October 22, 2001

VIA HAND DELIVERY
Francis L. Smith, Secretary
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Re: In the Matter of the 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

Dear Secretary Smith:

Please accept this letter motion seeking to dismiss Verizon New Jersey, Inc.'s ("Verizon") application for FCC authorization to provide in-region, interLATA services in New Jersey ("Section 271 filing").

I. LEGAL STANDARDS FOR MOTION TO DISMISS

The legal standards for a motion to dismiss are found in N.J.A.C. 1:1- 1.1(a) which states in relevant part that "[s]ubject to any superseding Federal or State law, this chapter shall govern the procedural aspects pertaining to transmission, the conduct of the hearing and the rendering of the initial and final decisions in all contested cases...", and in N.J.A.C. 1:1- 12.1 which sets out the procedures for filing a motion. As the N.J.A.C. does not contain standards specific to the filing of a motion to dismiss, the applicable standards are set forth in Civ.Rul. 4:37-2 (b) which governs involuntary dismissal. The rule states that following the conclusion of presentation of evidence on all matters by the petitioner, a motion may be made for dismissal of the action or of any claim on grounds that upon the facts and the law, the petitioner has shown no grounds for relief.

As described below, Verizon has failed to meet the statutory standards for the relief that it seeks, namely approval of its 271 filing. Accordingly, Verizon's application in this proceeding should be dismissed by the Board. The Ratepayer Advocate, pursuant to Rule 4.37-2(b), does not hereby waive any of its rights to offer evidence in the event that this motion is not granted.

The Ratepayer Advocate respectfully submits that Verizon did not present sufficient evidence upon which approval of its Section 271filing may be granted.[1] Pursuant to Civ. Rul. 4:37-2(b), the standard of review for dismissal is stated clearly, that the reviewing court (here the Board) must examine the evidence, together with legitimate inferences which can be drawn therefrom, and determine whether the evidence could have sustained a judgment in favor of the party who opposed the motion. Thus the Board is required to accept as true all evidence supporting the petitioner's claim and accord Verizon the benefit of all reasonable inferences.[2] Appropriately, the Board's concern is not with the worth, nature or extent of the evidence, but rather with its existence beyond a scintilla, as viewed most favorably to the petitioner.[3]

Federal standards for approval of 271

The Telecommunications Act of 1996[4] ("1996 Act") requires the Commission to examine compliance with four requirements before approving a Bell Operating Company's ("BOC") entry into the interLATA market. Under Section 271 the BOC must show: (1) that it satisfies the requirements of either Section 271 (c)(1)(A) known as Track A, or Section 271 (c)(1)(B), known as Track B;[5] (2) that it has "fully implemented the competitive checklist" contained in Section 271(c)(2)(B); (3) that the requested authorization will be carried out in accordance with the requirements of Section 272; and (4) Verizon's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity". [6] Section 271 specifies that unless the FCC finds that all of these four criteria have been satisfied, the Commission "shall not approve" the requested authorization.[7]

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[1] *See Dolson v. Anastasia*, 55 N.J. 2, 5-6 (1969).

[2] *See Bell v. Eastern Beef Co.*, 42 N.J. 126 (1964); *Bozza v. Vornado, Inc.*, 42 N.J. 355 (1964); *Walsh, et al. v. Madison Park Properties, Ltd.*, 102 N.J. Super. 134 (App. Div. 1968).

[3] *See Dolson* at 2, 5; *Tannock v. New Jersey Bell Telephone*, 223 N.J.Super. 2, 6 (1988); *Cameco, Inc. v. Gedicke*, 157 N.J. 504 (1999); *Teilhaber v. Greene*, 320 N.J. Super. 453, 462 (App. Div. 1999).

[4] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 153, *et seq*. (1996).

[5] *See* 47 U.S.C. § 271 (d)(3)(A). In this case, Verizon has opted to file under Track A which requires that a BOC must provide access to one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers.

[6] *See* 47 U.S.C. § 271(d)(3)(C).

[7] *Id.* § 271(d)(3). *See also SBC Communications, Inc.* v. *FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).

The role of the state commission in approving Verizon's Section 271 filing

Section 271(d)(2)(B) requires the FCC to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."[8] The FCC articulated that:

> In requiring the FCC to consult with the states, Congress "afforded the states an opportunity to present their views regarding the opening of the BOCs' local networks to competition. 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 and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition... The Commission, therefore, has discretion in each Section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant's compliance with Section 271 and the status of local competition. We will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record to be of great importance to our review of Section 271 applications...[9]

Thus, it is incumbent upon the Board to develop a full and complete record in order to provide a consultative report to the FCC regarding approval of Verizon's Section 271 authority. As the FCC did not set any limitations on a state commission's review of a Section 271 filing, the Board is not limited in its review of Verizon's filing to the 14-point checklist. But rather, as stated above by the FCC, the Board should also use its knowledge of local conditions and experience to develop a comprehensive record that demonstrates that New Jersey communications markets are irrevocably open to competition and that it would be in the public interest to grant Verizon entry into the long distance marketplace at this time. To fulfill this objective, the Board must review the sufficiency of Verizon's petition as filed within the context of the level of competition currently in New Jersey's local exchange marketplace, coupled with review of cost-based UNE rates, geographic distribution of competition, real-world testing of OSS enforcement mechanisms, and a state Universal Service Plan.

II. SUMMARY OF THE ARGUMENTS

[8] 47 U.S.C. § 271(d)(2)(B).

[9] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137, FCC 97-298, Memorandum Opinion and Order at para. 30 (hereinafter *Michigan Order*).

Verizon's filing must be dismissed because it does not meet the public interest requirements necessary for the Board's approval of Section 271 authority for the following reasons:

. A. Verizon's Section 271 filing must be dismissed because it relies upon unsupported testimony to demonstrate that the local exchange markets in New Jersey are irrevocably open to competition. Additionally, Verizon's Section 271 filing requires dismissal because it fails to provide any evidence as to the geographic distribution of competition in the local markets which is essential to satisfy the public interest.

B. Verizon's Section 271 filing should be dismissed because Verizon has failed to provide any evidence that no entry barriers exist in New Jersey.

i. Absence of permanent UNE Rates serves as an entry barrier to competition and warrants dismissal of Verizon's Section 271 filing.

ii. Verizon's filing is devoid of any provision for real world testing of operational support systems ("OSS") and enforcement remedies which support dismissal.

C. Public interest requires that a state Universal Service Plan be in place in New Jersey before Verizon's Section 271 filing can be approved.

III. ARGUMENT

Verizon's filing must be dismissed because it does not meet the public interest requirements necessary for the Board's approval of Section 271 authority.

The FCC stated that Section 271 gives it broad discretion to identify and weigh all relevant factors in determining whether BOC entry into the interLATA market is consistent with the public interest.[10] The FCC also made clear that compliance with the checklist requirements alone is not sufficient to satisfy the public interest standard nor is it sufficient to obtain interLATA authority.[11] According to the FCC, the public interest inquiry should concentrate on the status of market-opening measures in the relevant local exchange market. The presence of market-opening measures is demonstrated by "an adequate factual record that the BOC has undertaken all actions necessary to

[10] *See Michigan Order* at para. 383. The FCC is also required to consult with the Attorney General and give substantial weight to the Attorney General's evaluation before making a determination of whether the grant of an applicant's 271 application is consistent with the public interest. *Id*. at paras. 383-384. It is important to note that the Department of Justice ("DOJ") has developed a standard for analyzing whether an application for 271 authority meets the public interest requirement. According to the DOJ, an application is consistent with the public interest if it demonstrates that the local market is "*irreversibly open to competition*." *Id*. at para. 382. (emphasis added).

[11] *Michigan Order* at para. 385.

assure that its local telecommunications market is, and will remain, open to competition."[12] Specifically, the FCC examines: (1) whether pro competitive entry strategies are available to new entrants; (2) the effect of BOC entry on competition in the long distance market; (3) whether local markets are sufficiently open to competition to prevent a BOC's use of control over bottleneck local exchange facilities to undermine competition in the long distance market; (4) whether conditions are such that the local market will remain open; (5) "data on the nature and extent of *actual* local competition" and if "such data are not in the record or available for official notice [the FCC] would be forced to conclude that the BOC is not facing local competition," and (6) evidence that a BOC has agreed to performance monitoring, and whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with established performance standards. [13] Verizon's 271 filing is severely lacking in that it fails to demonstrate that its entry into the interLATA market would be in the public interest because it fails to provide evidence that meets the federal public interest requirements set forth above.

Contrary to Verizon's assertion, its filing requirements are not limited to its purported compliance with the 14 point checklist. Verizon's filing necessarily triggers public interest concerns and therefore the Board's review of such concerns independent of the federal checklist requirements. Not only is the Board required to examine Verizon's filing under the federal public interest requirements, but it is also required to review the filing under its own statutory public interest mandate. In regulating telecommunications services, the New Jersey Legislature intended to "safeguard the interest of the utilities and the public" and ensure that the "statutes governing public utilities reflect legislative recognition that public interest in proper regulation of public utilities...must be entrusted to an agency whose continually developing expertise will assure uniformly safe, proper and adequate service by utilities throughout the state."[14] In keeping with the New Jersey Legislature's intent, the Board is charged with considering public interest factors when reviewing Verizon's Section 271 filing.[15] The Legislative intent is clearly seen in the Board's authority to protect the public interest while bringing competition to the interexchange telecommunications

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[12] *Id*. at para. 386.

[13] *See Michigan Order* at paras. 388, 390, 391, 393, and 394.

[14] *See Bergen County v. Department of Public Utilities,* 117 N.J. Super. 304, 284 A.2d 543 (A.D. 1971).

[15] It is also significant that the New Jersey Legislature's intent was so broad as to require the Board to examine all utility filings in light of whether they are in the public interest. For instance, in furtherance of competition in the energy market, N.J.S.A. 48:3-50 (b) requires elimination of the traditional electric monopolies, and sets out certain parameters for the Board to follow in developing a competitive market. Specifically, N.J.S.A. 48:3-50 (b)(8) states that the legislature finds that the "electric power generation marketplace and gas supply marketplace should be subject to appropriate consumer protection standards that will ensure that all classes of customers in all regions of this State are properly and adequately served." Additionally, N.J.S.A. 48:3-50(c) sets out regulations that expressly require the Board to act in the public interest by authorizing the Board to "permit competition in the electric generation and gas marketplace and such other traditional utility areas as the board determines, and thereby reduce the aggregate energy rates currently paid by all New Jersey consumers;" and "[p]rovide for regulation of new market entrants in the areas of safe, adequate and proper services and customer protection."

marketplace for the benefit of all consumers. Specifically, N.J.S.A. 48:2-21.16(a) provides that among the policies of the state, is to "[m]aintain universal telecommunications service at affordable rates;" and to "[p]rovide diversity in the supply of telecommunications services and products in telecommunications markets throughout the State." Furthermore, N.J.S.A. 48:2-21.16(b)(5) expressly grants to the Board the ability to determine whether it is "in the public interest to relieve interexchange telecommunications carriers from traditional utility regulation." The Board must therefore determine whether Verizon's filing complies with the public interest and absent such a determination the filing must be dismissed.

A. Verizon's Section 271 filing must be dismissed because it relies upon unsupported testimony to demonstrate that the local exchange markets in New Jersey are irrevocably open to competition. Additionally, Verizon's Section 271 filing requires dismissal because it fails to provide any evidence as to the geographic distribution of the competition in residential markets which is essential to satisfy the public interest.

The Ratepayer Advocate contends that Verizon's entry into the interLATA long distance market is not yet in the public interest based on Verizon's failure to provide evidence that its local markets, especially its residential market, are irrevocably open to competition. Verizon relies on the naked assertions of its expert witnesses to support its application. Expert testimony need not be given greater weight than other evidence nor more weight than it otherwise deserves in light of common sense and experience.[16] The Board is never bound to accept the testimony of expert witnesses, even if it is unrebutted by any other evidence.[17] The weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.[18] In fact, an expert's bare conclusions, unsupported by factual evidence, are inadmissible as a mere "net opinion."[19] It therefore follows that the evidence, data and the totality of the facts on the basis of which the expert arrived at his opinion must be made known to the court so that it may evaluate the validity of the opinion and conclude what weight, if any, it should give to that opinion.[20]

As demonstrated below, Verizon has not provided any evidence, other than the unsupported statements of its witnesses, that the New Jersey local markets are irrevocably open to competition. The purpose of Dennis Bone's declaration is to demonstrate that the local market in New Jersey is

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[16] *Matter of Yaccarino,* 117 N.J. 175, 196 (1989).

[17] *Johnson v. American Homestead Mortg.,* 306 N.J. Super. 429, 438 (App. Div. 1997).

[18] *Johnson v. Salem Corp.,* 97 N.J. 78, 91 (1984).

[19] *Smart v. Fair Lawn Bd. Of Adj.,* 152 N.J. 309, 321, 334 (1998).

[20] *Bowen v. Bowen,* 96 N.J. 36, 50 (1984).

irreversibly open.[21] Instead, Mr. Bone presents various unsupported figures that purportedly show the presence of competition in New Jersey. Without support for these figures, Verizon cannot prove the existence of such competition. For example, the fact that Verizon has 160 approved interconnection agreements, and approximately 50 pending agreements[22] is by no means sufficient proof that competitive local exchange carriers ("CLECs") are actually providing service in the New Jersey local marketplace; it is simply proof that CLECS have the ability to provide service in New Jersey. The Ratepayer Advocate has always contended that there is a vast difference between actual CLEC competition and potential CLEC competition. The FCC has stated that to meet the public interest requirement, a filing must contain "data on the nature and extent of *actual* local competition" and if "such data are not in the record or available for official notice [the FCC] would be forced to conclude that the BOC is not facing local competition."[23] Thus, the success of Verizon's Section 271 approval is based on the existence of CLECs who are actively providing service in the local market, not on CLECs who have the requisite ability to do so.

Moreover, Mr. Bone's Declaration fails to provide ample support for the presence of facilities-based local exchange competition in New Jersey. For instance, Mr. Bone provides XO Communications as an example of a facilities-based carrier in New Jersey. However, XO Communications does not offer local services in New Jersey. Additionally, Mr. Bone cites Conectiv Communications as a local service provider in New Jersey even though, in footnote 5 of his Declaration, Mr. Bone states that "Conectiv has notified Verizon NJ that it intends to cease providing service to residential customers in New Jersey..."[24] Mr. Bone also states that competitors are serving at least 288,000 business lines, and 280 residential lines using their own facilities,[25] but then admits in Attachment 101 to his Declaration that the information needed to prove the existence of facilities-based competition "is incomplete."[26] This statement supports the Ratepayer Advocate's contention that Verizon's Section 271 filing is premature and merits dismissal because it does not possess the necessary information to definitively show that New Jersey local markets are truly open to competition.

Furthermore, Mr. Bone's Declaration does not adequately demonstrate that competition exists for CLECs in all areas of the state. Mr. Bone attempts to prove the geographic distribution of

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[21] *I/M/O Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, Inter-LATA Service in New Jersey*, Declaration of Dennis M. Bone at para. 4 (hereinafter *Bone Declaration*).

[22] *Bone Declaration* at para. 6.

[23] *Michigan Order* at para. 391.

[24] *Bone Declaration* at para 17.

[25] *Id.* Mr. Bone bases the number of residential lines and business lines on E911 listings which the Ratepayer Advocate believes is not sufficient proof of facilities competition in the residential market in New Jersey.

[26] *See Bone Declaration*, Attachment 101 at para. 3.

competition in New Jersey by including exhibits to his Declaration which state the number of CLEC facilities-based and resold lines by area code.[27] However, the numbers cited in Mr. Bone's exhibits still do not rise to the level of what Verizon is required to prove in order to gain Section 271 approval.[28] Absent evidence that each and every geographic area in New Jersey is sufficiently open to competition, approval of this application runs the risk of ignoring the vital importance of New Jersey ratepayers who face a single unregulated monopoly carrier, Verizon. Prior to approval of Section 271 authority, the New York PSC investigated the extent of competition in each geographic area of New York State.[29] They accomplished this by dividing New York State into seven regions,[30] and for each region they listed the ILECs and CLECs serving that region along with the number of access lines (business and residence) they serve in that particular region. As a result, the detailed data in New York PSC's annual report proved invaluable in determining whether consumers in every region of that state receive the benefits of competition. In engaging in this type of analysis prior to the grant of Section 271 approval, the NYPSC was able to definitively determine whether *all* consumers would benefit from Verizon's entry into the interLATA market. In New Jersey, however, unless Verizon's filing contains detailed and specific competitive information regarding each geographic region of New Jersey, the Board cannot fully determine whether *all* New Jersey consumers would benefit from Section 271 approval or whether consumers would be harmed by approval of Verizon's application. As filed, Verizon's application provides scant evidence that there is substantial facilities-based competitive entry outside of a few core urban wirecenters in New Jersey. Unfortunately, due to the aggressive schedule implemented by the Board, and Verizon's failure to provide responsive answers to the Ratepayer Advocate's discovery requests, Verizon necessarily fails to establish a strong case as to the geographic distribution of competition in the local residential markets.

Not only does Verizon's filing fail to provide information that local markets are open, there exists evidence to the contrary. The most obvious evidence that New Jersey's local markets are not open to competition is the fact that Verizon retains its monopoly in the local residential market. According to the data provided by Dr. Taylor in the CTP proceeding, Verizon still serves

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[27] *Bone Declaration*, Attachment 101, Exhibit 2 & 3.

[28] For instance, Mr. Bone states that 280 residential lines are served by CLECs using their own facilities, 400 residential lines using UNE-P, and approximately 59,000 resold residential lines. *See Bone Declaration* at para. 8. Mr. Bone also states that "CLECs are servicing business and residential customers in *each* area of the State. (emphasis added). *Id*. In fact, the residential line figures above, can be contained within a single area code demonstrating that in other areas of the state, no residential competition is present. Additionally, neither Exhibit 2 nor 3 pertain to residential customers. This means that no evidence regarding the geographic distribution of competition, as it pertains to residential customers, has been provided by Verizon in its filing.

[29] *See* Analysis of Local Exchange Service Competition in New York State, as of December 31, 2000.

[30] The regions included New York Metro, Albany, Binghamton, Buffalo, Poughkeepsie, Rochester, and Syracuse. New York Metro was further divided into Manhattan; Bronx; Staten Island, Brooklyn, and Queens; Long Island; and Northern.

approximately 96% of New Jersey's local exchange customers.[31] Verizon, still maintains a virtual monopoly in the small business and residential telecommunications markets in New Jersey almost six years after passage of the 1996 Act which sought to bring vibrant competition to the local marketplace.[32] According to the FCC report on local telephone competition, as of December 31, 2000, CLECs in New Jersey served 323,680 end-user lines (residential and business combined) by means of UNEs, resale, and over their own local loop facilities, which amounts to 5 percent of the total number of end-user lines.[33] In stark contrast, CLECs in Pennsylvania served 870,618 end-user lines which represented 10 percent of the total number of lines, and in Massachusetts, CLECs served 509,731 end-user lines which represented 11 percent of the total number of lines. It is quite notable that both Pennsylvania and Massachusetts received 271 approval this year, no doubt, because the BOCs provided evidence demonstrating (to the state commission and the FCC) that their respective local markets were sufficiently open to competition. The fact that New Jersey, perhaps the most densely populated state, has significantly less competition than Pennsylvania and Massachusetts, demonstrates that in comparison, New Jersey does not have competition sufficient to warrant review of Verizon's Section 271 filing at this time.

Accordingly, Verizon's argument that the doors to competition are open fails, given the clearly more significant levels of residential competition in states in which BOCs have received FCC approval of a Section 271 application.[34] Uncertainty in business conditions such as UNE pricing coupled with the absence of a real world application of OSS and proper review of enforcement mechanisms, constitute significant entry barriers for CLECs who seek to provide local service in New Jersey. As stated above, this is particularly true of the residential market, where competitive options are few or non-existent.

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[31] *See* Testimony of Dr. William E. Taylor on behalf of Bell Atlantic - New Jersey, Inc., *I/M/O Verizon-New Jersey, Inc. for Approval of a Modified Plan for an Alternative Form of Regulation and to Reclassify All Rate Regulated Services as Competitive Services*, Docket No. TO99120934, May 18, 2000, at 30-31; ARMIS 43-08, Table III.

[32] In fact, the 280 residential lines purportedly served by CLECs using their own facilities reported in Mr. Bone's Declaration, amounts to a mere .0065% of the total residence lines (according to the year 2000 ARMIS report) served by Verizon NJ. *See Bone Declaration* at para. 8.

[33] *See* FCC's *Local Telephone Competition Status as of December 31, 2000*, Table 6 (May 21, 2001).

[34] *See* FCC's *Local Telephone Competition Status as of December 31, 2000* (May 21, 2001).

B. Verizon's Section 271 filing should be dismissed because Verizon has failed to provide any evidence that no entry barriers exist in New Jersey.

i. Absence of permanent UNE rates serves as an entry barrier to competition and warrants dismissal of Verizon's Section 271 filing.

Barriers to competitive entry, particularly in the residential markets, remain. Verizon's entry into the interLATA long distance markets is not yet in the public interest based on the fact that permanent unbundled network element ("UNE") rates have not been established by the Board in New Jersey. According to the DOJ in its evaluation of the Ameritech Section 271 application in Michigan, there is a definite relationship between the cost-based pricing standards in Section 252(d) of the Act and the Section 271 entry process.[35] In fact, it has been shown that UNE pricing can constitute a significant barrier to entry if UNE rates are not cost-based.[36] Not only are established UNE rates essential for CLEC entry into the local market, but they are also important in satisfying the checklist requirements.

In its September 27, 2001 Procedural Order, the Board stated that it intends to issue a ruling in the UNE proceeding (Docket No. TO00060356) "at an upcoming Board meeting."[37] By mentioning the UNE proceeding in its Section 271 Procedural Order, the Board recognizes that establishment of UNE rates are necessarily linked to Verizon's ability to demonstrate that the New Jersey local markets are irrevocably open to competition. It is also important to note that in all the Section 271 applications that have been granted by the FCC to date, each state had set UNE rates already in place prior to approval of a BOC's Section 271 filing.[38] In fact, the Pennsylvania PUC considers it "preferable to analyze a section 271 application on the basis of permanent rates in effect at the direction of the state commission."[39] Until the Board finalizes all of the UNE rates, the economic uncertainty surrounding the costs of providing services to New Jersey consumers will serve

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[35] DOJ Michigan at 40-41.

[36] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order (released August 8, 1996).

[37] 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,* Docket No. TO01090541, Procedural Order at 6 (September 27, 2001) (hereinafter *Board Procedural Order*).

[38] *See* Pennsylvania Public Utility Commission, *Application of Verizon Pennsylvania Under Section 271 of the Communications Act to Provide In-Region, Inter-LATA Service in the Commonwealth of Pennsylvania* at para. 50 (June 25, 2001) ; *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* at paras. 18, 19, CC Docket No. 01-9, FCC 01-130 (released April 16, 2001); *I/M/O 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* at para. 238, CC Docket No. 99-295, FCC 99-404 (released December 22, 1999).

[39] *See* Pennsylvania Consultative 271 Report at 56.

to deter competitive entry.

More importantly, Verizon's filing as it currently stands is seriously flawed because without permanent UNE rates, Verizon cannot possibly satisfy the checklist requirement that it provide "nondiscriminatory access to network elements." [40] In fact, Verizon bases its filing on unsupported future promises of "nondiscriminatory access." Specifically, in its Checklist Declaration, Verizon states that in:

> "cases where the Board's 1997 decision did not yet establish a rate for a particular UNE or collocation arrangement, Verizon NJ offers CLECs interim rates with a "true-up" mechanism in their respective interconnection agreements. Thus, in that instance, when the Board does rule on a rate element, the CLEC will get the benefit of that ruling back to the time the element was first placed in service, if the CLEC opts for the true-up clause in its agreement. A few rate elements such as the charge for the set-up of the cabling to the Interconnection Cabinet, are currently priced on an Individual Case Basis. That is because Verizon has not had sufficient experience with this element to determine if costs can be standardized. If such costs have a consistent pattern, standardized rates will be developed and submitted to the Board for approval in the future."[41]

By this statement, Verizon concedes that it did not provide evidence regarding unbundling of essential UNEs. The FCC noted that "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" and "[p]aper promises do not, and cannot, satisfy a BOC's burden of proof."[42] The FCC's position is clearly based at least in part on the inability of agencies such as the Board and the FCC, to provide a reasoned decision on such an important matter based on a constantly evolving record. Therefore, this Board cannot recommend a decision to the FCC based on an incomplete record consisting of future promises and unsupported statements by Verizon witnesses. Because Verizon admits that such evidence is non existent, but is necessary to meet the checklist and public interest requirements, it cannot survive a motion to dismiss that requires at the very least, that a scintilla of evidence be present.

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[40] *See* 47 U.S.C. § 271(c)(2)(B)(ii).

[41] *See* Checklist Declaration at para. 110.

[42] *Michigan Order* at para. 55.

ii. Verizon's filing is devoid of any provision for real world testing of OSS and enforcement remedies which supports dismissal.

The Board's approval of Verizon's Section 271 application must depend on CLEC utilization of the Verizon OSS systems at full commercial volumes in order to ensure that the OSS can sufficiently support CLEC transactions in a "non-discriminatory" manner. In addition, a test should be conducted to ensure that the Board's recently approved enforcement penalties will prove adequate in ensuring that Verizon can act in a pro-competitive manner.

It is simply not enough for Verizon to submit KPMG's OSS testing results to show that its systems are fully functional because KPMG's test of Verizon's OSS was conducted in an artificial environment created solely for the purpose of the OSS test. Verizon's OSS must be tested using real CLEC transactions to confirm adequacy of the system. Both New York and Pennsylvania have stated that although OSS test results were extremely valuable to their evaluation of OSS, the "most probative evidence that OSS functions are operationally ready is actual commercial usage."[43] In keeping with the position that OSS should be tested using commercially available data, the Pennsylvania PUC allotted three months for the testing of OSS systems using such data. These tests were conducted prior to Section 271 approval in Pennsylvania. The Ratepayer Advocate believes that in order for Verizon to prove that it offers non-discriminatory access to its OSS systems, the Board must allow sufficient time for testing of Verizon's OSS using actual CLEC transaction data. It is therefore premature to consider Verizon's checklist compliance and whether Section 271 approval would be in the public interest, prior to having some degree of confidence that Verizon's OSS is functioning appropriately.

Additionally, the Ratepayer Advocate submits that the enforcement mechanisms established by the Board on October 12, 2001 during its Agenda Meeting, require testing outside the realm of consultant testing and "simulated CLEC transactions" to determine if Verizon can satisfy the performance standards set out in the Carrier-to-Carrier guidelines, without incurring significant penalties. The Board has stated that its enforcement plan will go into effect November 1, 2001, which allows for one month of testing of the penalties. As demonstrated in both New York and Pennsylvania, one month is not enough time to determine whether Verizon can perform adequately as a wholesale provider and whether the penalty structure the Board has approved, will prove sufficient. The Ratepayer Advocate contends that once Verizon can demonstrate that it can act in a pro-competitive manner for at least three months without incurring any significant penalties, it will then be possible for the Board to conclude that Verizon's Section 271 application is within the public interest.

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[43] *See* Pennsylvania Public Utility Commission Procedural Order at 12; *Application by Bell Atlantic New York for Authorization Under Section 271*, CC Docket No.99-295, Memorandum Opinion and Order (Dec. 22, 1999) at para. 89.

C. Public interest requires that a state Universal Service Plan be in place in New Jersey before Verizon's Section 271 filing can be approved.

The Board in its proceeding, *I/M/O Investigation Regarding Local Exchange Competition For Telecommunications Services*, Docket No. TX95120631, intended to address the issue of the effects of local competition on Universal Service that was to result in a decision by the Board.[44] Evidentiary hearings regarding the Universal Service issue were bifurcated into two portions.[45] Evidentiary hearings on the first portion were held on September 15,16 & 18, 1997, and hearings on the second portion were held on October 27-31, 1997, November 6-7 & 24-25, 1997. Initial briefs were filed on the Universal Service issue on December 5, 1997 and reply briefs were filed on December 15, 1997. To date, the Universal Service phase of the Local Competition proceeding is still pending before the Board. Basically, this means that the Board has not decided to institute a state Universal Service Fund. The Ratepayer Advocate contends that the establishment of a state Universal Fund is essential to satisfying the public interest requirement of Section 271 because such a program ensures the availability of affordable service to the state's low income ratepayers, and the benefits of competition to those persons in high cost geographic areas.[46] Other states have determined that the existence of a state Universal Service Fund is an integral part in determining if a BOC satisfies the Section 271 requirements. In fact, the Pennsylvania PUC, in evaluating Verizon's Section 271 application considered its ruling which created a state Universal Service Fund relevant to the 271 application.[47] Accordingly, in the absence of a Board decision on Universal Service in New Jersey, Verizon is unable to satisfy the public interest requirement of Section 271.

III. CONCLUSION

In conclusion, the Ratepayer Advocate moves before the Board to dismiss the pending petition of Verizon in its entirety, based on a variety of legal infirmities in its filing. The proposal is premature, anticompetitive, incomplete, and counter to the public interest. In order to approve the petition, the Board must have before it a full and complete record to support a reasonable recommendation to the FCC that Verizon's Section 271 filing satisfies the public interest requirement. Moreover, if the current motion is granted and Verizon's petition dismissed, Verizon is free to refile once real world OSS testing, actual application of enforcement remedies, and UNE rates are in place. Until then, Verizon's petition cannot meet the public interest requirements of the Board and the FCC.

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[44] New Jersey Board of Public Utilities, *I/M/O Investigation Regarding Local Exchange Competition For Telecommunications Services*, Telecommunications Decision and Order at 4, Docket No. TX95120631, (December 2, 1997) (hereinafter "Local Competition Proceeding").

[45] The first portion addressed the establishment of mandated discounts to schools, libraries, and hospitals in addition to the definition of advanced telecommunications capability and the establishment of levels of discounts for schools, libraries, and health care providers. See Initial Brief on Behalf of the Division of the Ratepayer Advocate on Universal Service, at 5. The second portion addressed the Universal Service Fund costs for all universal service elements associated with policy issues, and a determination of the price and support levels of Universal Service. *Id.*

[46] *See* Brief and Appendix on Behalf of The Division of the Ratepayer Advocate on Universal Service Policy Issues, at 3.

[47] *See* Pennsylvania Public Utility Commission Consultative Report at 8.

Once these elements are in place, the Board will be in a better position to evaluate Verizon's Section 271 filing and decide whether in the real world, absent future promises, the granting of Verizon's petition is truly in the public interest.

Furthermore, approval of Verizon's application as filed would severely hamper the ability of CLECs to compete against Verizon for customers in the mass market. This Board has time and again stated its goal and intention of achieving a vigorously competitive telecommunications market in New Jersey, a goal equally sought and supported by the Ratepayer Advocate. The approval of Verizon's Section 271 filing, on the basis of its Declarations and the state of the telecommunications market as it currently exists in New Jersey, will not only fail to advance the cause of competition in New Jersey, but will instead ensure that markets that are currently competitive, such as the intraLATA toll market, will once again become dominated by the incumbent monopoly carrier, Verizon. The Board should prevent this type of regression by dismissing Verizon's Section 271 filing in its entirety.

Very truly yours,

Blossom A. Peretz, Esq.
RATEPAYER ADVOCATE

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