

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter)
)
GTE CORP.)
Transferor,)
)
and) CC Docket No. 98-184
)
BELL ATLANTIC CORP.)
Transferee,)
)
For Consent to Transfer of Control)

COMMENTS OF AT&T CORP. TO
VERIZON'S REQUEST TO ELIMINATE MERGER CONDITION XXII

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July 27, 2004

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 2

ARGUMENT..... 4

I. TWO ESSENTIAL PREMISES OF VERIZON’S REQUEST – THAT THE ENFORCEMENT BUREAU HAS AUTHORITY TO REMOVE MERGER CONDITIONS AND THAT THE UNE CONDITION HAS SUNSET – ARE INCORRECT..... 4

 A. The Enforcement Bureau Has No Authority To Remove Merger Conditions That The Full Commission Has Found To Be Necessary To Approval Of The Merge 4

 B. Condition XIII, Offering UNEs, Has Not Sunset 6

II. EVEN AS TO THE CONDITIONS THAT VERIZON CONCEDES ARE STILL OPERATIVE, THE COMMISSION HAS DETERMINED THAT AN INDEPENDENT AUDIT IS NECESSARY.11

 A. The Remaining Conditions Are Important And Not “Self-Policing”13

 B. Experience With The Past Audits Of The Remaining Operative Conditions Shows That Independent Audits Result In The Disclosure of Information That Would Not Have Otherwise Been Voluntarily Reported By Verizon.....15

 C. The Annual Compliance Report Is Insufficient Because Of The Inability To Benchmark17

III. THE COMMISSION HAS ALREADY DETERMINED THAT THE PUBLIC INTEREST PRECLUDES EARLY TERMINATION OF ANY OF THE CONDITIONS FOR ANY REASON, INCLUDING COST18

CONCLUSION.....20

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**COMMENTS OF AT&T CORP. TO
VERIZON’S REQUEST TO ELIMINATE MERGER CONDITION XXII**

Pursuant to Public Notice DA-04-2093 issued by the Commission on July 13, 2004, AT&T Corp. (“AT&T”) submits its Comments to Verizon’s letter¹ requesting that the Commission eliminate Condition XXII of the *Bell Atlantic/GTE Merger Order*² requiring it to engage an independent auditor to examine its compliance with the non-sunset merger conditions, and to publicly file a report with the Commission, for all periods beginning on or after January 1,

¹ Letter from Jeffrey Ward, Senior Vice President, Regulatory Compliance, Verizon, to William Davenport, Chief, Investigations and Hearings Division, FCC, April 28, 2004 (“Verizon Audit Waiver Request Letter”) and Letter from Sara Cole, Associate Director, Federal Regulatory Advocacy, Verizon, to William Davenport, Chief, Investigations and Hearings Division, FCC, June 22, 2004 (“Verizon Supplemental Audit Waiver Request Letter”).

² Memorandum Opinion And Order, *Application Of GTE Corp., Transferor, And Bell Atlantic Corp., Transferee, For Consent To Transfer Control*, 15 FCC Rcd. 14032 (2000) (“*Bell Atlantic/GTE Merger Order*”).

2005. A virtually identical filing was made by SBC, seeking relief as of January 1, 2004.³ For the reasons set forth below, Verizon’s request should be denied.

INTRODUCTION AND SUMMARY

The Commission found that the proposed merger of Bell Atlantic and GTE posed “significant potential public interest harms” by removing an actual potential entrant; eliminating a “benchmark;” and “increasing the incentive and ability of the merged entity to discriminate against rivals, particularly with respect to advanced services” – harms “not mitigated by the proposed transaction’s potential public interest benefits.”⁴ The Commission ultimately agreed to the merger, and found that the “proposed transaction, on balance ... serve[d] the public interest, convenience and necessity,” but only because of the applicants’ “ongoing compliance” with the conditions, including the audit condition, agreed to by Verizon.⁵

Verizon now asks the Enforcement Bureau to eliminate one of the merger conditions – the condition requiring an annual, independent audit assessing Verizon’s compliance with the other conditions. Verizon asserts that it should be relieved of this condition because many of the conditions have sunset; most of the remaining operative conditions are “self-policing” and/or could be policed through complaints filed by a harmed party; it will continue to self-report on its compliance in its Annual Compliance Report; and compliance will cost “at least one million dollars” before the condition sunsets.⁶

³ See Public Notice DA-04-2092 issued by the Commission on July 13, 2004, CC Docket No. 98-141.

⁴ *Bell Atlantic/GTE Merger Order*, ¶ 246.

⁵ *Id.*, ¶ 250 (emphasis added).

⁶ Verizon Audit Waiver Request Letter at 2.

To begin with, two of the essential premises of Verizon's request are incorrect. The Enforcement Bureau has no power on delegated authority to eliminate any merger condition that the Commission has found to be a necessary prerequisite to the approval of a merger. Moreover, Verizon's unsupported assertion that Condition XIII (requiring the provision of unbundled network elements ("UNEs")) has sunset is wrong. That condition does not sunset until the Commission has issued a final, non-appealable order establishing Verizon's unbundling obligations – which has not yet occurred, because of the D.C. Circuit's two decisions vacating the Commission's rules and the fact that further proceedings are currently pending before the Commission on those issues on remand. The entire purpose of the condition was to provide market certainty and require Verizon to offer UNEs during any period in which the Commission's unbundling rules were stayed or vacated; the court's successive decisions vacating those rules leave the merger condition in place. Indeed, Verizon's request seems to be a backdoor attempt to obtain the Commission's blessing for its erroneous interpretation of this condition by burying it in a long list of allegedly "sunset" conditions.

The Commission's *Bell Atlantic/GTE Merger Order* also forecloses Verizon's request for elimination of the auditing requirement. As noted above, the Commission held that its "public interest" finding, on the basis of which the merger was approved, turned on the assumption of Verizon's "ongoing compliance" with *all* the conditions.⁷ The conditions, including the audit condition, were "intended to be a floor and not a ceiling."⁸ Reliance on the Annual Compliance Report to assure compliance is not sufficient: "[o]nly a strong corporate compliance program, *in*

⁷ *Bell Atlantic/GTE Merger Order*, ¶ 250.

⁸ *Id.*, ¶ 347.

conjunction with the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefits of the conditions.”⁹ Contrary to Verizon’s suggestion, the independent audits have identified existing violations of the conditions, as well as questionable Verizon interpretations of various conditions that would never have been uncovered but for the audits. And Verizon’s *ipse dixit* claim that the audits are costly is not only unsubstantiated, it is precluded by the Commission’s determination in the *Bell Atlantic/GTE Merger Order* that “[t]he independent audit requirement establishes an efficient and *cost-effective* mechanism for providing reasonable assurances of Bell Atlantic/GTE’s compliance with its obligations under the conditions.”¹⁰ Accordingly, Verizon’s request to eliminate the audit requirement should be denied.

ARGUMENT

I. TWO ESSENTIAL PREMISES OF VERIZON’S REQUEST – THAT THE ENFORCEMENT BUREAU HAS AUTHORITY TO REMOVE MERGER CONDITIONS AND THAT THE UNE CONDITION HAS SUNSET – ARE INCORRECT.

A. The Enforcement Bureau Has No Authority To Remove Merger Conditions That The Full Commission Has Found To Be Necessary To Approval Of The Merger.

Verizon’s Letter to the Bureau includes only the bald request that it “discontinue requiring Verizon to conduct BA/GTE post-merger audits for all periods beginning on or after January 1, 2005.” Verizon cites no authority under which the Enforcement Bureau could grant such a request, nor could it. The Enforcement Bureau has no power on delegated authority to

⁹ *Id.*, ¶ 335 (emphasis added).

¹⁰ *Id.*, ¶ 341 (emphasis added).

repeal a merger condition that the full Commission has found to be necessary in the public interest as a precondition to the approval of a merger.

The Commission made clear in the *Bell Atlantic/GTE Merger Order* that it would not grant early termination of any of the merger conditions. The Commission found the merger to be in the public interest *only* “with the full panoply of conditions that we adopt in this Order, and assuming the Applicants’ ongoing compliance with these conditions.”¹¹ Only by virtue of Verizon’s “*ongoing* compliance” with *all* of the Conditions, including condition requiring an independent audit, did the “proposed transaction, on balance ... serve the public interest, convenience and necessity.”¹² Elsewhere, the Commission indicated that full enforcement of the conditions for the full time frame “is critical for the conditions to ameliorate the potential public interest harms of the merger.”¹³ The Commission also determined that the minimum time frames were reasonable in the context of the telecommunications industry.¹⁴

The Enforcement Bureau has no power on delegated authority to revisit these Commission public interest determinations.¹⁵ While the Bureau certainly may enforce and interpret the scope of a merger order, “it is axiomatic that a delegated authority decision cannot

¹¹ *Id.*, ¶ 247 (emphasis added).

¹² *Id.*, ¶ 250.

¹³ *Id.*, ¶ 346.

¹⁴ *Id.*, ¶ 368 (“[i]n the fast-changing world of telecommunications industries, these commitments, in our judgment, will last for a sufficient period to have real impact, but not so long as to threaten imposing obsolete responses to future issues”).

¹⁵ See *Delegation of Additional Authority to the Enforcement Bureau*, 17 FCC Rcd. 4795, ¶¶ 2-3 (2002) (delegation of merger-related audit functions to Enforcement Bureau “in no way affects the substantive merger obligations” and the amendments to the merger orders “are non-substantive and pertain to agency organization, procedure, and practice”).

conflict or otherwise reverse the decision of the full Commission.” *E.g., Mintz, Levin, Cohn, Ferris, Glovsky & Pope, P.C.*, 17 FCC Rcd. 16100, ¶ 6 (2002); 47 C.F.R. § 1.115(b). There is no dispute that the audit condition remains operative under the plain terms of the *Bell Atlantic/GTE Merger Order*; therefore, any bureau decision that eliminates that condition would “reverse the decision of the full Commission.” *See also* Public Notice at 1 (recognizing that Verizon’s request “effectively asks the Commission to eliminate Condition XXIII for future periods”). The Commission found independent, annual audits to be a necessary condition to approving the merger, and only the full Commission can reverse that policy, and only under the stringent standards necessary for a waiver. Verizon has not even attempted such a showing, and its request should be denied for that reason alone.

B. Condition XIII, Offering UNEs, Has Not Sunset.

Verizon also simply asserts that Condition XIII, requiring the provision of unbundled network elements, has sunset.¹⁶ That is flatly incorrect. By its plain terms, that condition remains operative, and independent audits remain necessary to ensure Verizon’s compliance with that condition.

Condition XIII was one of the most important conditions to the merger, because there was a great need to protect local competition in light of the uncertainty surrounding the Commission’s unbundling rules. To address this, Verizon agreed “to reduce uncertainty to competing carriers from litigation that may arise in response to [the Commission’s] orders in the UNE Remand and Line Sharing proceedings,” and agreed that “from now until the date on which the Commission’s orders in those proceedings, and any subsequent proceedings, become final

¹⁶ Verizon Audit Waiver Request Letter at 1.

and non-appealable” it “will continue to make available to telecommunications carriers, in accordance with those orders, each UNE and combination of UNEs that is required under those orders, until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide the UNE or combination of UNEs in all or a portion of its operating territory.”¹⁷

The conditions for terminating these conditions have not yet been satisfied. As an initial matter, these conditions were effectively drafted by Verizon, and any ambiguity must be construed against it. *See United States v. Seckinger*, 397 U.S. 203, 210 (1970) (“[A] contract should be construed most strongly against the drafter”). In any event, by any reading of these contractual provisions, Verizon remains obligated to provide existing UNEs; there is no conceivable counterargument.

First, the merger condition is clearly not subject to a three-year sunset. It is true that many merger conditions expire after three years, but that default sunset provision does not apply to conditions that have their own specific termination language. *See Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, & SBC Communications, Inc., Transferee*, 17 FCC Rcd. 19,595, ¶ 3 (2002) (“Some of the [merger] conditions . . . are not subject to that

¹⁷ *Bell Atlantic/GTE Merger Order* ¶ 316. The merger condition itself (Merger Condition XIII) states that Bell Atlantic/GTE will continue to provide

the UNEs and UNE combinations required in [the UNE Remand Order and Line Sharing Order] in accordance with those orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable orders in the UNE Remand and Line Sharing proceedings, respectively.

Bell Atlantic/GTE Merger Order, App. D, ¶ 39.

expiration date because the condition itself specifically establishes its own period of applicability.”). The Enforcement Bureau has already expressly recognized that the UNE condition is a condition that is *not* subject to the three-year sunset period. *See id.* ¶ 3 n.7.

Nor could Verizon claim that the condition has expired because there is “a final and non-appealable Commission order in the UNE remand proceeding.” There is in fact no such order. This reading is compelled by the FCC’s explanation of this merger condition: that “from now until the date on which the Commission’s orders in those proceedings, *and any subsequent proceedings*, becomes final and non-appealable,” Verizon “will continue to make available to telecommunications carriers each UNE that was” previously available.¹⁸ In the wake of the D.C. Circuit’s decision in *USTA II*, there are still “subsequent proceedings” underway at the Commission, and the Commission has yet to issue a final, non-appealable order determining whether Verizon must make a number of important UNEs, including switching, available. Thus, the condition is still operative.

Any contrary argument would render the Commission’s phrase “any subsequent proceedings” superfluous. The *UNE Remand Order* was reversed by *USTA I*, and the *Triennial Review Order* was the FCC’s order on remand from that decision.¹⁹ Given that the *UNE Remand Order* and *Line Sharing Order* were both issued prior to the issuance of the FCC’s *Bell Atlantic/GTE Merger Order*, it would have been a simple matter for the FCC (or Verizon) to write the condition to specify that the obligation to offer UNEs would exist until the pending

¹⁸ *Bell Atlantic/GTE Merger Order* ¶ 316.

¹⁹ The *TRO* is expressly captioned as an “Order on Remand” in both the *UNE Remand* docket (CC Docket No. 96-98) and the *Line Sharing* docket (CC Docket No. 98-147). And that is, of course, why the appeal of the *TRO* was transferred from the Eighth Circuit to the D.C. Circuit and assigned to the same panel that heard *USTA I* – at Verizon’s request.

judicial review of the *UNE Remand Order* and the *Line Sharing Order* was final. The FCC, however, did not adopt such language. Rather, as noted, the plain language of the merger condition provides that the condition to offer UNEs applies until there is a “*final and non-appealable Commission order[]* in the *UNE Remand and Line Sharing proceedings*.”²⁰ Further, the FCC, in explaining this condition, expressly stated that the condition would apply “until the date on which the Commission’s order in *those proceedings* [UNE Remand and Line Sharing], *and any subsequent proceedings*, become final and non-appealable.”²¹ Under the reading that Verizon is implicitly proposing, there would never be any “subsequent proceedings” because the obligation would terminate after the initial review of the *UNE Remand Order* and *Line Sharing Order*.²²

Nor is it the case that this condition terminates when *USTA II* becomes final. In *USTA II*, the court did not hold that ILECs “are not required” to provide UNEs within the meaning of the condition. Rather, the court vacated the unbundling rules a second time merely for lack of reasoned explanation, which has triggered another “subsequent proceeding” on remand which is still pending at the Commission. There is still no final, non-appealable order with respect to the aspects of the Commission’s unbundling rules that were vacated in *USTA II*. The very point of the condition was to preserve the *status quo* should a court stay or vacate the unbundling rules that the FCC adopted in the UNE proceeding – as the D.C. Circuit has done in *USTA II*.²³

²⁰ *Bell Atlantic/GTE Merger Order*, App. D, ¶ 39 (emphasis added).

²¹ *Bell Atlantic/GTE Merger Order*, ¶ 316 (emphasis added).

²² *Id.* (UNE condition would have no “practical effect” unless the UNE Remand Order or Line Sharing Order were “stayed or vacated” (emphasis added)).

²³ *Id.*

Accordingly, any contention that the merger conditions have been satisfied, notwithstanding the current uncertainty regarding the scope of ILEC unbundling obligations, would be contrary to the entire purpose of these conditions. The FCC found both that these mergers would reduce local competition and that affirmative steps were necessary to facilitate UNE-based competition. In particular, the FCC recognized that local competition was unlikely if carriers did not have a clear entitlement to particular UNEs.²⁴ Thus, the intended purpose of the condition was to provide the necessary certainty to induce local entry.²⁵ And it does so by ensuring that the ILEC remains obligated to provide UNEs until litigation surrounding the *UNE Remand Order* is finally resolved, by either: (1) a final judicial decision upholding the unbundling rules the FCC issues in those proceedings; (2) a final, non-appealable FCC order eliminating unbundling of a particular UNE; or (3) a final judicial decision holding the FCC cannot require unbundling of a particular element. Because none of those conditions is satisfied, application of this condition is mandatory.

The audit is a critical component for insuring compliance with this condition. As the Commission noted, “the comprehensive UNE compliance audit that the Applicants have agreed to undergo as a condition of the instant merger should reveal any compliance with the Commission’s unbundling requirement.”²⁶

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* ¶ 375.

II. EVEN AS TO THE CONDITIONS THAT VERIZON CONCEDES ARE STILL OPERATIVE, THE COMMISSION HAS DETERMINED THAT AN INDEPENDENT AUDIT IS NECESSARY.

Even as to the conditions that Verizon concedes are still operative, these conditions are important conditions to the merger and independent audits remain necessary to ensure that Verizon complies with them.

One of the “five primary public interest goals” the conditions were designed to accomplish included “ensuring compliance with and enforcement of the conditions.”²⁷ The Commission imposed three conditions relating to compliance with the merger order: “(1) establishing a self-executing compliance mechanism; (2) requiring an independent audit of the Applicants’ compliance with the conditions; *and* (3) providing self-executing remedies for failure to perform an obligation.”²⁸ The first was embodied in Condition XXI and includes Verizon’s obligation to file its annual merger compliance report.²⁹ The second is embodied in Condition XXII which required an audit to evaluate both the effectiveness of Verizon’s internal control over compliance with the specified merger conditions (and Verizon’s assertions regarding those controls in its Annual Merger Compliance Report) and Verizon’s compliance with the specified conditions and managements assertions included in the Report of Management

²⁷ *Id.*, ¶ 251.

²⁸ *Id.*, ¶ 332 (emphasis added).

²⁹ *Id.*, ¶ 333-335.

on Compliance.³⁰ The last is embodied in Condition XXIII, pursuant to which Verizon has made over \$17.7 million of “voluntary” payments over a two-year period.³¹

In the *GTE/Bell Atlantic Merger Order*, the Commission, after setting forth the Annual Compliance Report requirement, held that “[b]ecause the public interest benefit of these conditions *depends entirely* upon Bell Atlantic/GTE’s Compliance, the conditions *also* establish an independent oversight program.”³² As the Commission previously noted, “[o]nly a strong corporate compliance program, *in conjunction with* the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefits of the conditions.”³³ Independent audits are essential because it is “the findings in the auditor’s report, or the review of the auditor’s working papers,” not Verizon’s compliance report, that would “form the basis of enforcement actions.”³⁴ This includes enforcement not only by the Commission and the public, but by the state commissions as well.³⁵

³⁰ *Id.*, ¶ 336-342.

³¹ Notice of Verizon Voluntary Payments Pursuant to Merger Conditions CC Docket No. 98-184 (July 2, 2004) for Performance Months April 2001 through April 2004.

³² *Bell Atlantic/GTE Merger Order*, ¶ 336 (emphasis added).

³³ *Id.*, ¶ 335 (emphasis added).

³⁴ *Id.*, ¶ 338.

³⁵ *Bell Atlantic/GTE Merger Order* ¶¶ 338 (“Commission and the public”), 342 (“We recognize that the state commissions have valuable insight into ongoing issues and problems in the telecommunications industry ... we note that, under the conditions, Bell Atlantic/GTE will ensure that the independent auditor provides access to its working papers to state commissions, thereby ensuring that state commissions can perform their own reviews of the audit work concerning the conditions”). *See also, id.*, ¶ 365 (“the audit provisions in Bell Atlantic/GTE’s conditions ... [make] availab[le] to regulators and competitors ... precious information for detection of discriminatory behavior”).

Independent audits have found numerous problems relating to the conditions that Verizon concedes are still operative; audits uncover questionable Verizon interpretations of conditions that would not otherwise be uncovered; and audits compensate for the lack of other ILEC benchmarks, which is a consequence of the merger. For all of these reasons, the audits should be retained.

A. The Remaining Conditions Are Important And Not “Self-Policing.”

Verizon argues that it ought to be relieved of the auditing requirement because twelve conditions have already sunset, three conditions will expire in 2004 and that “[a]fter 2004 only five operative merger conditions will remain in effect.”³⁶ That some, or even most, of the conditions have sunset does not mean that the remaining conditions are not important, or that they should not be audited. The continuing conditions relate to the “primary public interest goals” identified by the Commission as underlying the conditions and the basis on which it allowed the merger to proceed:³⁷ (a) promoting equitable and efficient advanced services deployment – Condition I (“Separate Affiliate for Advanced Services”) to sunset in 2004³⁸ and Condition IV (“Non-Discriminatory Rollout of xDSL Services”); (b) ensuring open local markets – Condition V (“Carrier-to-Carrier Performance Plan (Including Performance Measurements)”) which sunsets in 2004, Condition VI (“Uniform and Enhanced OSS and Advanced Services OSS”), Condition XI (“Carrier-to-Carrier Promotions: Unbundled Loop Discount”), Condition XII (“Carrier-to-Carrier Promotions: Resale Discount”), and, as explained

³⁶ Verizon Audit Waiver Request Letter at 2. That is, five merger conditions other than the compliance conditions.

³⁷ *Bell Atlantic/GTE Merger Order*, ¶ 251.

³⁸ Condition I sunsets in 2004.

above, Condition XIII (“Offering UNEs”);³⁹ and (d) improving residential phone service – Condition XVII (“InterLATA Services Pricing”) and Condition XVIII (“Enhanced Lifeline Plans”).⁴⁰

Verizon asserts that “[n]one of the most recent audits has included any findings of non-compliance with respect to any of these merger conditions [that is, the five that will remain in effect after 2004]” and that “[t]here is no reason to believe that additional audits will disclose any failure by Verizon to satisfy these merger conditions while they remain in effect.”⁴¹ In fact, the Auditor has repeatedly found violations of the continuing discount-related conditions. In the two most recent audits, the independent Auditor found, as to both Conditions XI (“Carrier-to-Carrier Promotions: Unbundled Loop Discount”) and XII (“Carrier-to-Carrier Promotions: Resale Discount”) that “Verizon provided an incorrect discount amount, or provided the discount outside the 60-day requirement” and credits were accordingly issued.⁴²

Verizon argues that continuing Condition IV (“Non-Discriminatory Rollout of xDSL Services”) is “self-policing,” and requires only the filing of quarterly reports. But the filing of unaudited quarterly reports is not a substitute for an auditor’s review of Verizon’s performance.

Verizon further argues that “most of the remaining conditions require specific discounts or pricing terms for competitive local exchange carriers, who could be expected to bring to the Commission’s attention any failure by Verizon to continue complying with those

³⁹ Condition V sunsets in 2004.

⁴⁰ Condition XVII sunsets in 2004.

⁴¹ Verizon Audit Waiver Request Letter at 2.

⁴² Deloitte, Independent Accountant Report (on Conditions IV, VI, VII, IX-XII, XVII, XVIII, XXI-XXV) (March 17, 2004) at 6-7. *See also*, Deloitte, Independent Accountant Report (May 1, 2003), subsection (f) at 8.

requirements.”⁴³ As noted above, the Auditor has found repeated violations of the discount-related conditions. Violations of the discount conditions will only be identified by the auditors rather than as the result of the filing of a formal complaint, not only because of the auditors’ unique access to Verizon’s papers in the first instance (reducing both the cost and time of discovering a violation) but because of the relatively small size of the discount relative to the high cost of pursuing a formal complaint, and the length of time to resolve formal complaints.⁴⁴ As the Commission concluded in the *Order*, an audit is far more cost-efficient and the cost burden should be borne by Verizon, not the public or the Commission.⁴⁵

Nor should the audit requirement be waived as to any of the other continuing merger conditions because of the ability of harmed parties to file a complaint. The ability to file a complaint did not obviate the need for an independent auditor when the conditions were imposed and nothing has changed since then to alter that conclusion.

B. Experience With The Past Audits Of The Remaining Operative Conditions Shows That Independent Audits Result In The Disclosure of Information That Would Not Have Otherwise Been Voluntarily Reported By Verizon.

Past Verizon merger audits have also identified disputed interpretations affecting a determination of compliance with the conditions⁴⁶ that would not necessarily be identified or

⁴³ *Id.*

⁴⁴ This is confirmed in the 2003 SBC Audit Report, Ernst & Young, Report of the Independent Accountants (August 29, 2003), CC Docket No. 98-141, Attachment C, which showed that CLEC complaints alleging non-compliance by SBC with the merger conditions remained unresolved two to three years after they were filed.

⁴⁵ *Bell Atlantic/GTE Merger Order*, ¶ 341

⁴⁶ For example, with respect to Condition V, the most recent Audit Report identified an issue involving the interpretation of the Performance Measurement Business Rules associated with the method by which Verizon measures the Trouble Duration Interval for *f*GTE (“MR-4 metrics”). E&Y 2004 Audit Report, ¶ 3, at 1-2.

disclosed absent the audit. This is because Verizon’s Annual Compliance Report contains its own conclusions of compliance. There is no assurance that Verizon would self-identify non-compliance where its interpretation differed from that of those harmed by non-compliance. For example, differing interpretations of the requirements in Condition VI that “Bell Atlantic/GTE shall implement uniform interfaces and business rules for at least eighty (80) percent of the access lines in the GTE Service Areas in Pennsylvania and Virginia” could affect determination of compliance by Verizon.⁴⁷ To the extent Verizon interprets that requirement as applying to the combined lines in the two states (Pennsylvania and Virginia), it would self-report compliance even though this condition in fact requires compliance separately in each state.

Moreover, the auditor has found material violations by Verizon of the conditions that could only be found by virtue of an audit. For example, the most recent Merger Order Audit Report “disclosed certain instances of material noncompliance with Condition V based on the

⁴⁷ Subparagraph 19(f)(2) of that section provides that “Bell Atlantic/GTE shall implement uniform interfaces and business rules for at least eighty (80) percent of the access lines in the GTE Service Areas in Pennsylvania and Virginia ... by converting the following percentages of such access lines that Bell Atlantic/GTE have an obligation to convert (‘Obligated Access Lines’):”

| Date | Percent of Obligated Access Lines |
|---|--|
| No later than 24 months after Merger Closing Date | 40% |
| No later than 36 months after Merger Closing Date | 60% |
| No later than 48 months after Merger Closing Date | 80% |
| No later than 60 months after Merger Closing Date | 100% |

See also Application of GTE Corp., Transferor, And Bell Atlantic, Transferee, for Consent To Transfer Control, 19 FCC Rcd. 4022 (2004) (Commission granted Verizon’s request for a temporary suspension of the reporting requirements in Condition V to accommodate Verizon’s implementation of OSS uniformity, affecting compliance with Condition VI).

(footnote continued on next page)

Performance Measurement Business Rules.”⁴⁸ While Verizon in its Annual Compliance Report claimed to have detected “a substantial majority” of the Condition V errors on its own, it did not detect all of them.⁴⁹ Moreover, the discipline of an independent audit no doubt encouraged the self-identification of these errors.⁵⁰

C. The Annual Compliance Report Is Insufficient Because Of The Inability To Benchmark.

As noted above, one of the anticompetitive effects of the merger that the conditions were designed to address was the loss of yet another BOC “benchmark.” The Commission found that “the major incumbent LECs (RBOCs and GTE) ... remain uniquely valuable benchmarks for assessing each others performance.”⁵¹ As the Commission noted, the further loss of benchmarks, which “provide valuable information regarding the incumbents’ networks, practices and

(footnote continued from previous page)

⁴⁸ Ernst & Young, Auditor’s Report of Independent Accountants on Conditions V and XVI and XIX, April 23, 2004 (“E&Y 2004 Audit Report”), ¶ 6 and Attachment A. *See also*, Ernst & Young, Auditor’s Report of Independent Accountants on Conditions V and XVI and XIX, May 30, 2003 (“E&Y 2003 Audit Report”), ¶ 6 and Attachment A.

⁴⁹ Verizon Annual Compliance Report, March 11, 2004 at 7.

⁵⁰ The Audit also identified deficiencies in the proper “voluntary payments” made by Verizon for its failure to meet these metrics. As noted by the Auditor, Verizon “has not implemented a process to adjust voluntary payments made to the U.S. Treasury due to the impact, if any, of known errors that are only corrected on a prospective basis. Accordingly, we were unable to, and do not, express an opinion on the Company’s internal control over compliance with the requirement to accurately calculate and remit voluntary payments under Condition V.” E&Y 2004 Audit Report, ¶ 5, at 2. Prior to April 2003, Verizon filed restatements to originally filed performance measurement data with the FCC for known errors that could be corrected on a retroactive basis six months after the original filing date. Subsequent to March 2003, the Company discontinued filing restated performance measurement data. *Id. See also*, E&Y 2003 Audit Report, ¶ 5, at 2-3.

⁵¹ *Bell Atlantic/GTE Merger Order*, ¶ 129.

capabilities to regulators and competitors seeking, in particular, to promote and enforce market-opening measures required by the 1996 Act and the rapid deployment of advanced services”⁵² (the same goals that the remaining operative merger conditions seek to achieve) increases the risk that the remaining firms will, *inter alia* “conceal information.”⁵³ Thus, it would be difficult to evaluate the reliability of a self-reported Compliance Report on, *e.g.*, Conditions IV (Non-Discriminatory Rollout of xDSL Services), V (Carrier-to-Carrier Performance Plan (Including Performance Measurements), VI (Uniform and Enhanced OSS and Advances Services OSS), and XIII (Offering UNEs) because there would be few benchmarks with which to compare the results and to see whether any information was being concealed.⁵⁴ Because of the absence of benchmarks, the audit is a critical compliance condition.

III. THE COMMISSION HAS ALREADY DETERMINED THAT THE PUBLIC INTEREST PRECLUDES EARLY TERMINATION OF ANY OF THE CONDITIONS FOR ANY REASON, INCLUDING COST.

Finally, Verizon’s reliance on the cost of the audit as a ground for its elimination is meritless. Verizon states that it “expects that merger condition audits for the years 2005 and beyond would cost at least one million dollars.”⁵⁵ First, that cost figure (which happens to be the same as SBC’s in its parallel filing, even though SBC seeks to exclude the 2004 audit as well and the number of continuing conditions) is unsubstantiated. Verizon has submitted no declaration

⁵² *Id.*, ¶ 127.

⁵³ *Id.*, ¶¶ 128, 130.

⁵⁴ *Id.*, ¶ 166 (in addition to parity analyses, benchmarks are necessary to evaluate both performance metrics – “lackluster service” – and pricing behavior – “excessive rates”).

⁵⁵ Verizon Audit Waiver Request Letter at 2.

or evidence of ongoing audit costs (which have certainly decreased as conditions have sunset), or on the impact on costs of using three separate auditors rather than one.

More importantly, the Commission held in the *Bell Atlantic/GTE Merger Order* that the cost of the audit is a necessary cost for protecting the public interest and less costly than more intrusive regulation. There the Commission held that the independent audit requirement in Condition XXII was “an efficient and cost-effective mechanism for providing reasonable assurances of Bell Atlantic/GTE’s compliance with its obligations under the conditions.”⁵⁶ Indeed, when the Enforcement Bureau in 2002 required the auditor to “assess Verizon’s entire performance measurements collection and reporting process,” it rejected Verizon’s objection that such a requirement was unduly costly, because “the cost Verizon incurs to obtain a sufficient audit is a *necessary* cost of compliance.”⁵⁷

⁵⁶ *Id.*, ¶ 341.

⁵⁷ Letter Ruling from Maureen Del Duca, Deputy Chief, Investigations and Hearing Division, to Mr. Jeffrey Ward, Senior Vice President, Regulatory Compliance, Verizon (June 12, 2002) at 2 (emphasis added).

CONCLUSION

For the reasons stated above, Verizon's request to eliminate the audit requirement in Condition XXII should be denied.

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July 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2004, I caused true and correct copies of the forgoing Comments of AT&T Corp. to Verizon's Request To Eliminate Merger Condition XXII to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 27, 2004
Bedminster, NJ

/s/ Karen Kotula

Karen Kotula

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