] Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112 ("section 272 Sunset proceeding"). In this opposition, references to "Comments" and "Reply Comments" are to the submissions in that proceeding, filed August 5 and August 26, 2002, respectively. Sprint incorporates its Comments and Reply Comments by reference.

[3] The New Jersey Department of the Ratepayer Advocate ("NJDRA") stated that Verizon's OI&M petition is outside the scope of the NPRM and therefore could not be granted without a further NPRM on its issues. NJDRA Reply Comments at 14.

[4] Sprint joined the wide array of non-BOC parties calling for the Commission to exercise its authority to extend the separate affiliate requirements beyond the sunset date. Sprint contends that the Commission should retain current separate affiliate and nondiscrimination requirements and their implementing regulations for any Regional Bell Operating Company until at least the following competitive milestones have been met: (1) the Commission adopts special access and UNE performance measurements and enforcement measures; (2) 3 years have passed since the RBOC received Section 271 authority in the last of its states; and (3) the Commission has concluded, after reviewing results of two biennial audits for each state in which Section 271 authority has been granted, that the RBOC is in compliance with its Section 272 obligations. Sprint also recommended that the Commission establish a broad framework for determining whether to extend Section 272 requirements or to allow them to sunset, and that that framework be applied to each RBOC as a whole rather than on a state-specific basis. See Comments of Sprint Corp. at 1.

restriction remains necessary to prevent BOC misconduct and to protect consumers and the competitive marketplace.

II. The Act's "*Operating Independently*" Requirement Makes the OI&M Restriction Mandatory.

Verizon contends that, because the OI&M restriction is not specifically mentioned in the Act, it is purely a "creation of regulation and not the Act." Petition at 2. However, the Commission found that this restriction was compelled by the Act's express requirement in section 271(b)(1) that BOC affiliates "shall operate independently from the Bell Operating Company."[5]

The Commission recognized from the outset "that the 'operate independently' requirement ... imposes requirements beyond those listed in sections 272(b)(2)-(5)." Order at ¶ 156. The Commission noted that "[t]his conclusion is based on the principle of statutory construction that the statute should be construed so as to give effect to each of its provisions" (Order at ¶ 156), rather than on section 272(b)(3)'s requirement "that a BOC and its section 272 affiliate have 'separate officers, directors, and employees.'" Order at ¶ 166.

As the Commission explained, this requirement is necessary "to prevent a BOC from integrating its local exchange and exchange access operations with its Section 272 affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently, as required by the statute." Id. at ¶ 158. After all, "allowing the

[5] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd 21905 at ¶ 166 (1996) ("Non-Accounting Safeguards Order" or "Order").

same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the *opportunity for such substantial integration of operating functions* as to preclude independent operation, in violation of section 272(b)(1)." Id. at ¶ 163. The Commission rightly recognized that these functions are the very core of any communications business. Therefore, "operational independence precludes a Section 272 affiliate from performing operation, installation, and maintenance functions associated with the BOC's facilities." Id. at ¶ 158.

Verizon implies that it should be presumed to have a right to provide such services to its affiliates. Given the market-opening purpose of the Act, and its recognition that Bell monopolies are to be ended, that presumption cannot be read into the Act.[6] The OI&M restriction is an essential requirement to ensure both that the section 272 affiliate does "operate independently" from the BOC and that the BOC does not abuse its dominant position to discriminate in favor of its section 272 affiliate and against its competitors. 47 U.S.C. §§ 272(b)(1), 272(c)(1); Non-Accounting Safeguards Order at ¶ 163.

6 [S]ection 272(e)(4) does not grant a BOC the authority to provide particular services to its affiliate, but rather prescribes the manner in which a BOC must provide those services that it is otherwise authorized to provide. Thus, section 272(e)(4) does not grant a BOC the authority to provide operating, installation, and maintenance services associated with the facilities that a section 272 affiliate owns or leases from a provider other than the BOC.

Order at ¶ 164.

III. The OI&M Restriction Remains Necessary to Protect the Public and the Competitive Marketplace.

(A) Verizon Remains Overwhelmingly Dominant in the Local Exchange and Exchange Access Markets.

It has been less than three years since the Commission found that the OI&M restriction was necessary. Today, Verizon and the other BOCs remain overwhelmingly dominant in the local exchange and exchange access markets in which they are the ILEC, and they retain the incentive and the ability to adversely affect long distance competition.[7]

In the local exchange market, CLECs hold a mere 6.6% of the residential and small business market, and just 10.2% of the total end-user switched access lines.[8] Moreover, only a third of these CLECs provide service solely through their own facilities. Id. CLECs remain heavily dependent on BOCs for the facilities necessary to serve the majority of their customers. As Sprint noted in the Sunset proceeding, "Six and a half years after passage of the Telecommunications Act of 1996, a 10.2% market share for all competitors combined is hardly a testament to robust competition or a lack of ILEC dominance." Sprint Comments at 7. The Commission must also realize that

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[7] However, the same is *not* true of non-BOC ILECs, which because of their much smaller scale and geographically dispersed (and largely rural) local operations are not in the same position as the BOCs to adversely affect interexchange competition. (Indeed, insofar as Sprint is aware, the Commission has never found that a non-BOC ILEC has discriminated in favor of its affiliate at the expense of other unaffiliated carriers.) The fact that section 272 applies only to the Bell Operating Companies reflects Congress' recognition that the BOCs must be subject to more stringent safeguards than are required for other ILECs.

[8] Local Competition: Status as of Dec. 31, 2001, Industry Analysis Div., Common Carrier Bureau (July 2002) at Table 2.

competitive carriers will have difficulty holding onto what little portion of the market they have gained. The CLEC industry is in a seriously troubled, fragile state. Dozens of CLECs have gone bankrupt, as have several competitive IXCs -- including WorldCom. Smaller carriers, in particular, now find the financial markets closed to them, and what little funding is available for any carriers is now high-priced. Under these conditions, the Commission should not be entertaining a roll-back of such a key marketplace protection.

In the exchange access market, competitive gains have also been very limited. Competitive IXCs remain dependent on ILECs for special access. Sprint explained in the Special Access Performance Measurement docket that its long distance division relies on ILECs for approximately 93% of its total special access requirements, despite aggressive efforts to self-supply and to utilize non-ILEC suppliers.[9] AT&T explained in the ILEC Broadband proceeding that it is similarly dependent on BOC facilities for special access,[10] and WorldCom's comments in the Sunset proceeding noted its heavy reliance on ILEC special access.[11] As the New Jersey Department of the Ratepayer Advocate emphasized in the Sunset proceeding, "[a] BOC's interLATA competitors remain dependent on BOC facilities to reach their customers," which gives Verizon the ability and the incentive to discriminate against its competitors. NJDRA Reply Comments at 13.

Verizon cites the so-called "UNE Fact Report," which the BOCs submitted with their comments in the UNE Triennial Review proceeding, claiming that many of

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[9] Comments of Sprint Corp., CC Docket No. 01-321, at 4 (Jan. 22, 2002).

[10] Comments of AT&T Corp., CC Docket No. 01-337, at 28 (Mar. 1, 2002).

[11] WorldCom Reply Comments at 4.

Verizon's "competitors provide their own transmission facilities directly to the customer's location," and that CLECs "use their own fiber-based last-mile facilities to serve the vast majority of their large business customers." Petition at 7. These assertions are, at best, misleading, because CLECs and IXCs necessarily rely on BOC facilities to reach the *great majority* of their customers, including large enterprise customers. Much of the CLECs' "own" facilities are in fact elements secured from the ILEC. In any event, the Commission cannot rely on the BOCs' widely-discredited UNE Fact Report. The biased, self-serving, and utterly unreliable nature of the UNE Fact Report was solidly established by commenters in the Triennial Review proceeding.[12]

A more reliable source is the New York State Department of Public Service. It recently investigated Verizon's dominance of the special access market in that state, and it concluded that Verizon remains clearly "dominant" in all geographic markets -- including New York City, which is widely presumed to be the most competitive in the nation.[13] The Commission found, for example, that in New York City, "Verizon has 8,311 miles of fiber compared to a few hundred for most competing carriers," that "Verizon has 7,364 buildings on a fiber network compared to less than 1,000 for most competing carriers," and that Verizon's own figures showed "a maximum of 900 buildings served by individual competitors' fiber facilities." Id. at 7. These figures are for a city with

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[12] See, in particular, AT&T Reply Comment at Attachments E (Decl. of M. Lancaster & D. Morgenstern), G (Decl. of C. Pfau), and I (Decl. of D. Willig); WorldCom Reply Comments at Attachments B (Decl. of A. Kelley) and D (Ordover Report).

[13] Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services by Verizon New York Inc., Order Denying Petitions for Rehearing and Clarifying Applicability of Special Services Guidelines, NY PSC Case 00-C-2051 (Dec. 20, 2001).

"775,000 buildings ... over 200,000 of which are mixed use, commercial, industrial, or public institutions." Id. at 7-8. Consequently, "Verizon represents a bottleneck to the development of a healthy competitive market for Special Services." Id. at 8.

With market power of that magnitude even in New York City, it is simply unrealistic to lift the OI&M safeguard. In fact, the likelihood of OI&M misconduct by BOCs has increased since 1999. As Verizon and the other BOCs have received section 271 authority in a growing number of states, they have a rapidly growing stake in the long distance market. Indeed, Verizon boasts that it is now the nation's fourth largest long distance carrier.[14] Verizon obviously has the incentive and the ability to abuse its dominant market position by misallocating OI&M costs and discriminating in favor of its affiliate and against its competitors. Verizon's claim that there is "no regulatory need" for this safeguard is plainly false. The OI&M restriction is now more important than it has ever been.

(B) The OI&M Restriction Remains Necessary to Prevent Cost Misallocation.

Verizon suggests that the Commission was unreasonable in prohibiting sharing of OI&M services, when it permitted BOCs to share with their affiliates other administrative functions, including "finance, human resources, legal, and accounting." Petition at 4; Verizon Comments at 17. The record shows that BOCs have misallocated costs for those

[14] Investor Quarterly 2Q2002, Verizon Communications Investor Relations (July 31, 2002) at 3.

administrative services,[15] and Sprint believes the Commission could justifiably have prohibited BOCs from sharing those services as well, in order to ensure that section 272 affiliates in fact operate independently. But the Commission determined that "[r]egardless of whether the BOC or the section 272 affiliate were to provide such services ... allowing the same individuals to perform such *core functions* on the facilities of both entities would create *substantial* opportunities for improper cost allocation, in terms of both the personnel time spent in performing such functions and the equipment utilized." Order at ¶ 163 (emphasis added). As AT&T explained, "[t]he operation, installation and maintenance of networks and network facilities represents the heart of a telecommunications company -- and for the BOC, relates directly to the source of the BOCs' bottleneck control over local exchange and exchange access facilities." AT&T Reply Comments at 23-24. Allocating those costs is more difficult, and the impact of misallocation is more serious, than for ancillary, administrative costs. Contrary to Verizon's claim (Petition at 4), there is a "fundamental difference" between OI&M and administrative services that requires at least this measure of structural separation.

Verizon's claims that conventional, arms' length dealing requirements would be sufficient to prevent cost misallocation are without merit. Petition at 9. It is one thing to have a rule prohibiting cross-subsidization, and quite another to be able to detect and then enforce it. In the GTE Consent Decree proceeding, for example, the court noted how

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[15] See, e.g., WorldCom Reply Comments at 5 (recounting BOC failure "to value sales and marketing services provided by the BOC to the section 272 affiliate in accordance with the Commission's Part 32 affiliate transactions rules").

difficult it can be to monitor and prevent cross-subsidization, given Verizon's ability to shroud misconduct in obscuring accounting.[16] As the court explained, it is "the more indirect, subtle vehicles for cross-subsidization that are ordinarily the most difficult to detect." 603 F. Supp. at 738. OI&M costs involve more opportunity for abuse than administrative costs. Similarly, in the Non-Accounting Safeguards Order (at ¶ 163), the Commission recognized that relying solely on accounting safeguards is unrealistic.

> We conclude, as we did in the BOC Separations Order, that allowing the sharing of such services would require 'excessive costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier ... to audit and monitor the accounting plans necessary for such sharing to take place.' Accordingly, we read section 272(b)(1) to bar a section 272 affiliate from contracting with a BOC or another entity affiliated with the BOC to obtain operating, installation, and maintenance functions associated with the section 272 affiliate's facilities.

Verizon also argues that cross-subsidization worries should no longer matter in any event, because -- at least in most states -- its rates are no longer cost-based. Petition at 5. Even under a price-cap regime, however, Verizon obviously can exploit its dominance in the local exchange and exchange access markets to subsidize its entry into the long distance market, consolidate its dominant position, frustrate competition, and ultimately harm consumers. As the National Association of State Utility Consumer Advocates ("NASUCA") explained in the Sunset proceeding, "Qwest's recent disclosure that it had improperly accounted for $1.1 billion dollars in revenue calls into question the

[16] United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) (subsequent history omitted).

adequacy of accounting safeguards alone in protecting the public interest."[17] The Commission was right to consider the practical difficulties of detecting cost misallocation and enforcing compliance. Those concerns remain just as valid today.

(C) The OI&M Restriction Remains Necessary to Curb Discrimination.

Verizon contends that the OI&M restriction is unnecessary to prevent BOC discrimination. Petition at 8-9. In the Non-Accounting Safeguards Order, however, the Commission realized that "[a]llowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." Order at ¶ 163. The Commission found that the OI&M restriction therefore was necessary to implement section 272(e)(4)'s requirement that a BOC "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate [only] if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions." Order at ¶ 164.

Such discrimination is a real problem, which will only get worse as Verizon increases its expansion into the long distance market in its home states. Indeed, last year, the New York State Department of Public Service reviewed Verizon's performance in

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[17] NASUCA Reply Comments at 8. NASUCA added, "At a time when public confidence in accounting standards for the telecommunications industry is ebbing, it would be administratively efficient and prudent to keep the separate affiliate requirements in place as the Commission wrestles with how best to ensure that financial information being report in the recent past -- including past compliance with section 272 by those now urging its elimination -- has been accurate." Id.

provisioning of special access and other services.[18] The Department concluded, "we find that a competitive facilities-based market for Special Services has yet to emerge and that Verizon continues to dominate the market overall."[19] The Department also found that Verizon discriminated against its competitors in its provision of service.[20]

> The data also suggest that Verizon treats other carriers less favorably than its retail customers. On average, it meets only 74% of its appointments on carrier service requests, but meets 94% of its retail customer appointments. ... Verizon denies discrimination, but provides no data to explain the 20% difference in performance or to refute the prima facie indicia of discrimination.

Verizon, of course, is not the only BOC that discriminates in favor of its affiliate. For example, the Public Utility Commission of Texas recounted in the Sunset proceeding that, two years after receiving section 271 approval, SWBT continues to fail to meet performance measures, having committed more than 5,254 violations between November 2001 and April 2002, including repeated instances of discrimination.[21] It concluded (id. at 7):

[18] Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc., Case 00-C-2051, and Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Co., Case 92-C-0665, Opinion No. 01-1, *Opinion & Order Concerning Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.* (issued June 15, 2001).

[19] Id. at 9.

[20] Id. at 5-6.

[21] Texas PUC Comments at 7. The commission added "that there does not appear to be a significant trend downward" in SWBT violations. Id.

> Until these matters [special access performance measures] are resolved, the separate affiliate requirements of section 272 [including the OI&M restriction] remain the most effective means of assessing the BOCs' compliance with the statutory obligation to not discriminate against other entities in favor of its affiliates.

The Commission must acknowledge that the situation for competitive carriers, including competitive IXCs, has been made worse by the BOCs' failure to comply fully with their obligations under the Act. As the Texas Attorney General noted in its Sunset comments, Verizon and other BOCs "have all been fined for a list of abuses and violations of their statutory and regulatory obligations -- all of which occurred during a period in which the RBOCs must have been particularly sensitive to the need for compliance."[22] To date, the BOCs have been assessed fines, penalties, commitments, or refunds of over $2.1 billion for violations of statutory obligations, merger conditions, and conditions of section 271 approvals.[23] Verizon alone has incurred more than $300 million in such penalties.[24] Verizon has been repeatedly fined, in particular, for its continuing unwillingness to meet wholesale services standards that are essential to competition. Verizon was compelled to enter a further consent decree and pay another

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[22] Texas Attorney General Reply Comments at 3 (noting also that Verizon and other BOCs "have used every means to slow or prevent the development of robust competition").

[23] The competition advocacy group, Voices for Choices, maintains a running tally of these penalties. <u>See</u> Bell Fine Watch" at *http://www.voicesforchoices.com.*

[24] <u>Id.</u> The Verizon companies have been fined, ordered to make refunds, or compelled to enter consent decrees nearly 30 times since 1996. Verizon has shown no trend toward improvement, either. It has been fined more than ten times so far in 2002.

"voluntary contribution to the U.S. Treasury" on August 20 -- two weeks after filing the petition.[25]

(D) The OI&M Safeguard is Not Unreasonably "Inefficient" or Burdensome.

Verizon's petition alleges that the OI&M restriction is "inefficient," and that the Commission did not have sufficient information on costs at the time of the Non-Accounting Safeguards Order "to properly conduct a cost-benefit analysis." Petition at 3. Actually, the FCC had a full and extensive record in that proceeding, including comments submitted by every BOC and more than 50 other parties. Cost and efficiency arguments featured prominently in the RBOCs' submissions. Ultimately, reviewing its extensive record, the Commission reached an "appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination." Order at ¶ 167. It imposed the OI&M restriction, but declined to find that "operating independently" would require prohibition of all shared services. Id. at ¶ 168.

Verizon claims that the OI&M restriction costs it a dazzling sum in unspecified "costs" of compliance. Petition at 3-4 & Decl. of F. Howard at 2-3. Its petition, however, offers no evidence or actual data -- only vague and self-serving assertions and

[25] Verizon Communications Inc., DA 02-2017 (rel. Aug. 20, 2002) (consent decree imposing $260,000 penalty and mandating a formal compliance plan to remedy systemic inaccuracies in Verizon's performance measures required under market-opening conditions).

far-fetched, and unverifiable, *estimates*.[26] The basis of Verizon's claimed cost estimates are not provided, nor are its figures independently verified. As the Texas Attorney General explained in the Sunset proceeding, after reviewing the same declarations attached to Verizon's comments, "RBOCs' 'efficiency losses' arguments are suspect, since the rules permit RBOC and section 272 affiliates to share a broad range of services and facilities, including sales, marketing, and administrative services." Texas AG Reply Comments at 3. See also NJDRA Reply Comments at 15 (noting Verizon cost estimates are not credible).

Verizon's unsupported factual assertions are difficult to accept at face value. Verizon claims that the cost of maintaining duplicate personnel in its section 272 affiliates is a substantial "handicap" on its business. Yet the Commission may note that Verizon is one of the largest companies in the country, employing nearly 250,000 people -- most of them in Verizon's BOC operations.[27] In comparison, Verizon Long Distance has only a handful of employees -- just 452 according to Verizon's web page[28] -- already serving some 9 million long distance customers.

Sprint will grant that the OI&M may cause Verizon some burdens and some inefficiencies. But the limited burdens and inefficiencies of the OI&M safeguard are reasonable when weighed against cost misallocation and discrimination in a marketplace

[26] In the Section 272 Sunset proceeding, none of the BOCs provided any specific or verifiable data or support their claims about the costs of structural safeguards. Verizon Comments at 9-10; SBC Comments at 6-7; Qwest Comments at 13-15.

[27] *http://investor.verizon.com/profile/index.html*

[28] *www.verizonlongdistance.com/news/index.cfm?Article=72*

that is a long way from being fully competitive. Moreover, many -- perhaps most -- of the inefficiencies and costs Verizon speculates about are its own creation. Verizon voluntarily maintains no fewer than five separate, core section 272 affiliates. And in any event, Verizon retains huge advantages of scale and scope -- not to mention a captive customer base -- that vastly outweigh the limited impact of the OI&M restriction on its costs and operations.

Verizon also claims that the OI&M restriction "discourage[s] investment." Petition at 4 & J. Diefenderfer Decl. at 2. Verizon again provides no substance to support its assertion, and the Commission already determined that the loss of potential efficiency was a necessary trade-off to and required by the Act's pro-competitive mandate. Order at ¶ 167. If the Commission disregarded the "operating independently" requirement of the Act -- and if it failed to maintain an environment that promotes competition -- other carriers would be less willing to invest. In the long run, Verizon itself will have far less incentive to invest, and every incentive to compel consumers and carrier customers to pay more for its services.

Verizon also claims that the OI&M restriction is "anachronistic" because the trend toward digital and packet-based networks begins to blur distinctions between local and long distance and voice and data. Petition at 5.[29] For the time-being, however, Verizon's competitors are bound to the local vs. long distance distinction, and section 272 calls for Verizon's long distance affiliate to be in the same position.

[29] Ironically, in the UNE Triennial Review, Verizon and the other BOCs have opposed updating Section 251 unbundling requirements to reflect DSL and packet-based technologies.

(E) The OI&M Restriction Does Not Place Verizon at a Competitive Disadvantage.

Verizon claims, incredibly, that it is at a "significant disadvantage in competing" because of the OI&M safeguard. Petition at 7 & S. McGully Decl. at 2. Verizon surely needs no protection from competitive "disadvantage."

As the National Association of State Utility Consumer Advocates explained in comments in the section 272(f)(1) Sunset proceeding, NASUCA Comments at 5, Verizon has become -- overnight -- the nation's fourth largest long distance carrier, with 9 million customers. It has increased its long distance subscriber base by more than 50% since the second quarter of this year alone. Id. Combining its dominant local services with long distance has allowed it to win nearly 18% of New York's interstate long distance market in just thirty months, 18% of the Massachusetts market in just over twelve months, and 8% of Pennsylvania's market in about nine months. Id. Further, this growth has not been based on Verizon's construction of facilities, but purely on exploiting its overwhelming dominance in the local exchange market while it resells long distance services acquired from other carriers. Rather than protect the competitive position of BOCs like Verizon, the Commission should stay focused on protecting the competitive marketplace from abuse by a dominant carrier enjoying the legacy of decades of local monopoly.

The restriction, Verizon asserts, "imposes marketing handicaps on the BOCs that inhibit their ability to meet customers' needs," because it is impossible to provide customers a "high level of support" while complying with the OI&M restriction. Petition at 6. Generalized assertions are hardly sufficient grounds for reversing a rule the Commission adopted after a thorough rulemaking. Verizon's reliance on the UNE Fact

Report is further reason to doubt his assumptions. As WorldCom remarked, "No independent analysis has ever found that the section 272 requirements [including the OI&M requirements] place the RBOCs at a cost disadvantage." WorldCom Reply at 6-7.

Instead, Verizon enjoys significant cost *advantages* unavailable to other interLATA carriers. The sharing of sales and marketing services alone gives Verizon a significant edge over competitors. As WorldCom noted, the president of Verizon's long distance company was quoted bragging that shared sales and marketing give it customer acquisition costs 20% to 30% lower than its competitors.' WorldCom Reply at 6-7 (quoting an article in USA Today). And while Verizon claims that the OI&M restriction disadvantages Verizon versus competing carriers that "are able to offer an integrated services platform using their own local and long distance facilities" (Petition at 7), it is exceptionally rare that any other carrier can provide the "seamless" end-to-end service that Verizon ascribes to them. Competitors can offer such end-to-end service only where they have their own fiber to the premises at each circuit end, and only a tiny percentage of buildings nationwide are reached by non-ILEC fiber. In addition, in the vast majority of cases (even with the largest business customers), competitive long distance carriers must routinely coordinate installation, repair, and maintenance actions with the BOC, just as its section 272 affiliate must do.

So while Verizon voices concern that it "cannot respond as a single team that can maintain end-to-end service" (Petition at 7; Verizon Comments at 20), it is merely in the same position as other long distance companies. It is entirely appropriate that Verizon's long distance affiliate should follow the same procedures as its long distance competitors -- and face the same difficulties. That principle of equal treatment is embedded in section

272 and in the Non-Accounting Safeguards Order.[30] Lifting the OI&M restriction would in fact give Verizon's section 272 affiliate an unfair advantage over competitors.

IV. The Petition Fails to Meet the Requirements of Section 10 for Forbearance.

Section 10(a) of the Act provides that the Commission may forbear from applying requirements of the Act only if the petitioner proves three stringent criteria are met:[31]

> (1) enforcement is not necessary to ensure that the charges and practices of the carrier are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement is not necessary to protect consumers; *and*
>
> (3) forbearance is consistent with the public interest.

47 U.S.C. § 160(a). Section 10(b) provides further that, in considering the public interest under section 10(a)(3), "the Commission *shall* consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition…." 47 U.S.C. § 160(b). Verizon, curiously, glosses over this requirement, but its petition fails the section 10 test regardless.

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30 See Non-Accounting Safeguards Order at ¶ 160.

31 Verizon contends that Section 10(a) is not discretionary, and that if conditions are met the Commission *must* grant forbearance. Nevertheless, the courts have recognized that the Commission has significant latitude to determine, in the reasonable exercise of its expert judgment, whether such conditions are met. The courts' "deference is particularly great where … the issues involve 'a high level of technical expertise in an area of rapidly changing technological and competitive circumstances.'" Verizon Tel. Cos. v. FCC, 292 F.3d 903, 909 (D.C. Cir. 2002), quoting from Sprint Comms. Co. v. FCC, 274 F.3d 549, 556 (D.C. Cir. 2001).

(A) The OI&M Restriction Remains Necessary to Ensure that Charges and Practices Are Just and Reasonable and Not Discriminatory.

Sprint has already established that the OI&M restriction remains necessary to prevent discrimination in favor of Verizon's long distance affiliate. See Section III, supra. The state commissions and their consumer advocates also recognized the need for such safeguards in the Sunset proceeding. As NASUCA explained, "Clearly, the BOCs still have market power and thus still have the ability to discriminate against competitors. ... By any reasonable definition, the BOCs are still monopolists," and the situation is only "likely to worsen." NASUCA Comments at 4. As the Commission has acknowledged in successive section 271 orders, "compliance with section 272 is of 'crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a *level playing field*."[32]

(B) The OI&M Restriction Remains Necessary to Protect Consumers.

Verizon claims that freeing it from these market-opening restraints will "further consumer interests" by allowing it to "offer better prices and services." Petition at 10. It argues further that the "costs of complying" mean less money is available for "productive investments." Id. Verizon's blanket assertions, however, are insufficient.

[32] Application by SBC Comms. Inc., Southwestern Bell Tel. Co., and Southwestern Bell Comms. Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Tex., 15 FCC Rcd 18354 at ¶ 395 (2000), quoting Application of Ameritech Mich. Pursuant to Section 271 of the Comms. Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Mich., 12 FCC Rcd 20543, 20725 (1997).

The New Jersey Department of the Ratepayer Advocate addressed this issue in its Sunset Comments. It pointed out that the Commission has received no showing, and has no record to support a finding, that a BOC's long distance affiliate is *not* subsidized at the expense of consumers. NJDRA Reply Comments at 14-16. Verizon has undeniable market power in local exchange and exchange access services, and will continue to have such power for the foreseeable future. As the NJDRA agreed, that market power is virtually certain to lead to cross-subsidies as Verizon eagerly buys market share in long distance.

As Sprint showed above, the OI&M restriction helps reduce the risk of cross-subsidization and discrimination against competitors. Ultimately, the OI&M safeguards promote the interests of consumers while fulfilling the market-opening and pro-competitive goals of the Act.

(C) Forbearing to Enforce the OI&M Restriction Would be Contrary to the Public Interest.

Verizon claims that lifting the OI&M requirement would "promote[ ] efficiency and economic growth" and "promote development of broadband," and thereby the public interest. Petition at 10. Sprint believes the record shows that removing the OI&M safeguard for Verizon would ultimately undermine efficiency and slow growth. Lifting the long-standing OI&M restriction would inevitably lead to some measure of cost misallocation and discrimination. It would frustrate competition by giving BOCs, including Verizon, even greater ability to exploit their dominant market positions to discriminate in favor of their own long distance affiliates.

Verizon's suggestion that broadband would be promoted "by removing artificial limitations and operational inefficiencies" (Petition at 10) is simply an empty claim. Without the spur of competition that is enabled by the OI&M restriction, there is every reason to expect that Verizon will have less incentive to invest in new facilities and services. Self-serving statements of Verizon and its declarants do not establish the public interest, and they certainly do not provide the conclusive showing required under sections 10(a) and (b) to justify reversing the well-founded OI&M rule.

V. Conclusion

The Commission addressed the OI&M issue thoroughly in the Non-Accounting Safeguards proceeding. It found that the OI&M restriction was mandated by the Act, that it was necessary to reduce cost misallocation and discrimination, and that it was a reasonable trade-off between BOC efficiency and market protection. In seeking forbearance, Verizon has offered only unsubstantiated claims, and it fails to meet the demanding requirements of section 10.

Sprint, and virtually all other non-BOC commenters in the section 272 Sunset proceeding, agreed that the Commission should maintain, even extend, all market safeguards under section 272, including the OI&M safeguard.

Even with the OI&M restriction in place, the playing field is hardly level. Verizon and the other BOCs clearly still have the ability and incentive to unfairly exploit their market dominance. In the section 272 Sunset proceeding, Sprint and virtually all other non-BOC commenters concurred that the section 272 safeguards, including the OI&M restriction, remain necessary and should be extended. In the meantime, Verizon's petition should be denied.

Respectfully submitted,

SPRINT CORPORATION

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