December 17, 2001

Via Hand Delivery
Henry M. Ogden, Esq.
Acting Secretary
New Jersey Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Re: I/M/O the Consultative Report on the Application of Verizon New Jersey, Inc., for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey BPU Docket No. TO01090541

Dear Acting Secretary Ogden:

Enclosed please find an original and ten copies of the Reply Brief on Behalf of the New Jersey Division of the Ratepayer Advocate in the above-captioned matter.

We are enclosing one additional copy of the brief. Please stamp and date the copy as filed and return it to our courier.

Thank you for your consideration and assistance in this regard.

Very truly yours,

Blossom A. Peretz, Esq.
RATEPAYER ADVOCATE

By: _____
Lawanda R. Gilbert, Esq.
Deputy Ratepayer Advocate

LRG:dlc
Enclosures
cc: Service list (via e-mail and regular mail)

BEFORE THE
STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

I/M/O the Consultative Report on the Application of Verizon New Jersey, Inc., for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey	:	BPU Docket No. TO01090541

REPLY BRIEF ON BEHALF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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On the Brief

Table of Contents

Page No.

PROLOGUE

THE NEW YORK TIMES reported on Saturday, December 15, 2001, that *Verizon Seeks Advantage Over Small Competitors; Wants to Charge More to Lease Phone Line.* (See Attachment 1). The article reported that Verizon is lobbying state regulators in Albany, New York, to increase rates for competitors "to lease space on its networks," because of "new security needs" and more importantly, that Verizon lobbyists have asked federal regulators "to make it more difficult for competitors to lease space on its network, arguing that its success in restoring phone service in Lower Manhattan proves that only a big company could handle maintenance, recovery and security in the wake of such a disaster." The article went on to say that since September 11th, Verizon executives have been arguing that "all competitors should eventually be forced to build their own networks." Mr. Ivan Seidenberg, the co-chief executive of Verizon, is quoted to say that he would welcome competition "from companies with the same scale as Verizon, but that smaller ones that lease lines on a local carrier's network" could not cope with security or recovery of the system. In that article it was reported that the small telecommunications companies argued, in response to Mr Seidenberg's allegations, that Verizon was intending to gain competitive advantage from September 11th events to return to the pre-1996 federal Telecommunications Act state of monopoly.

On that same day in an Op-Ed article in the New York Times, an economist, Vijag Vaitheeswaran, discussed the impact of the collapse of Enron on the energy marketplace. He cautioned regulators that the Enron collapse should not portend the return to a regulated energy market, but instead that "deregulation, carefully monitored, remains sound policy." He opined that:

> (E)xperience in other nations shows that competition in energy works if there is a strong, but carefully circumscribed, role for regulators -- especially during the heady, uncertain transition phase.

THE NEW YORK TIMES, Op-Ed, *Electricity Deregulation is Still Sound Policy*, Vijag Vaitheeswaran, December 15, 2001, A31 (see Attachment 1)

The Ratepayer Advocate was astounded to read the news article citing the quotes from the remarks of Ivan Seidenberg, co-chief executive of Verizon coupled with references to similar remarks of Chuck Lee, Verizon's chairman, last month in Boston. Both CEOs have attacked the very core of Congress' intent in its passage of the 1996 federal Telecommunications Act - to provide incentives for a robust competitive marketplace with opportunities and incentives for small start up companies to bring choice for all classes of consumers: low income, residential, schools and libraries and hospitals, and for customers who live in high costs areas. To publicly decry the intent of the Act and seek greater monopoly advantage sends a warning to all state and national regulators; let's not respond and return to the monopoly system of telecommunications and support Verizon's intent to ridicule and stifle competition. Let us encourage a vibrant marketplace with new opportunities and technologies. Let the policy guiding the breakup of AT&T and the long distance marketplace, bringing lower rates and new technologies, remain the regulator's goal for the local exchange marketplace. And let us follow the wise advise of the economist Vijay Vaitheeswaran, that to reach the goals of utility competition, **regulators must remain vigilant during the transition process.**

Most surprisingly, in its initial brief, Verizon has ignored the statutory role of the New Jersey Board of Public Utilities and has claimed that the Board in its recommendation to the FCC, on the Verizon application for 271 authority, has no responsibility or concern with the public

interest issues or their impact on consumers. As will be more fully argued in this brief, there is no matter on the Board's template at any time that does not impact the public interest responsibility of this Board. Verizon seems to imply that this Board should become a computer operation - inputting data and making decisions of a robot. Even if Verizon were correct in its analysis of the 271 checklist, which fails in many respects to meet the FCC guidelines and requirements, this Board has the continuing obligation, as always to be concerned with the full impact of its decisions on all classes of ratepayers and on the entire economic and business vitality of the state of New Jersey. Until the Commissioners are satisfied that the time is ripe for Verizon-NJ to enter the long distance marketplace, until effective competition really exists in the local marketplace with choice for consumers, and until there is public access to a ubiquitous universal service system as envisioned by the Act with a safety net for societal concerns, consumers still require the protection of regulation. Leading telecommunications economists and analysts have opined that with the passage of the Federal Telecommunications Act the purpose of utility regulation has changed. While utility regulation will no longer provide government regulation as the surrogate for competition, until competition really exists, the regulation must guarantee that competitors really compete and must assure public access to a universal service system. The regulators must make sure they have shepherded in place a competitive industry, before letting go of their traditional regulatory role.[1] Where effective competition has not yet developed within the telecommunications marketplace, "consumers still require the protection of regulation." *Id* at 213.

[1] Leonard S. Hyman, *et al.*, THE NEW TELECOMMUNICATION INDUSTRY: MEETING THE COMPETITION , at pp. 181-183 (Public Utilities Report. Inc. 1997).

The voices of Ivan Seidenberg and Charles Lee, the Verizon policy makers, provide a wake-up call for regulators. Telecommunications services should not be dominated by the monopoly provider seeking to shut out the competitors. Telecommunications services remain a lifeline service. It remains the responsibility of regulators, as part of their oath of office -- as government officials -- to protect the interests of New Jersey consumers.

I. INTRODUCTION

A recommendation to grant interLATA authority depends fundamentally on the state of competition in New Jersey's local exchange market, the effect of such a grant on the public interest, and the prospect that competition and the public interest will be protected after any such grant. As the initial briefs demonstrate, Verizon-NJ has made an insufficient showing on this vital question of competition. The initial briefs show that the local exchange market in New Jersey remains a monopoly today, with no choice for consumers and no competitive providers in a position to provide a choice. RPA Initial Brief at 2; *see also* Lightpath Initial Brief at 1-3, 9; ATX Initial Brief at 1; AT&T Initial Brief at 2, 16-17, WorldCom Initial Brief at 1,4.

Verizon-NJ's contention that it has complied with the competitive checklist of section 271 is deficient in a variety of ways. As a preliminary matter, Verizon-NJ cannot show compliance with Track A of section 271 for the simple reason that it cannot demonstrate facilities-based competition for residential customers. *Infra* Section II. In addition Verizon-NJ often relies on promises of future compliance that are as a matter of law inadequate. *Infra* Section III.A. Verizon-NJ offers only an unsubstantiated hope that its operational support system ("OSS") procedures and unbundled network element ("UNE") prices will in fact have non-discriminatory, pro-competitive results. *Infra* Section III.B. Moreover, Verizon-NJ fails to address the ongoing

concerns of competitors in terms of OSS provisioning. *Infra* Section III.B. The day may come when Verizon-NJ can demonstrate that it has met the requirements of section 271, but that has yet to occur. Thus, the Board should withhold a favorable recommendation to the Federal Communication Commission ("FCC") until Verizon-NJ has in fact delivered on all its promises, showing that its OSS and UNE rates are promoting rather than suppressing competition, and correcting other deficiencies in its current showing.

The Board must also require Verizon-NJ to seriously address the public interest implications of its request. Verizon-NJ does not even attempt to show that approval of its request for long-distance authority will promote and protect the public interest. Instead, Verizon-NJ argues that in this proceeding the Board should forget the public interest, despite the Board's recognized, clear duty to make this a paramount consideration in this application and in all proceedings. *Infra* Section IV.B.

Finally, the Ratepayer Advocate urges the Board to establish mechanisms for safeguarding competition and the public interest after any grant of section 271 authority. To this end, the Board should, prior to recommending section 271 authority for Verizon-NJ, establish a state Universal Service Fund to protect the right of all New Jersey's citizens to affordable service provided on competitively determined terms. In addition, the Board should help ensure that competition will endure by ordering structural separation or functional/structural separation under a strict code of conduct.

With these steps, all of which are within the reach (if not the plans) of Verizon-NJ, the Board will have put into place the conditions necessary to justify a grant of 271 authority for Verizon-NJ.

II. VERIZON-NJ DOES NOT MEET ITS BURDEN UNDER SECTION 271 (C)(1)(A) [TRACK A]

The fact that Verizon-NJ misunderstands the requirements of section 271(c)(1)(A) is apparent in its Initial Brief. Verizon-NJ misstates the section 271(c)(1)(A) requirement as limited only to a showing that "competitors are providing services either exclusively or predominantly over their own facilities to both residential and business customers." Verizon-NJ Initial Brief at 55. Verizon-NJ also claims that it has "demonstrated that 'one or more competing providers collectively serve residential and business customers,'" implying that it has therefore satisfied the requirements of Track A. In support, Verizon-NJ incorrectly cites to the *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, IntraLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order at ¶ 40 (rel. Jan. 22, 2001) ("FCC KS/OK 271 Order"). The FCC 271 KS/OK Order, however, cites the Michigan Order, which defines the section 271(c)(1)(A) requirement as having two separate prongs. Verizon-NJ Initial Brief at 58. However, the FCC statement cited was in response to disagreements between the parties regarding the statutory interpretation of section 271(c)(1)(A), rather than a statement on the incumbent's burden under Track A. The FCC did not address the manner in which service is to be provided, nor the number of customers necessary to meet the next portion of the section 271(c)(1)(A) requirement:

> that competing providers offer telephone exchange service either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities *in combination* with the resale of the telecommunications services of another carrier.

FCC MI 271 Order at ¶ 85 (emphasis added).

Verizon-NJ fails to provide any evidence that even a single provider serves residential customers either exclusively or predominantly over its own facilities in New Jersey. On page 55 of its Initial Brief, Verizon-NJ lists companies that purportedly provide local residential service either predominantly or exclusively over their own facilities. However, evidence was provided in the proceeding verifying that several of the companies listed do not even offer local residential services in New Jersey, *see* RPA Exhs. 8, 9, and Verizon-NJ has provided no evidence that any of these companies offer local residential services over their own facilities rather than via resale. As stated in the Ratepayer Advocate's Initial Brief, the FCC defines facilities-based to include only services provided via a CLEC's own network, UNEs, or UNE-Ps. *See* Ratepayer Advocate Initial Brief at 21. Verizon-NJ fails to provide evidence that even a single CLEC serves residential customers in New Jersey over its own facilities. Verizon-NJ cannot therefore, properly claim that it meets the section 271(c)(1)(A) requirements. As stated in the FCC KS/OK 271 Order, the amount of local residential customers must be more than *de minimis,* such customers must "be persons receiving the service for a fee", and the service must be an "actual commercial alternative" to meet this requirement. *See* FCC KS/OK 271 Order at ¶¶ 17, 42. In its Initial Brief, the Ratepayer Advocate demonstrated that Verizon-NJ fails to provide any evidence that comports with the FCC's requirements interpreting section 271(c)(1)(A). RPA Initial Brief at 20.

Verizon-NJ attempts to draw an inaccurate parallel with the situation examined in the FCC KS/OK 271 Order where Southwestern Bell was not required to show that its "estimates for other competing carriers were correct" as long as there "was a single competing carrier that represented an actual commercial alternative[.]" See Verizon-NJ Initial Brief at 57 (*citing Kansas/Oklahoma*

Order ¶ 42. However, in Oklahoma unlike in New Jersey, there existed enough facilities-based residential customers to constitute an "actual commercial alternative." *Id.*, footnote at 97. The FCC made the same conclusions in its recent approval of Southwestern Bell's 271 application for Arkansas and Missouri.[2] Specifically, the FCC relied upon the data furnished by the Arkansas Commission which determined that several thousand residential lines were being served by ALLTEL and this level of service satisfied the criteria of "more than a *de minimis* number of customers."[3] In reaching this conclusion the FCC stated:

> Although commenters dispute the exact number of residential subscribers served by carriers in Arkansas, we conclude that a sufficient number of residential customers are being served by ALLTEL through the use of their own facilities. SWBT has shown that ALLTEL serves more than a *de minimuis* number of customers to quality ALLTEL, as a "competing provider"- several thousand according to the Arkansas Commission- and no commenter has challenged SWBT's claim regarding the number of customers served by ALLTELL (footnotes omitted)

Ark-Mo Order at 118. In New Jersey, Verizon-NJ has not provided evidence that there exists even a single customer that can constitute an "actual commercial alternative." Thus, the simple truth is that Verizon-NJ cannot demonstrate, beyond a preponderance of the evidence, that CLECs serve more than a *de minimis* number of local residential customers in New Jersey via their own facilities.

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[2] *I/M/O Joint Application by SBC. Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, 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 Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338, *Memoarandum Opinion and Order* at ¶¶ 117-118 (released November 16, 2001) (hereinafter "*Ark-Mo Order*").

[3] Id. at 118.

Verizon-NJ bears the burden of proof to demonstrate that it meets each and every section 271 requirement including Track A. Instead of refusing to provide information, Verizon-NJ should have cross-examined the CLECs in this proceeding and sought discovery regarding the type of customers served by CLECs over their own facilities. Throughout this proceeding, the Ratepayer Advocate has endeavored to seek relevant supporting documentation for all of Verizon-NJ's numbers reported in Mr. Bone's Declaration. However, Verizon-NJ has, time and again, stated that this information is "within the knowledge of the CLECs." *See* RPA Exh. 2, RPA-VNJ 10. Verizon-NJ thus chose to use estimates and assumptions in an attempt to meet section 271(c)(1)(A) requirements. *See* RPA Initial Brief at 24; *see also* Verizon-NJ Initial Brief at 55 (referring to the numbers reported in Mr. Bone's Declaration as being based on estimates rather than concrete data). Verizon-NJ therefore attempts to use its own failure as both a shield and a sword in this proceeding. The Board should not countenance Verizon-NJ's attempt to shift the burden of this proceeding onto competitors.

Verizon-NJ claims that the fact that the New Jersey marketplace has no local residential facilities-based competition is due to "individual competitive LEC entry strategies" rather than due to any action by Verizon-NJ. Verizon-NJ Initial Brief at 56. However, the fact that Verizon-NJ has not opened its local markets to competition serves as a more accurate explanation.[4] Verizon-NJ also states that the "decisions of potential customers to decline these carriers'

[4] In pending litigation between Ntegrity Telcontent Services and Verizon-NJ, Ntegrity alleges that Verizon-NJ has engaged in an array of anti- competitive practices. One of Ntegrity's founders has stated that "[W]hen you deal with the phone company, it's really death by a thousand cuts." Ntegrity avers that Verizon-NJ's practice of charging a fee every time the smaller carrier signed up a customer, and erroneous billing, are the types of "...things that make it impossible to make a business grow." Tom Johnson, *A Tale Of 2 Telephone Companies*, THE STAR-LEDGER, December 12, 2001 at 51, 56 (*see* Attachment 1).

services" should not control Verizon-NJ's entry into the long distance market. *Id.* at 57. This is irrelevant. Verizon-NJ bears the ultimate burden of proof that there exists an actual commercial alternative for local residential service. Since there are no actual facilities-based commercial alternatives for local residential service in New Jersey the lack of customer choice is of the utmost importance in determining compliance with section 271(c)(1)(A). Verizon-NJ's failure to provide this evidence means simply that it has not complied with section 271(c)(1)(A).

Finally, Verizon-NJ's claim that it has "signed more than 200 interconnection agreements, of which this Board has already approved more than 160," and that "[o]f these signed agreements, … 90 are for facilities-based service," is utterly irrelevant to the Board's determination of whether Verizon-NJ complies with section 271(c)(1)(A) requirements. Verizon Initial Brief at 55. The fact that interconnection agreements may exist, does not mean that CLECs are actually providing facilities-based services to local residential subscribers pursuant to those agreements. This Board is tasked with determining the level of competition as it exists at the time of Verizon-NJ's filing. Since Verizon-NJ has not provided evidence as to whether any CLEC offers facilities based residential service on a commercial basis, Verizon-NJ's evidence with regard to any interconnection agreements is probative of nothing.

III. VERIZON-NJ'S PETITION IS PREMATURE UNTIL IT CAN SATISFY THE CHECKLIST

A. Verizon-NJ has Failed to Satisfy its Burden of Proving Compliance With Section 271(c)(2)(B)

Verizon-NJ claims that it "has done everything required of it to open the local market in New Jersey." Verizon-NJ Initial Brief at 1. This is incorrect. While Verizon-NJ has demonstrated some effort toward nondiscriminatory treatment of competitors, it has not met its

burden of proof under section 271. Specifically, Verizon-NJ must demonstrate that "[a]ccess or interconnection *provided* … includes … (ii) nondiscriminatory access to network elements in accordance with sections 251(c)(2) and 252 (d)(1); … (viii) White pages directory listings for customers of the other carrier's telephone exchange service; [and] … (xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." 47 U.S.C. §271(c)(2)(B) (emphasis added). It has not done so.

In its Initial Brief, Verizon-NJ repeatedly *promises* compliance with the competitive checklist, but *does not demonstrate compliance* with section 271. Verizon-NJ for example *promises*

1. "to accept requests from CLECs for interconnection at any … technically feasible points using the Bona Fide Request process that is provided for in interconnection agreements," Verizon-NJ Initial Brief at 6-7;

2. "to combine 'loopless' unbundled local switching with other UNEs or Verizon-NJ services, including shared or dedicated interoffice transport, shared tandem switching, SS7 signaling, and access to E-911," Verizon-NJ Initial Brief at 19;

3. "[to] provide common interoffice transport in conjunction with a dedicated trunk port," Verizon-NJ Initial Brief at 19;

4. to make available "a remote call forwarding feature and analog PBX trunk ports" via UNE-P, Verizon-NJ Initial Brief at 20; and

5. to "analyz[e] any new order types that show up in volume and design[] as many as possible to flow through," Verizon-NJ Initial Brief at 68.

The Ratepayer Advocate applauds these commitments by Verizon-NJ. Follow-through on these commitments will increase the likelihood that local competition will develop in New Jersey. However, the Board should recognize that such intentions do not rise to the level of demonstrated

compliance with the competitive checklist under 47 U.S.C. §271. Indeed, the FCC has quite clearly stated its position on statements of future compliance:

> [A] BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof. In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.

Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order ¶ 55 (1997) ("FCC MI 271 Order") (emphasis in original).

Not only do Verizon-NJ's promises not support its application for 271 authority, they clearly show that Verizon-NJ *does not presently comply* with the requirements of section 271. The Board should recognize this fact and recommend against approval.

B. Verizon-NJ Fails to Recognize That it is Unable to Satisfy Checklist Item ii Until it Provides Evidence of Real World CLEC Experience With its OSS, Final UNE Rates and the PAP[5]

1. Section 271 requires commercial testing of OSS and an opportunity to evaluate the effectiveness of the PAP

Under section 271 checklist item ii, Verizon-NJ must demonstrate "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and

[5] Moreover, the Board's examination of Verizon-NJ's pending application for approval of a new plan of alternative regulation is ongoing. AT&T Initial Brief at 9; *see I/M/O/ Application of Verizon New Jersey, Inc. For Approval (i) of a New Plan for an Alternative Form of Regulation, and, (ii) to Reclassify Multi-Line Rate Regulated Business Services as Competitive Services, and Compliance Filing*, BPU Docket No. TO01020095. The issue of local competition is also being examined in that proceeding, and competitors have likewise demonstrated a decided lack of local competition.

252(d)(1)." 47 U.S.C. §271(c)(2)(B)(ii). To meet this standard, Verizon-NJ must demonstrate, among other things, the nondiscriminatory commercial availability and effectiveness of OSS. *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, CC Docket No. 99-295, FCC 99-404 ¶ 89 (1999) ("FCC NY 271 Order"). In its Initial Brief, Verizon-NJ claims that it

> has deployed the necessary systems and personnel to provide competing carriers in New Jersey with non-discriminatory access to each of the necessary OSS functions, and has adequately assisted competing carriers in understanding how to implement and use all of the OSS functions available to them.

Verizon-NJ Initial Brief at 58. The Ratepayer Advocate recognizes Verizon-NJ's efforts so far to improve its OSS systems and disseminate relevant information to competitors; however, those efforts likewise fail to reach the level required for section 271 authorization.

As stated in the Ratepayer Advocate's Initial Brief, the FCC and several state commissions have clearly established that, when it comes to OSS, actual commercial usage provides the most probative form of evidence under section 271. RPA Initial Brief at 25-26 (*citing Application by SBC Communications, Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order at ¶ 102 (June 30, 2000) ("FCC TX 271 Order"), FCC NY 271 Order ¶ 89, *Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, Docket No. M-00001435, Procedural Order, Pennsylvania Public Utility Commission at 12 (November

29, 2000) ("PA Procedural Order")). Indeed, only by actual commercial testing of OSS can the Board be satisfied that competitors are receiving OSS on a nondiscriminatory basis. *See* Lightpath Initial Brief at 21-22, WorldCom Initial Brief at 15-21, ATX Initial Brief at 13-19, AT&T Initial Brief at 37-41.

It is important to note that throughout its Initial Brief, Verizon-NJ makes much of its section 271 filings in New York and Pennsylvania. In both of those filings Verizon-NJ provided data on actual commercial use of OSS.[6] Selwyn Declaration ¶ 19. In stark contrast to its filings in New York and Pennsylvania, Verizon-NJ has provided no such data here. In fact, despite more than 40 pages of OSS discussion, Verizon-NJ barely touches on the subject of commercial testing in its Initial Brief. Verizon-NJ seeks to dismiss the use of commercial testing in New Jersey by claiming that the third party testing conducted by KPMG included "commercial transactions." The parties to this proceeding allege a number of failings with the KPMG test. AT&T and WorldCom allege that KPMG's volume test did not examine Verizon-NJ's capabilities for provisioning and billing functions. AT&T Initial Brief at 39-40, WorldCom Initial Brief at 16. Thus, Verizon-NJ is unable to demonstrate that its OSS can actually provision orders, update billing records in a timely fashion, and provide CLECs timely notifications in a commercial environment for significant volumes of orders. Id. AT&T, WorldCom, and Lightpath also express concern that Verizon-NJ's recently implemented electronic billing functions were not tested as a part of the KPMG test, and therefore the Board has no independent commercial data to evaluate Verizon-NJ's compliance with the checklist for the electronic billing functions. AT&T Initial Brief

[6] The record shows moreover that in New York, where only partial data on commercial usage of OSS was submitted, significant problems developed after Verizon was granted section 271 authority. AT&T Initial Brief at 39; Lightpath Initial Brief at 22, n. 76.

at 41; WorldCom Initial Brief at 16-21; Lightpath Initial Brief at 22. WorldCom made clear that Verizon-NJ's engagement of Price Waterhouse Cooper ("PWC") was strictly to review the electronic billing functions and not to test the functionality of the systems "based on a transaction-driven system analysis." WorldCom Initial Brief at 17. AT&T also stated that PWC's review of Verizon-NJ's electronic billing systems did not assess the accuracy of those bills which is an important determination and of crucial importance to many CLECs. AT&T Initial Brief at 41; ATX Initial Brief at 13-18. In fact, electronic billing data submitted to WorldCom for September 2001 and October 2001 reveal that CLECs in New Jersey experienced the most problems with electronic billing. WorldCom Initial Brief at 20. Verizon-NJ Initial Brief at 105. The CLEC participation to which Verizon-NJ refers is a far cry from the robust commercial testing that is necessary to determine the competitive viability of its OSS. As several of the parties noted, commercial testing is critical to ensuring the effectiveness of Verizon-NJ's OSS: "the level of competition in New Jersey simply is not meaningful enough to evaluate the capabilities of VNJ's OSS to perform for *real* CLECs, handling *real* competitive order volumes." AT&T Initial Brief at 37; *see also* Lightpath Initial Brief at 21-22, WorldCom Initial Brief at 15-21, ATX Initial Brief at 13-19, AT&T Initial Brief at 37-41.

Thus, there is a strong consensus among both the parties in this proceeding and other states that have recommended approval of Verizon's 271 applications of the need for commercial testing of OSS prior to providing interLATA authority. *See* RPA Initial Brief at 25-27. Until Verizon-NJ's OSS is exposed to live testing, the Board has no reliable assurance that the OSS systems will function adequately.

In its brief, Verizon-NJ acknowledges that commercial usage is preferred by the FCC in assessing whether the section 271 applicant's "maintenance and repair interface can handle reasonably foreseeable demand levels." Verizon-NJ Initial Brief at 82. Verizon-NJ then states that its records show that its Maintenance and Repair OSS "meet actual levels of use and have kept pace with increasing CLEC use." Verizon-NJ Initial Brief at 82. This admission by Verizon-NJ proves that it is very cognizant of the fact that real world testing of Verizon-NJ's OSS is crucial to determining its ability to handle foreseeable CLEC demand levels. Although the Ratepayer Advocate is encouraged that Verizon-NJ has subjected one of the five OSS functions to real world testing, this still falls short of what is required to demonstrate compliance with checklist item ii.

As appropriately stated by the FCC in its approval of the Verizon PA application, "[u]nder checklist item 2, a BOC must demonstrate that it provides non-discriminatory access to [all] the five OSS functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair, and (5) billing." FCC PA 271 Order at ¶12. As AT&T noted in its Initial Brief,

> [r]eview of VNJ's OSS in real-world situations is even more important because VNJ utilizes a Service Order Processor which is <u>not used anywhere else in the Verizon territory</u>, and has therefore, <u>never</u> been exposed to large commercial volumes in a production environment.

AT&T Initial Brief at 39 (emphasis in original). Until Verizon-NJ subjects all five OSS functions to actual commercial testing for a specified period, it cannot demonstrate that it offers nondiscriminatory access to its OSS systems.

Given the absence of data on actual commercial usage, Verizon-NJ seems to expect the Board to rely upon the newly-implemented Performance Assurance Plan ("PAP") for continued

compliance with section 271. Unfortunately, New Jersey competitors and the Board have as little experience with the PAP as they do with Verizon-NJ's OSS systems. More importantly, the PAP has not yet proven its reliability, as Verizon-NJ has presented no data for the short time period during which it has been effective. Selwyn Declaration at 21. The Board should ensure the effectiveness of the PAP by allowing it to operate for several months. This is the only way in which the Board will be able to adequately determine whether the PAP is sufficient to restrain Verizon-NJ's natural incentives to discriminate against its competitors.

Thus, to conclude that Verizon-NJ is providing "nondiscriminatory access" to OSS, as required by 47 U.S.C. §271(c)(2)(B)(ii), the Board should order a trial period in which it can evaluate the effectiveness of both Verizon-NJ's OSS systems and the PAP. Once such data is assembled, Verizon-NJ 's section 271 application will be more ripe. Until that time, however, Verizon-NJ cannot demonstrate that its OSS provide "nondiscriminatory access" as required.

2. Performance data show that Verizon-NJ is not providing nondiscriminatory access to OSS

Several parties to this proceeding have provided evidence indicating that Verizon-NJ has failed to provide nondiscriminatory access to its OSS in several key areas, including billing, provisioning completion notices, and order flow-through. *See* AT&T Initial Brief at 41-47; WorldCom Initial Brief at 23-26; MetTel Initial Brief at 4-11.

With respect to billing, both AT&T and ATX allege that they have experienced problems with Verizon-NJ's OSS regarding the accuracy of the wholesale bills. ATX claims that the wholesale bills it receives from Verizon-NJ routinely contain errors, and to date its concerns have not been resolved by Verizon-NJ. *See* ATX Initial Brief at 13. As a result of Verizon-NJ's

repeated wholesale bill errors, ATX claims it has been forced to allocate resources to reconcile and review Verizon-NJ's bills for mistakes which hampers ATX's ability to focus its resources on increasing competitive offerings. *Id*. ATX also cites as a problem the fact that Verizon-NJ's wholesale bills are not auditable because Verizon-NJ provides it with two separate bills instead of one centralized bill. *See* ATX Initial Brief at 15-16.

In addition, the FCC has stated that a "BOC must demonstrate that it can produce a readable, auditable and accurate wholesale bill in order to satisfy its nondiscrimination requirements under checklist item 2." *See* FCC PA 271 Order at ¶ 22. AT&T claims that for July, September and October 2001, Verizon-NJ did not satisfy the Board's standard for wholesale billing accuracy. *See* AT&T Initial Brief at 42. Insofar as Verizon-NJ is not providing CLECs with accurate and auditable bills, then Verizon-NJ has not met the requirements of checklist item ii.

Second, both MetTel and AT&T state that there is ample evidence that Verizon-NJ has not supplied provisioning notices in a timely fashion and that the notifications are inaccurate. *See* AT&T Initial Brief at 42-44; MetTel Initial Brief at 5-7. Provisioning notices indicate when an order has been provisioned and when the CLEC can start billing their customers. Without this information, the CLEC could incur significant costs and forego revenues. MetTel claims that Verizon-NJ's provisioning notices are inaccurate because they do not signal the completion of operations as intended. *See* MetTel Initial Brief at 6. The problems encountered by AT&T and MetTel in the area of provisioning notices raise concerns as to whether Verizon-NJ's OSS can adequately handle this function when confronted with commercial volumes.

Third, both AT&T and WorldCom allege problems with Verizon-NJ's order flow-through performance.[7] They state that Verizon-NJ's performance has been dismal at best especially when compared to the flow through performance of Verizon in New York and Pennsylvania at the time of their 271 applications.[8] AT&T Initial Brief at 45. AT&T is also concerned that, because the volume of transactions in New Jersey is small, there is no credible evidence to suggest that Verizon-NJ will be able to flow-through orders at commercially significant volumes. AT&T Initial Brief at 46. Verizon-NJ responds that there has been no forecast from CLECs that there will be a major increase in monthly orders in the next twelve months, and therefore no reason to believe that Verizon-NJ will be unable to flow through orders. Verizon-NJ Initial Brief at 68.

3. Section 271 requires that newly ordered UNE rates be evaluated to determine whether they will facilitate the development of competition

Verizon-NJ makes several additional, specific promises of compliance related to the prospective development and implementation of UNE rates to be set under the Board's announcement in November. *I/M/O The Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*, Docket No. TO00060356, Board Meeting, Item 4A (Nov. 20, 2001) ("November 20 Board Meeting"); Verizon-NJ Initial Brief at 22, 23, 24. Verizon-NJ promises to (1) abide by its interconnection agreements with regard to "true up" of UNE rates, Verizon-NJ Initial Brief at 22; (2) implement "true up" "shortly" after the

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[7] Flow-through is the process by which electronically submitted CLEC orders are entered into the Service Order Processor ("SOP") without manual assistance by Verizon-NJ staff.

[8] The standard for the order flow-through achieved metric is 95% for loops and platform, but Verizon-NJ's performance in April, May and June 2001 was 52.89%, 36.64% and 62.03% respectively. Worldcom Initial Brief at 24-25.

Board issues a written decision, Verizon-NJ Initial Brief at 23; and (3) make all modifications to the new UNE rates "consistent with the Board's directives and established timeframes." Verizon-NJ Initial Brief at 23. While the Ratepayer Advocate once again supports Verizon-NJ's proclaimed intent to achieve section 271 compliance, the need for these promises demonstrates that such compliance is not yet a reality. Contrary to Verizon-NJ's assertions that the new Order on UNE rates satisfies its obligation, section 271 requires current, and not promissory, compliance with its tenets; Verizon-NJ's intentions have nothing to do with the proceeding. Rather, to comply with section 271, Verizon-NJ must both offer rates "that are just, reasonable, and nondiscriminatory," 47 U.S.C. §251 (c)(2)(D), and implement those rates to provide "nondiscriminatory access to network elements." 47 U.S.C. §271(c)(2)(B)(ii). Neither has yet occurred.

AT&T concurs with the Ratepayer Advocate, stating that Verizon-NJ cannot demonstrate compliance given the absence of a written order. AT&T Initial Brief at 29. And it is, as AT&T states, "axiomatic" that a promise to comply does not constitute compliance. AT&T Initial Brief at 31. Without a written Order, Verizon-NJ does not have anything with which to comply. Moreover, compliance is not a ministerial act. As AT&T notes, in Pennsylvania it took months for Verizon to charge the correct port rate. AT&T Initial Brief at 31. Finally, none of the evidence offered by Verizon-NJ demonstrates compliance with the Board's oral decision. AT&T Initial Brief at 29.

Other parties to this proceeding also noted the logical impossibility of Verizon-NJ's compliance with regulations that have yet to be issued.[9] Lightpath Initial Brief at 18, 19 (the announcement of new UNE rates is not sufficient to demonstrate compliance with Checklist Item ii); ATX Initial Brief at 11, 12 (although Verizon-NJ has filed rates, there is no indication that these rates are compliant with Board directives); NJCTA Initial Brief at 9 (it is logically impossible for Verizon-NJ to comply with Checklist Item ii until the Board issues the final UNE Order). Accordingly, the Board should dismiss Verizon-NJ's promise to comply with unissued regulations out of hand. Satisfaction of UNE-related requirements can occur only when those requirements are known and implemented in the marketplace.

Moreover, significant experience with the new UNE rates is required prior to any inference that Verizon-NJ is providing "nondiscriminatory access" to UNEs under 47 U.S.C. §271(c)(2)(B)(ii). The Board orally approved new UNE rates on November 20, 2001. No written order has yet been issued. Indeed, Verizon-NJ could petition for reconsideration of this decision, thus putting into question when, or even if, the rates will be implemented.[10] In addition, the Board required Verizon-NJ to rerun a number of rates to comply with the dictates of its Order. November 20 Board Meeting. Those rerun figures have only recently been submitted by

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[9] Verizon-NJ mysteriously argues that "no party has standing in this proceeding to contend that the Board has not ... set TELRIC compliant rates," and notes that Section 271 requirements are satisfied if a local commission applies TELRIC compliant rates. Verizon-NJ Initial Brief at 22. In fact, however, the Ratepayer Advocate does have statutory standing to participate in this proceeding, *see* N.J.S.A. 13:1D-1, while other parties have standing as intervenors. The parties to this proceeding further clearly have standing to address the issue of Verizon-NJ's compliance with the UNE pricing requirements of Checklist Item ii. Verizon-NJ has failed to meet these requirements, and its statements that it will, in the future, meet these obligations cannot be equated with actual satisfaction.

[10] *See* Verizon news release, November 20, 2001, *Verizon Concerned that New Jersey Utilities Board Set New Wholesale Rates Artificially Low* (Attachment 1).

Verizon-NJ, and have not been confirmed by the Board. In fact, AT&T has already challenged the validity of the figures provided by Verizon. *See* December 10, 2001 letter to Board from Frederick Pappalardo and accompanying Affidavit of Michael R. Baranowski. To date, no competitor has been offered the new UNE rates. As things stand, neither competitors nor ratepayers know whether Verizon-NJ will implement or challenge those rates, and, if the former, it is unclear whether Verizon-NJ will implement the rates in a nondiscriminatory manner or what the competitive effect of those rates will be. RPA Initial Brief at 29; *see also* AT&T Initial Brief at 4, 7-8, 28, 32-34, ATX Initial Brief at 11-13, WorldCom Initial Brief at 2-3, 11-14, NJCTA Initial Brief at 9-10, Lightpath Initial Brief at 17-20.

Despite Verizon-NJ's assertions to the contrary, implementation of the new UNE rates requires real world experience. Thus, the Ratepayer Advocate recommends a trial period of six months, after which Verizon-NJ will be free to resubmit its section 271 application to the Board. That six-month period will provide the opportunity to gather actual information on the implementation of UNE rates, thus providing for a complete record and aiding the Board in its assessment of section 271 compliance. Until data on actual implementation of UNE rates is gathered, Verizon-NJ is precluded from claiming such compliance.

C. There is Substantial Evidence That Verizon-NJ has Failed to Satisfy Several Additional Checklist Items

In its Initial Brief, Verizon-NJ repeatedly points to the fact that "[n]o party has contended that Verizon-NJ has failed to meet its [specific] checklist obligation[.]" Verizon-NJ Initial Brief at 24. The Board should be wary of these statements for two reasons. First, Verizon-NJ, and not competitors, bears the burden of proof in this case. Whether or not a competitor has complained,

Verizon-NJ must demonstrate its compliance with each checklist item. *E.g.*, FCC MI 271 Order ¶ 49. Second, there are not more competitor complaints for one simple reason: there are no competitors. In this regard, Verizon-NJ is attempting to use the dismal state of competition in New Jersey to veil its failures to comply with the checklist. The Board should recognize these facts and accord Verizon-NJ's statements on the absence of competitor complaints little weight.

Notwithstanding Verizon-NJ's claims, a number of parties to this proceeding have provided evidence of Verizon-NJ's failure to meet other checklist items. The Board has been presented additional evidence of discriminatory treatment and/or noncompliance with the provision of nondiscriminatory access to UNEs (additional failings under checklist item ii), the provision of white pages directory listings to competitors (checklist item viii), and reciprocal compensation (checklist item xiii).

1. Non-discriminatory access to UNEs (ii)

The issue of Verizon-NJ's compliance with checklist item ii has been a subject of great debate throughout this proceeding. While the Ratepayer Advocate recommends against a grant of section 271 authority for the reasons related above, it is instructive also to survey the other parties' proof of additional failures under the checklist. For example, Verizon-NJ is currently allowed to unilaterally interpret the term "available," to dictate when and how UNEs are available to competitors, and that Verizon-NJ is interpreting the term too narrowly, often improperly rejecting UNE requests. Both the Michigan Public Service Commission and the Illinois Commerce Commission have established definitions of "available" to avoid this type of discrimination by incumbents. XO Initial Brief at 12-15 (*citing In the Matter of Complaint of BRE Communications, L.L.C., d/b/a Phone Michigan for violations of the Michigan*

Telecommunications Act, Case No. U-11735, at 15 (Feb. 9, 1999); *Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company Investigation of Construction Charges*, Docket 99-0593, at 21 (Aug. 15, 2000)).

In addition, Verizon-NJ discriminates against competitors by not providing a UNE-P product with an automatic dial 9 feature, such as Verizon-NJ provides for itself. ATX Initial Brief at 6. Moreover, Verizon-NJ fails to provide "as is" conversions, remote call forwarding and PBX trunking for UNE-P customers, resulting in significant discrimination against competitors.[11] ATX Initial Brief at 8-11. As a result of all of these failures, competitors face serious discrimination with regard to Verizon-NJ's wholesale provisioning responsibilities.

2. Reciprocal compensation (xiii)

The evidence also shows that Verizon-NJ has not demonstrated compliance with the reciprocal compensation provisions of section 271. The record demonstrates that Verizon-NJ has failed to make reciprocal compensation payments to competitors. This omission both violates Verizon-NJ's interconnection agreements and precludes a finding of compliance with checklist item xiii. AT&T Initial Brief at 50-56. Specifically, there is evidence that Verizon-NJ owes at least one carrier in excess of $25 million in such payments. AT&T Initial Brief at 56. Moreover, Verizon-NJ also owes significant reciprocal compensation payments to other carriers and has unilaterally (and without a basis in fact or law) instituted a 2:1 compensation ratio based on Verizon-NJ's unilateral presumption that traffic in excess of this ratio is presumed to be Internet traffic. WorldCom Initial Brief at 29; XO Initial Brief at 5. In other instances, Verizon-NJ is

[11] This is also a failure of compliance with checklist item vi, "local switching unbundled from transport, local loop transmission, or other services." 47 U.S.C. §271(c)(2)(B)(vi).

refusing to pay the tandem reciprocal compensation rate, even though this is a well-settled requirement. Lightpath Initial Brief at 16-17.

Finally, there is evidence that Verizon-NJ continues to misinterpret the FCC's Reciprocal Compensation Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Order on Remand, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Report and Order (rel. Apr. 27, 2001) ("Reciprocal Compensation Order"), by unilaterally withholding payments that are required under existing interconnection agreements. XO Initial Brief at 7-8. In fact, virtually every competitor in New Jersey contends that Verizon-NJ misinterprets the law and implements improper modifications to existing interconnection agreements, in direct non-compliance with checklist item xiii. AT&T Initial Brief at 50-56; WorldCom Initial Brief at 29; XO Initial Brief at 5-8; Lightpath Initial Brief at 16-17.

3. Directory assistance (viii)

Verizon-NJ also appears to be discriminating against competitors in the provision of directory assistance services. The record indicates that CLEC listing orders of more than six lines are retyped by Verizon staff, creating a significant opportunity for error. XO Initial Brief at 19 (*citing* Tr. 930-932:21-19). Verizon-NJ listings are not subject to this requirement. The result is that competitors are subject to (and blamed for) more errors in directory listings than Verizon-NJ; the negative effect on customer relations places competitors at a further disadvantage.

The evidence provided in this proceeding, and the general lack of competition in New Jersey, demonstrates that not only has Verizon-NJ failed to satisfy its burden of proof that it has met all the checklist items, but that Verizon-NJ has indeed not satisfied several items in the

competitive checklist. Specifically, significant discrimination against competitors remains in regard to access to UNEs (checklist item ii), reciprocal compensation (checklist item xiii) and directory listings (checklist item viii) at a minimum. The Board should require Verizon-NJ to demonstrate its compliance with these requirements prior to issuing a favorable recommendation on section 271 authority.

IV. VERIZON-NJ'S SECTION 271 APPLICATION DOES NOT SATISFY THE PUBLIC INTEREST STANDARD AT THIS TIME

Verizon-NJ errs when it asserts both that (1) a public interest inquiry is "irrelevant" to the Board's evaluation of its section 271 application and that such analysis is "expressly reserve[d]" to the FCC, and (2) Verizon-NJ would pass a public interest test if one were performed by the Board. Verizon-NJ Initial Brief at 3, 5-6, 117-119. Verizon-NJ is simply wrong on both of these points. In addition to satisfying its competitive checklist obligations, Verizon-NJ *must* prove to the Board that approving its application is in the public interest. *Infra* Sections IV.B-C. Because Verizon-NJ has failed to meet this burden, and indeed because approving Verizon-NJ's application as it stands would not be in the public interest, the Board should recommend against 271 authority at this time. *Infra* Section IV.C. Any refusal by the Board to conduct a public interest analysis would result in the Board's abdicating its constitutionally mandated responsibilities. *Infra* Sections IV.B.

A. Verizon-NJ Well Knows That the Board Must Perform a Public Interest Analysis

Contrary to Verizon-NJ's argument, the Board's critical role in evaluating Verizon-NJ's section 271 application against the public interest standard has been widely recognized, *including*

by Verizon-NJ itself. In its prior section 271 applications before the Board, Verizon-NJ[12] petitioned the Board to "consider evidence submitted with [its] Petition that shows that it is in the public interest for [Verizon-NJ] to provide interLATA service in New Jersey." *I/M/O Notice of Pre-Proposal and Notice of Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket* No. TO97030166 ("1997 NJ 271 Proceeding"), Petition at 3; *see also* New Jersey Cable Telecommunications Association ("NJCTA") Initial Brief at 6. In fact, in that case Verizon-NJ devoted fully half of its Petition to public interest claims, and specifically submitted three accompanying affidavits "to provide information necessary for the Board to conclude that [Verizon-NJ's] request to provide long distance service within New Jersey is consistent with the public interest." 1997 NJ 271 Proceeding, Petition at 4, 7-14. In one of those affidavits, the then President and Chief Executive Officer of Verizon-NJ specifically testified that "the Board should conclude that it is in the public interest for [Verizon-NJ] to provide long distance service in New Jersey." 1997 NJ 271 Proceeding, Lauer Affidavit at 20; *see also* 1997 NJ 271 Proceeding, Taylor Affidavit ¶ 48 (concluding Verizon-NJ's "entry into the interexchange market in New Jersey is in the public interest"); NJCTA Initial Brief at 7.

Similarly, in other filings Verizon-NJ has consistently requested that the Board find its petitions to be in the public interest. *See, e.g., Joint Petition of Bell Atlantic Corporation and GTE Corporation for Approval of Agreement and Plan of Merger*, BPU Docket No. TM98101125 (October 2, 1998). For example, in the Bell Atlantic-NJ merger with GTE that led

[12] In the prior proceeding the Board was asked to evaluate the section 271 application of Verizon-NJ's predecessor in interest, Bell Atlantic – New Jersey. To limit possible confusion, this Reply Brief will utilize the term Verizon-NJ to refer to the former Bell Atlantic – New Jersey and its contemplated long distance affiliate (BACI), as well as to Verizon New Jersey, Inc.

to the creation of Verizon-NJ, the merging companies requested the Board agree with their assertion that the merger would benefit the public interest, including by increasing competition in the long distance market. *Id*. ¶¶ 13-15.

By Verizon-NJ's own admissions, therefore, the Board should perform a public interest examination in evaluating Verizon-NJ's application. It speaks volumes about the merit of Verizon-NJ's current application that Verizon-NJ now seeks to avoid this aspect of its application, an aspect it once embraced. Accordingly, the Board should recognize Verizon-NJ's assertion that the Board lacks authority to conduct a public interest review for what it really is – a disingenuous attempt to prevent the Board from performing an analysis that Verizon-NJ knows it cannot satisfy. *See* NJCTA Initial Brief at 2-3.

B. The Board Has the Responsibility to Conduct a Public Interest Analysis of Verizon-NJ's Section 271 Application

1. Contrary to Verizon-NJ's assertions, the Board has the obligation to conduct a public interest analysis of Verizon-NJ's section 271 application under federal law

Verizon-NJ is mistaken in its suggestion that the 1996 Act allows only the FCC – and not the Board – to evaluate its compliance with the public interest test. Verizon-NJ Initial Brief at 117-118. While section 271(d)(3)(C) of the 1996 Act certainly requires the FCC to find Verizon-NJ's section 271 application to be in the public interest as a predicate for approval, this in no way restricts the Board from, or relieves the Board of the responsibility of, conducting its own public interest analysis. NJCTA Initial Brief at 4; *see* AT&T Initial Brief at 2. Indeed, a careful examination of Verizon-NJ's Initial Brief reveals that even Verizon-NJ was unwilling to claim that the Board may not perform a public interest analysis. Instead, while Verizon-NJ may have

implied such a prohibition, it was only willing to state that "[t]here is thus *no need* for the Board to undertake a public interest analysis." Verizon-NJ Initial Brief at 118 (emphasis added).

A public interest evaluation by the Board is precisely the sort of analysis that the FCC has repeatedly requested state commissions to provide when submitting their section 271 evaluations. Section 271 requires that the FCC consult with the relevant state commission before rendering any decision on Verizon-NJ's application. 47 U.S.C. § 271(d)(2)(B). As part of this consultative relationship between the state commission and the FCC, the FCC requested – in its very first section 271 proceeding – that the state commission develop and provide it with comprehensive factual records on local public interest conditions.

> In order to fulfill this role as effectively as possible, state commissions *must* conduct proceedings to develop a *comprehensive factual record* concerning BOC compliance with the requirements of section 271 *and the status of local competition* in advance of the filing of section 271 applications. We believe that the state commissions' knowledge of local conditions . . . affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition.
> . . .
> We would also want to know about state and local laws, or other legal requirements, that may constitute barriers to entry into the local telecommunications market, or that are intended to promote such entry.

FCC MI 271 Order ¶¶ 30, 396 (emphasis added). Moreover, the FCC explicitly left to the state commission the decision concerning what local factors to consider when assessing the state of local competition and other local public interest conditions. *Id*. ¶ 398.

Assessing local conditions, other state commissions have recognized the importance of rendering findings on the public interest to the FCC in their consultative reports. For example, in Massachusetts, the Department of Telecommunications and Energy rendered a recommendation to the FCC on the perceived effect of Verizon-MA's Section 271 application upon the public

interest in view of the acknowledgment that the FCC would evaluate the public interest as an element independent of the checklist. *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 00-176, Evaluation of the Massachusetts DTE at 657 (filed Oct. 16, 2000). In Pennsylvania, the commission noted that section 271, as well as its independent public interest responsibilities, required it to engage in a detailed inquiry into the status of local competition in Verizon-PA's territories. *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01- 138, Consultative Report of the Pennsylvania Public Utilities Commission (filed June 25, 2001) ("PA Commission Consultative Report"). In fact, Verizon-PA submitted testimony by William E. Taylor and Daniel J. Whelan in support of the Verizon-PA application on the issue of how the public interest would be beneficial to consumers and competition.[13]

[13] *See* Declaration of William E. Taylor on Behalf of Verizon Pennsylvania, Inc. at p. 4, "In sum, Verizon-PA's entry in the long distance market in Pennsylvania is in the public interest."

2. Verizon-NJ fails to recognize that the Board has a responsibility under New Jersey law to safeguard the public interest

a. The Board's fundamental purpose is to protect the public interest in New Jersey; the Board – not the FCC – is ideally suited to that task

Under New Jersey law, the Board has a fundamental responsibility to protect the public interest in every action it takes. This responsibility, as the Supreme Court of New Jersey long ago recognized, originates in the New Jersey Constitution.

> [B]ecause administrative agencies serve in part to effectuate the constitutional obligation of the executive branch to see that laws are faithfully executed, *N.J. Const.* (1947), Art. V, § I, par. 11, the public interest is an added dimension in every administrative proceeding. That interest is necessarily implicated in agency adjudications, and, in a sense, the public is an omnipresent party in all administrative actions.

Hackensack v. Winner, 82 N.J. 1, 30, 410 A.2d 1146, 1160 (1980); *see also* NJCTA Initial Brief at 3-7; AT&T Initial Brief at 2. Further, the New Jersey Legislature granted the Board broad powers to assess the public interest. *See* N.J.S.A. §§ 48:2-16 et. seq. (telecommunications); N.J.S.A. § 48:3-50 (electric utilities); *see also Bergen County v. Dep't of Public Utils.*, 117 N.J. Super. 304, 284 A.2d 543 (App.Div. 1971); NJCTA Initial Brief at 3-7. Verizon-NJ is simply wrong when it claims that the Board should not make a public interest determination in evaluating Verizon-NJ's section 271 application.

Both the courts and the Legislature have specifically recognized the Board's omnipresent responsibility to protect the public interest.

> In construing *N.J.S.A. 48:1-1 et seq.*, our courts uniformly hold that the Legislature intended that the Board of Public Utilities Commissioners have [sic] the widest range of regulatory power over public utilities. The provisions of this title are to be construed liberally, and the powers delegated by the Legislature to the Board are to be read broadly. . . . *At the core of this regulatory scheme is a*

> *legislative recognition that the interest of the general public in the proper regulation of those industries classified as public utilities transcends the relatively parochial interests of [those entities regulated by the Board,* including,] any subdivision of the public, and that a centralized control must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities.

Daaleman v. Elizabethtown Gas Company, 142 N.J. Super. 531, 535, 362 A.2d 70, 72 (1976) (internal citations omitted) (emphasis added), *rev'd on other grounds*, 150 N.J. Super. 78, 374 A.2d 1237 (1977) , *rev'd on other grounds*, 77 N.J. 267, 390 A.3d 566 (1978) (reinstating trial court decision). Moreover, the courts have recognized that the Board's mandate to protect the public interest continues under both the New Jersey Telecommunications Act of 1992 Act, 48 N.J.S.A. § 48:2-21.16 *et. seq*., and the 1996 Act.

> [B]oth the Federal Telecommunications Act of 1996 and the State Telecommunications Act of 1992 are designed to encourage and extend competition in the provision of telecommunications services primarily and specifically for the benefit of the consuming public on the premise that the benefits would flow from a competitively neutral regulatory regime. Neither act can be seen as extinguishing the State's authority to act by way of regulating specific practices to protect the public interest in particular ways.

I/M/O Regulation of Operator Service Providers, 343 N.J. Super. 282, 326 (2001)

The Board itself consistently has recognized both its authority and responsibility to affirmatively act for the public interest in all of its actions. For example, in "categorically" determining that it has the authority to determine whether a public utility merger is in the public interest, the Board noted the considerable breadth of its public interest authority and responsibility:

> The courts of this state have consistently held that the legislature in Title 48 has delegated to the [B]oard the widest range of regulatory power over public utilities. *Township of Deptford v Woodbury Terrace Sewerage Corp. (1969) 54 NJ 418, 255 A2d 737.* The state has delegated to the [B]oard in most sweeping terms

> "general supervision and regulation of and jurisdiction and control over all public utilities and their property, property rights, equipment, facilities and franchises." *Re Public Service Electric & Gas Co. (1961) 35 NJ 358, 371, 40 PUR3d 70, 173 A2d 233*. We recently noted in Re Jersey Central Power & Light Co., Docket No. 8111 952, Oct. 12, 1983, that the responsibilities exercised by utility board of directors may go to the heart of the ability of a company to render safe, adequate and proper service.

New Jersey Resource Corp. v. NUI Corp. BPU Docket No. 8312-1093, 57 PUR 4th 709, 714 (1984); *see also* NJCTA Initial Brief at 3-7.

Finally, Verizon-NJ ignores the obvious, common sense conclusion that the Board is the administrative body best suited to make a public interest evaluation about the local conditions in New Jersey. The Board has extensive experience evaluating these conditions, experience that far outweighs that of the FCC. Indeed, this is precisely why the FCC itself requested that the state commissions provide the FCC with a detailed evaluation of local conditions. FCC MI 271 Order ¶¶ 30, 396, 398; *supra* Section IV.B.1.

Consequently, Verizon-NJ is simply wrong when it claims that the Board should not make a public interest determination in evaluating Verizon-NJ's section 271 application. To the contrary,, it is imperative that the Board include a public interest analysis in its evaluation of Verizon-NJ's section 271 application. Failure to do so would amount to an abdication of the Board's authority and responsibility, and would leave New Jersey consumers at the mercy of the FCC to, on its own, perform a public interest analysis about local New Jersey conditions.

b. Verizon-NJ is putting its section 271 interest ahead of the Board's responsibility to safeguard the public interest

In attempting to limit the Board's examination of Verizon-NJ's section 271 application by excluding the public interest analysis, while at the same time requesting expedited approval of its

application, Verizon-NJ seeks to place its corporate interests in receiving long distance authority above the public interest. *See* AT&T Initial Brief at 2-3, 6-7. In enacting section 271, Congress contemplated that no BOC would receive permission to enter the lucrative long distance market until that BOC first opened its local markets to competition. *E.g.*, FCC MI 271 Order ¶¶ 14-15, 18; *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, CC Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order ¶ 3 n. 6 (1998) ("FCC LA II 271 Order") (quoting statement of Sen. Dorgan, 141 Cong. Rec. S8057 (1995)). As demonstrated by various parties in this proceeding, and as shown above, satisfying the public interest test is a key prerequisite to obtaining intrastate, in-region interLATA relief. NJCTA Initial Brief at 5-7; AT&T Initial Brief at 6-7; *supra* Section IV.B.1, IV.B.2.a. Further, as shown above, a public interest analysis is a necessary part of every Board decision. *Supra* Section IV.B.2.a. Nevertheless, abandoning its earlier position, *supra* Section IV.A., Verizon-NJ now tells the Board to approve its section 271 application without considering the public interest. This the Board should not do.

C. Verizon-NJ's Section 271 Application is not in the Public Interest at This Time and Thus is Premature

As shown above, in its application Verizon-NJ should have demonstrated that it met each of its section 271 requirements, including the public interest test. While Verizon-NJ may be able to demonstrate that it has met its public interest (and its competitive checklist obligations) in the upcoming months, as of now it has failed to do so. Therefore, as with the competitive checklist, it is premature for the Board to find that Verizon-NJ has passed the public interest test.

1. Verizon-NJ's entry into the long distance market will serve the public interest at the appropriate time

Verizon-NJ is correct that its entry into the long distance market will benefit consumers and competition *when* it has opened its local markets to competition. Verizon-NJ Initial Brief at 5-6, 120. Clearly, once Verizon-NJ has demonstrated that its local markets are open – which it has yet to do – Verizon-NJ will have met the most formidable section 271 criterion. *E.g.* FCC MI 271 Order ¶¶ 14-15, 18. As the Ratepayer Advocate has previously stated, once it meets that criterion Verizon-NJ's entry into the New Jersey long distance market would serve the public interest. T.17:21-18:6 (11/05/01) (opening statement of Ratepayer Advocate Blossom A. Peretz).

2. Now is not the appropriate time for section 271 authorization

a. Verizon-NJ misuses the FCC's general comments on BOC entry into the long distance market to argue that it would be in the public interest for Verizon-NJ to enter the long distance market

While Verizon-NJ correctly noted that the FCC has found that BOC entry into the long distance market serves the public interest if the BOC has demonstrated that it has opened its local market to competition, Verizon-NJ takes the FCC's statements too far. Verizon-NJ Initial Brief at 5-6, 118-119 (citing *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269, Memorandum Opinion and Order, ¶ 125 (rel. Sept. 19, 2001) ("FCC PA 271 Order").). Verizon-NJ argues that "it is beyond all reasonable dispute that Verizon-NJ's entry into the long distance market is in the public interest," merely because the FCC had found that,

once the local market is open to competition, BOC long distance entry would be in the public interest. Verizon-NJ Initial Brief at 118. In so arguing, Verizon-NJ applies circular logic, assuming rather than proving its conclusion that the market is open to competition. Of course, once the local market is open to competition Verizon-NJ's long distance entry would be in the public interest. However, proving that its local market is irrevocably open to competition is the crux of Verizon-NJ's responsibility, and therefore the central issue that the Board must evaluate. It cannot simply be assumed.

Verizon-NJ also ignores the FCC's repeated statements that the public interest test is a separate and independent criterion from the competitive checklist.

> [W]e reaffirm the Commission's earlier decision that section 271 relief may be granted only when: (1) the competitive checklist has been satisfied; and (2) the Commission has independently determined that such relief is in the public interest.

FCC LA II 271 Order ¶ 361 (emphasis added); *see*, *e.g.*, FCC PA 271 Order, App. C ¶ 71; FCC NY 271 Order ¶¶ 422-423; FCC MI 271 Order ¶¶ 389-390. While Verizon-NJ is correct that the FCC has found that compliance with all the competitive checklist items – which has not occurred here, *supra* Section III – may be evidence bearing on a BOC's satisfaction of the public interest test, these findings do not lessen the need for an independent public interest analysis. *See, e.g.*,FCC PA 271 Order, App. C ¶ 71; FCC NY 271 Order ¶¶ 422-423; FCC MI 271 Order ¶¶ 389-390. In fact, in the very FCC decision cited by Verizon-NJ, the FCC reconfirmed that the public interest analysis is an independent one. FCC PA 271 Order, App. C ¶ 71 ("the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."); *see* Verizon-NJ Initial Brief at 5, 118-119.

Accordingly only *when* the New Jersey local telecommunications market is actually and irreversibly open to competition will Verizon-NJ's long distance entry serve the public interest.

b. New Jersey's local market is not yet open to competition: there is no residential competition and no geographic distribution of competition

Unfortunately, Verizon-NJ's local telecommunications markets are not yet open to competition. Today, there is effectively no residential competition anywhere in New Jersey, and what business competition exists is insufficient because it is not geographically distributed throughout the state. *E.g.*, Lightpath Initial Brief at 2-3, 9-12; AT&T Initial Brief at 16-20; RPA Initial Brief at 21-25, 33-37.

Verizon-NJ completely ignores the utter lack of residential competition when it claims "that there is facilities-based competition in New Jersey." Verizon-NJ Initial Brief at 2. Verizon-NJ failed to demonstrate that any significant number of residential customers are receiving service from competitive carriers. Lightpath Initial Brief at 2-3, 9-12; AT&T Initial Brief at 16-20; RPA Initial Brief at 21-25, 33-35. Rather, Verizon-NJ alleged, but was unable to support, that 280 residential customers are receiving service for a fee from facilities-based competitive carriers. RPA Initial Brief at 22-23, 33-34. Assuming *arguendo* that this number is accurate, it represents a mere 0.0064% of Verizon-NJ's local residential lines. *See* RPA Initial Brief at 23; *see also* WorldCom Initial Brief at 8-9 (calculating the percentage as an even lower 0.002%); Lightpath Initial Brief at 9-10. This percentage is less – indeed, orders of magnitude less – than the percentage of residential customers being served by competitors at the time Verizon filed for Section 271 approval at the FCC in other states. The percentage in New Jersey is more than 100

times less than even the closest other state, New York. Lightpath Initial Brief at 9-11; *see* Selwyn Declaration at 27.

Residential Market Penetration
Facilities-Based Competitive Carriers

State	Percentage Penetration
New Jersey	0.0064%
New York	1.54%
Massachusetts	1.91%
Pennsylvania	4.71%
Rhode Island	6.26%

Lightpath Initial Brief at 2, 9-11; RPA Initial Brief at 23; *see* AT&T Initial Brief at 16-20.

While Verizon-NJ is correct that it is not required to show that competitors have achieved a specific aggregate market share, Verizon-NJ Initial Brief at 2-3 (citation omitted), Verizon-NJ utterly ignores the fact that the FCC requires that a "sufficient number of residential customers [must be] served by competing LECs through the use of their own facilities." *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, IntraLATA Services in Kansas and Oklahoma,* 16 FCC Rcd 6237, CC Docket No. 00-217, FCC 01-29, Memorandum Opinion and Order ¶42 (rel. Jan. 22, 2001) ("FCC KS/OK 271 Order"). 680 residential customers out of over 4.3 million is hardly sufficient. *See* Lightpath Initial Brief at 9. Rather, 680 customers is merely *de minimis,* and therefore insufficient to demonstrate that there is an actual commercial alternative to Verizon-NJ. *Id*. Indeed, the dearth

of residential customers receiving service from competitive carriers much more closely resembles the four customers that the FCC found insufficient in analyzing and rejecting the initial Southwestern Bell section 271 application for Oklahoma than it does the tens or hundreds of thousands of residential customers receiving competitive service in each of the other Verizon states. *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amende4d, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order 12 FCC Rcd 8685 ¶ 17 (June 26, 1997); *see* Lightpath Initial Brief at 11-12; AT&T Initial Brief at 18-19; RPA Initial Brief at 21-23; *see also* WorldCom Initial Brief at 10. Thus, today there is insufficient residential competition in New Jersey to satisfy the requirements of Section 271.

Verizon-NJ also failed to demonstrate that competitive local service is being provided geographically throughout the entire state. *See* Selwyn Declaration ¶ 23; RPA Initial Brief at 35-37. In fact, nowhere in Verizon-NJ's Initial Brief did it even attempt to address this issue. Absent such a showing, any approval of Verizon-NJ's section 271 petition runs the grave risk of enabling – and, indeed, sanctioning – a continued Verizon-NJ local monopoly in the areas not presently served by competitors. RPA Initial Brief at 35-37. Verizon-NJ's failure to present concrete evidence of facilities-based competition in the separate geographic regions of the state, therefore, cannot satisfy the public interest requirement. *See, e.g.*, RPA Exh. 2, Verizon-NJ response to RPA-21; *see also Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Services in New Jersey*, Docket No. TO01090541, Motion to Dismiss of the Ratepayer Advocate at 6-9 (filed Oct. 22, 2001).

For this reason, the New York Public Service Commission investigated the extent of competition not just statewide, but in seven separate and distinct geographic regions of the state as well. *See Analysis of local Exchange Service Competition in New York State*, New York Public Service Commission (Dec. 31, 2000). In this analysis, the New York Commission performed a detailed analysis of the number of access lines – both residential and business – that ILECs and CLECs were serving in each region. *Id*. No similar examination has occurred in New Jersey. The fair conclusion therefore is that local exchange service competition in New Jersey remains a goal to be reached.

Therefore, Verizon-NJ's claim that "the New Jersey local market is open," Verizon-NJ Initial Brief at 6, is unsupported and should be rejected by the Board.

V. BEFORE GRANTING SECTION 271 AUTHORITY, THE BOARD SHOULD ESTABLISH PUBLIC INTEREST SAFEGUARDS TO ENSURE THAT NEW JERSEY CONSUMERS CONTINUE TO BENEFIT FROM COMPETITIVE CONDITIONS

Throughout its advocacy in this proceeding, Verizon-NJ has focused on the competitive checklist as the basis for its request for interLATA authority. As the Ratepayer Advocate discussed in its Initial Brief and in preceding sections of this Brief, Verizon-NJ has not met even that aspect of its burden of proof. Beyond Verizon-NJ's inadequate showing of present competitive conditions, however, lies an equally serious flaw in its case. Verizon-NJ makes no effort to propose mechanisms for ensuring that any opening of New Jersey's markets to competition will be "irrevocable," as the FCC requires. *E.g.*, FCC PA 271 Order , App. C ¶ 71; RPA Initial Brief at 46-47. The Ratepayer Advocate strongly urges the Board to withhold any recommendation for section 271 authority until it ensures the preservation of competitive

conditions and the public interest generally through the establishment of a state Universal Service Fund ("USF") and a requirement that Verizon-NJ be subject to structural separation or at least functional/structural separation through a code of conduct.

A state USF for New Jersey is essential to satisfy the public interest requirement of Section 271. Such a fund will ensure that all New Jersey ratepayers will have the benefit of affordable telephone service, first-class telecommunications facilities in their schools and libraries, and competition for the provision of advanced services. . RPA Initial Brief at 40-43. In point of fact, the Pennsylvania Commission, commented to the FCC on Verizon-PA's Section 271 application that a key issue resolved prior to its Section 271 consideration was the creation of a state USF. PA Commission Consultative Report at 8-9. Although the federal USF is intended to provide funding to every state that demonstrates a need, there is no guarantee that the funding provided by the federal USF will suffice to accomplish the universal service goals of that particular state. *See* Consumer Energy Council of America Report, *Universal Service Policy Issues for the 21st Century* at 15, 23.Without a state USF, Verizon-NJ's entry into the provision of long-distance service will carry a risk of reduced USF benefits, a risk that the Board should not countenance.

In the Ratepayer Advocate's view, structural separation or a strong code of conduct are crucial to preserving and enhancing whatever competition may exist in New Jersey's telecommunications markets. Structural approaches are the only proven means of creating and preserving competition, a fact that this Board and the New Jersey Legislature have recognized and that experience with telecommunications markets firmly establishes. RPA Initial Brief at 52-56. The Board should not recommend that Verizon-NJ be allowed into the interLATA market

until structural separation or a code of conduct are in place. Without one of these measures, the danger is great that Verizon-NJ will be able to remonopolize this market, with disastrous results for New Jersey's consumers. RPA Initial Brief at 48-49.

VI. CONCLUSION

For the reasons stated above and in the Ratepayer Advocate's Initial Brief, the Ratepayer Advocate respectfully urges the Board to withhold a recommendation that Verizon-NJ receive section 271 authorization until it has fully complied with Section 271 and until the Board has taken steps that will safeguard competition and the public interest following that authorization.

Respectfully submitted,

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