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September 4, 2001

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 010795-TP Sprint's Motion to Join Verizon Advanced Data, Inc. as a Party and to Amend Tentative Issues List and Request for Oral Argument

Dear Ms. Bayó:

Enclosed for filing is the original and fifteen (15) copies of Sprint's:

(1) Motion to Join Verizon Advanced Data, Inc. as a Party and to Amend Tentative Issues List. 10955-01
(2) Request for Oral Argument. 10956-01

Copies of this Motion and Request for Oral Argument have been served pursuant to the attached Certificate of Service.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning the same to this writer.

Thank you for your assistance in this matter.

Sincerely,

Susan S. Masterton

Susan S. Masterton

Enclosure

omm - 3 of each
lgal - 1 of each
ec - 1 of each
org - org

RLM

OA Request
DOCUMENT NUMBER-DATE
10956 SEP-4 ō
FPSC-COMMISSION CLERK

Motion
DOCUMENT NUMBER-DATE
10955 SEP-4 ō
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sprint Communications Company Limited Partnership for Arbitration with Verizon Florida, Inc. f/k/a GTE Florida Incorporated, Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)))))))	Docket No. 010795-TP Filed: September 4, 2001

SPRINT'S MOTION TO JOIN VERIZON ADVANCED DATA, INC. AS A PARTY AND TO AMEND TENTATIVE ISSUES LIST

COMES NOW Sprint Communications Company Limited Partnership ("Sprint") and hereby files this motion to join Verizon Advanced Data, Inc. (VADI) as a party to this proceeding, pursuant to Rule 28-106.109, Florida Administrative Code[1]. In addition Sprint requests that the "Tentative Issues List", Appendix A to the *Order Establishing Procedure*, issued August 28, 2001 in this proceeding, be modified to include the following issue, necessary to a full and fair resolution of Issue 5 concerning Verizon's obligations to provide unbundled packet switching to Sprint:

> Should Sprint's notice to and negotiations with Verizon require that VADI be required to be made a party to the interconnection agreement and be bound by the outcome of this arbitration?[2]

In support Sprint states as follows:

I. Introduction

1. In its Response to Issue 5 identified in Sprint's Petition for Arbitration, Verizon raised a jurisdictional issue regarding it's obligations under the Act to provide advanced services and the role of Verizon Advanced Data Inc. ("VADI") in meeting those

[1] Rule 28-106.109, F.A.C., replaced former Commission Rule 25.22-026, F.A.C., which contained essentially identical language regarding the Commission's authority to join parties.

[2] Verizon objected to the inclusion of an issue regarding VADI at the issue identification conducted by staff on August 23, 2001.

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obligations.[3] Verizon asserts that Verizon itself does not provide advanced services, but that these services are provided by VADI.[4]

2. VADI was created to provide advanced services to Verizon customers as a result of the FCC's Order approving the merger between Bell Atlantic and GTE.[5] VADI is a certificated ALEC in Florida.[6]

3. Verizon claims that VADI – not Verizon the ILEC – owns the packet switching assets to which Sprint seeks access on an unbundled basis.[7] Verizon maintains that Sprint must separately seek to negotiate and arbitrate with VADI regarding this issue. Verizon suggests that Sprint must negotiate a separate interconnection agreement with VADI to obtain the advanced services that Sprint believes an ILEC is required to provide pursuant to the Telecommunications Act and the FCC rules.[8]

4. As an initial matter it should be noted that Verizon makes this claim despite including language in its version of the Florida agreement, filed as part of its answer in this proceeding, that clearly indicates that it assumes the responsibility to provide packet switching as a UNE to Sprint. Under Verizon's proposed language for packet switching, Verizon has indicated it is apparently able to provide packet switching under the FCC's

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[3] See, Verizon Response to Arbitration Petition at page 22.

[4] Id.

[5] Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, Order, 15 FCC Rcd 14032 (2000) ("*BA/GTE Merger Order*") at App. D, Condition 11c.

[6] FPSC Certificate Number 7588.

[7] Verizon Answer at 22.

[8] Id.

current rules and offers this to Sprint.[9] In spite of this representation, Verizon simultaneously contends in its answer that VADI is necessary to fulfill this representation. However, its proposed contract language makes no reference to VADI. Verizon's language states as follows:

Unbundled Network Elements (UNES) Attachment

2.7 Packet Switching.

> The Packet Switching UNE is defined as the basic packet switching function of routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units, and the functions that are performed by the DSLAM. VERIZON reserves the right to provide packet switching as an UNE only under the circumstances described in Rule 51.319(c)(5).

As a procedural matter, Sprint asserts that VADI is a necessary party to this proceeding in order to provide Sprint the opportunity to fully understand how such services are to be provided to Sprint if Sprint is ultimately successful with respect to a determination on the merits of Verizon's packet switching obligations.

5. Sprint disputes Verizon's stance that the FCC's merger conditions protect Verizon and VADI and the packet switching assets at issue from arbitration. Sprint submits that the impact of the recent decision of the United States Court of Appeals for the D.C. Circuit in *Association of Communication Enterprises v. FCC* (hereinafter the *ASCENT Decision)* [10] is that Verizon and VADI are not separate for purposes of gaining interconnection arrangements pursuant to Section 251 and 252 of the

[9] Verizon Answer, Exhibit A, 251/252 Agreement, Unbundled Network Elements (UNES) Attachment Section 2.7 Packet Switching, page 81.

[10] 235 F.3d 662 (D.C. Cir. 2001)

Telecommunications Act of 1996. Sprint maintains that Verizon cannot avoid its obligation to negotiate and arbitrate by hiding behind VADI.

II. Background

A. BA/GTE Merger Order

6. In 1998, Ameritech and Southwestern Bell Telephone Company ("SBC") proposed a stock-for-stock merger that would make Ameritech a wholly owned subsidiary of SBC. The merging companies filed a joint application requesting FCC approval to transfer control to SBC of licenses and lines owned and controlled by Ameritech.[12] The FCC determined that this application compelled it to consider whether the merger as a whole -- not just the transfer of individual lines -- was consistent with the Act. As part of its approval, the FCC permitted the new company to offer advanced services through a separate affiliate and, by doing so, avoid its §251(c) duties. In making this determination, the FCC found that the separate affiliate would not be a successor or assign under the provisions of the Act.[13] The *ASCENT Decision* is the determination on appeal that the FCC acted unlawfully in approving the separate affiliate structure.

7. The FCC in the approval of the Bell Atlantic/GTE Merger application again considered this separate affiliate structure. Under the *BA/GTE Merger Order* [14] the FCC

[12] See *Merger of SBC Communications, Inc. and Ameritech, Description of the Transaction, Public Interest Showing and Related Documentation* (July 24, 1998) FCC 99-279 ("*SBC/Ameritech Application*").

[13] *In re: Ameritech Corp. and SBC Communications Inc., for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 95 and 101 of the [FCC's] Rules*, CC Docket No. 98-141 (FCC 99-279), Paragraphs. 457-461 (rel. Oct. 8, 1999) (*Memorandum Opinion and Order*) (hereinafter, "*SBC/Ameritech Merger Order*").

[14] *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Order, 15 FCC Rcd 14032 (2000) ("*BA/GTE Merger Order*") at Paragraphs 260-278.

again found, relying heavily on the *SBC/Ameritech Merger Order* and noting that the affiliate requirements in both cases were "identical in all relevant respects",[15] that the separate affiliate would not be a successor or assign under the provisions of the Act. Verizon agreed to provide all advanced services, as defined in the *BA/GTE Merger Order*, through one or more affiliates that were structurally separate from the Verizon LECs. Numerous transitional conditions were set forth as to how the separation would be implemented. Upon receiving state approval of any necessary interconnection agreements and obtaining any necessary state authority, Verizon would transition the provisioning of advanced services to this separate affiliate(s).

8. For purposes of the *BA/GTE Merger Order*, advanced services were defined to mean "intrastate or interstate wireline telecommunications services, such as ADSL, IDSL, xDSL, Frame Relay, and asynchronous transfer mode ("ATM") that rely on packetized technology and have the capability of supporting transmissions speeds of at least 56 kilobits per second in both directions." Access to these services is what Sprint is requesting from Verizon in this proceeding. Certain services were excluded from this definition, such as ISDN and circuit switched services.[16]

9. It is important to note that the *BA/GTE Merger Order* provided that the advanced services affiliate and any Bell Atlantic/GTE incumbent LEC could jointly market their services with the services of the other and provide related customer care on behalf of the other. Permitted joint marketing by the advanced services affiliate included sales and the completion of the sales function, up to and including the taking of an order for advanced

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[15] *Id.* at Paragraph 268. Apparently, the FCC had some reservation about this conclusion and specifically provided that if a court determined that the affiliate *is* a successor or assign under the specified conditions, then the new company's obligation to provide advanced services only through an affiliate would terminate. *Id* at Paragraph 265.

services and local services by the affiliate. The *BA/GTE Merger Order* also permitted the Bell Atlantic/GTE incumbent LEC to provide billing and collection services to the advanced services affiliate, including payment arrangements, account adjustment, responding to account balance inquiries, account closure, responses to legal action affecting or involving the customer, and receipt and resolution of customer billing and collection complaints. In addition, the BA/GTE incumbent LEC could provide operations, installation, and maintenance ("OI&M") services permitted to any separate advanced services affiliate.

B. Effect of Ascent Decision

10. The *ASCENT Decision* eviscerated the separate advanced services structure. First, the D.C. Court's opinion found that Congress did not treat advanced services differently from other telecommunications services under the Act. Thus, it found that the FCC could not permit an ILEC to avoid §251(c) obligations as applied to "advanced services" by setting up a wholly owned affiliate to offer those services. The Court found that the Act treated the ILEC the same for all telecommunications services, whether advanced service or other services. The Court also rejected the FCC's analysis that the advanced service affiliate was not a successor or assign of the ILEC. The court characterized the FCC's analysis as "legal jujitsu" to justify the relaxation of the § 251(c) obligations. In light of the *ASCENT Decision*, Verizon should be prevented from playing corporate shell games.

[16] *Id.* paragraphs 262 - 264.

11. The Court, in the *ASCENT Decision*, determined that an ILEC could not escape its § 251(c) obligations by setting up a separate subsidiary for the provision of advanced services.

> In short, the Act's structure renders implausible the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent.
>
> . . . . .
>
> But whether or not SBC's premise is economically sound, it is unfortunately not Congress' premise. As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services. *See* Deployment Order P 11. It did not limit the regulation of telecommunications services to those services that rely on the local loop. For that reason the Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services. Whether one concludes that the Commission has actually forborne or whether its interpretation of "successor or assign" is unreasonable, the conclusion is the same: The Commission's interpretation of the Act's structure is unreasonable.[17]

The Court is clearly indicating that the affiliate has the same obligations as the ILEC. In this case, VADI has the same obligations as Verizon. The Court found that if the ILEC (Verizon) can escape any obligations through the creation of an affiliate (VADI), the result is in conflict with the Act.

III. Argument

12. The FCC's merger conditions, which Verizon agreed to as a condition of the merger, should not be utilized by Verizon as a shield to effectively block competitors' access to increasingly vital RBOC assets held in the name of an affiliate, with the effect

[17] *ASCENT Decision* at 668.

of creating a new bottleneck in the provision of data services and impeding competitors' efforts in the provisioning of these services. Incredibly, Verizon is using the separate advanced services affiliate requirement for its own benefit. A tool intended to protect CLECs in the non-discriminatory provision of advanced services is instead being used by Verizon to hinder them. The CLEC's shield has actually become Verizon's shield.

13. Section 252 of the Act provides that only an "incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . " 47 U.S.C. § 252(a).[18] VADI is not certified as an "incumbent" local exchange carrier in Florida. VADI was granted an ALEC certificate by the Commission in Order No. PSC-00-1761-PAA-TX issued on September 27, 2000. As stated in the Order, VADI applied for and was granted certification as an ALEC pursuant to s. 364.337, Florida Statutes.

14. If recognized on the terms Verizon and VADI seek, the effect of VADI's current certification in Florida would frustrate the ends of justice by hindering Sprint from pursuing interconnection with VADI, from determining what VADI's obligations are and from determining how VADI is to be treated for purpose of interconnection as an incumbent local exchange carrier.[19] As such, Sprint cannot seek to trigger Verizon's duty

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[18] Sprint is unaware of any CLEC to CLEC arbitrations that have occurred in Florida.

[19] Nevertheless, recently, in an *Ex Parte* filing at the FCC dated June 27, 2001 by Dee May, in Application by Verizon New York Inc. for Authorization To Provide In-Region, InterLATA Services in State of Connecticut, Docket No. 01-100: Application of Ameritech and SBC Communications For Consent to Transfer Control, CC Docket No. 98-141and 98-184; Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98, Verizon/VADI appears to have conceded VADI's standing as an ILEC where it states at page 7:

> Of course, in this case, that conclusion is only reinforced by (but not dependent upon) the technical limitations and regulatory requirements that VADI labors under as a separate affiliate. Here, VADI is "the carrier" that provides xDSL services; because it is deemed to be a "successor or assign" of an ILEC, therefore, VADI itself is treated as an ILEC (see 252(h)(l)(B)(ii) and must

to negotiate and enter into an interconnection arrangement on packet switching with Sprint the CLEC by going through VADI – another ALEC/reseller under its certification in Florida.

15. It should be noted that once Sprint learned of Verizon's position with respect to VADI, Sprint sent a 251/252 letter to VADI for the state of Florida. This letter was sent out of an abundance of caution to preserve Sprint's rights with respect to VADI in the arbitration process. Sprint asserts that this letter was unnecessary and that VADI should be made a party to this proceeding. However, depending on the outcome of this request to join VADI, Sprint may still pursue arbitration separately with VADI.

16. VADI has had actual and constructive notice of Sprint's packet switching request for negotiation. VADI was not certificated or known to Sprint on March 21, 2000 when Sprint started negotiations with Verizon in Florida .[20] VADI was certificated in Florida on September 27, 2000. Moreover, upon receipt of Sprint's numerous Section 251 (c) negotiation requests, Verizon made no effort to distinguish VADI so as to indicate that Verizon the ILEC was excluding the VADI entity from interconnection agreement negotiations. Thus, Sprint's request for negotiation, and subsequent agreements of Verizon and Sprint to rescind and refile the request for negotiation, should be construed as constructive negotiations with VADI and these timeframes should govern VADI as well.[21] As summary of relevant dates is attached hereto as Attachment 2.

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make the services that it provides available for resale to the same extent as any other incumbent. And here, VADI does not (and cannot) provide service where another carrier provides voice service on the line. Consequently, there is no service to resell. (A copy of this filing is attached hereto as Attachment 1.)

[20] Sprint Letter of March 21, 2000 to Verizon, See, Attachment B to Sprint's Petition for Arbitration.

[21] As reflected in Attachment C to Sprint's Petition for Arbitration.

17. During the course of negotiations, Verizon never informed Sprint of its position that it did not provide advanced services and that Sprint must initiate negotiations with VADI to obtain those services in Verizon's certificated territory. Sprint did not learn of Verizon's position until its response to Sprint's arbitration Petition in Pennsylvania,[22] too late for Sprint to initiate negotiations with VADI in a timely manner coincident with the time frame for its negotiations with Verizon and too late to include VADI in its initial filing of its Petition for Arbitration in Florida.

18. Verizon cannot avoid its statutory obligations by claiming VADI's "separate entity" status. As noted previously, the *ASCENT Decision* eviscerated the separate advanced services structure. The D.C. Court's opinion supported both arguments that (i) the creation of an advanced services affiliate not subject to the obligations of §251(c) represented an improper forbearance of ILEC obligations in violation of §160(d) of the Act,[23] and (ii) the affiliate was a successor or assign of the ILEC and therefore subject to the ILEC's obligations. In light of this decision, Verizon should be prevented from playing corporate shell games.

19. Verizon recently requested that the FCC expedite the sunset of the merger conditions giving rise to VADI.[24] In its FCC filing Verizon clearly articulates its position that the *ASCENT Decision* effectively started the clock toward sunsetting the affiliate requirement under the *BA/GTE Merger Order.* That is, the *BA/GTE Merger Order* provides that the requirement to maintain the affiliate would sunset nine months after a final and non-appealable judicial decision determining that the affiliate is a successor or

[22] See, *Petition of Sprint Communications, L.P., Docket No. A-310183F0002,* Pennsylvania Public Utility Commission, Verizon Answer to Sprint Arbitration (June 11, 2001) at 34 where Verizon states that if Sprint feels VADI has an obligation to provide access to packet switching, it must contract with VADI.

assign of the ILEC. In the *ASCENT Decision*, the D.C. Circuit Court confirmed that the Commission's approval of a separate advanced services affiliate in connection with the SBC-Ameritech merger was an improper forbearance of an ILEC's requirements under §251(c) of the Act, and that such affiliate was a successor or assign of the ILEC and thus assumed the ILEC's obligations under §251(c). The salient point relevant to this arbitration proceeding is that if Verizon has its way, VADI may not be in existence by the time that Sprint seeks negotiation and arbitration from VADI. This further supports Sprint's position that the VADI artifice has no substantive purpose.

20. VADI's ownership of the packet switching assets and its claimed status as a "separate entity" is not material or relevant for the application of Verizon's statutory duties – *i.e.*, to negotiate and interconnect under Section 252 of the Act and ultimately to offer unbundled access to ILEC facilities on a nondiscriminatory basis under Section 251(c). Under these circumstances it is Verizon who is responsible to ensure that the Section 252 request is honored. The Act simply does not require that the Sprint send a separate Section 252 request to VADI. It is Sprint's position that under the express provisions of the Act any request to negotiate and/or arbitrate made of Verizon constitutes a request/notice made of VADI, even if a separate entity.

21. Verizon improperly attempts to characterize and elevate the "separate entity" status of VADI to force negotiation and arbitration on two fronts to obtain a complete set of services. The fiction that Verizon perpetuates must be dismissed as contrary to the express provisions of the Act and the pro-competition goals that this Commission has attempted to implement. VADI and Verizon are one and the same for a CLEC seeking

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[23] 47 U.S.C. §160(d)

[24] A copy of Verizon's filing before the FCC is attached heretoas Attachment 3.

unbundled packet switching at Verizon's remote terminals and central offices located within the FPSC-certificated ILEC territory.

IV. Legal Authority

22. The law is well settled that an indispensable party must be joined as a party for the court [or Commission] to make a complete and fair determination of the equities, rights and liabilities of all parties who could reasonably be substantially and directly affected by the decision. *Amerada Hess Corp. v. Morgan*, 426 So. 2d 1122, 1125 (Fla. 1st DCA 1983; *National Title Insurance Co. v. Oscar Dooley Associates, Inc.*, 377 So. 2d 730, 731 (Fla. 3rd DCA 1980).

23. Rule 28-106.109, F.A.C., authorizes this Commission to afford persons who are not parties to a proceeding the opportunity to be joined as parties if their substantial interests will be affected by a determination of the Commission. This Commission has ordered the joinder of parties determined to be indispensable in several instances. See, *In re: Application of United Telephone Long Distance, Inc. for authority to provide interexchange telecommunications service between points within the State of Florida*, Docket No. 870285-TI, Order No. 17869 (relying on Commission Rule 25-22.026, F.A.C., the predecessor to Rule 28-106.109, F.AC. cited above). See also, *In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc.*, Docket No. 921237-WS, Order No. 93-1724-PCO-WS; *In re: Complaint of Citizens for Overcharging for water services by Woods Division of Homosassa Utilities, Inc. in Sumter County*, Docket No. 920754-WU, Order No. PSC-93-0028-FOF-WS.

24. Other state's that have considered this exact issue in the context of Sprint's arbitrations with the Verizon entities in those states have found that VADI is a necessary party to a determination of the unbundled packet switching issue. Attached as Attachment 4 are recent decisions by arbitrators in Texas (Commission Order) and Pennsylvania (ALJ Recommended Decision) where the issue of VADI has been addressed.

V. Conclusion

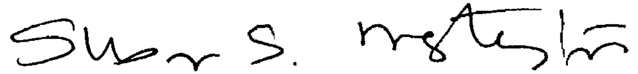
25. Verizon and VADI are one and the same for purposes of a CLEC seeking unbundled packet switching at Verizon's remote terminals and central offices. Sprint adheres to its position that Verizon and VADI should not be treated as separate entities for the purposes of determining Verizon's interconnection obligation within the certificated local exchange territory in Florida. Even so, in an abundance of caution and to eliminate any doubt as to the Commission's authority to fully adjudicate this arbitration, Sprint requests joinder of VADI as a party.

26. VADI's participation as a party is indispensable and necessary for Sprint to obtain adequate discovery to prosecute its case regarding Verizon's obligation to provide unbundled packet switching. A decision concerning the ILEC's obligation to provide unbundled packet switching by the Commission will affect the rights and obligations of VADI as well as Verizon as to the terms of the agreement entered into as a result of the Commission's decision. VADI is an indispensable and necessary party to the full and fair resolution of the issues in this arbitration.

WHEREFORE, Sprint requests that the Commission order VADI to be joined as a party at interest in this proceeding and the "Tentative Issues List" be amended as set forth

above to reflect a determination of VADI's obligations to provide requested services to Sprint in concert with Verizon's obligations.

Respectfully submitted,



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ATTORNEYS FOR SPRINT

Attachment 1

Dee May
Executive Director
Federal Regulatory

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Phone 202 515-2529
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dolores.a.may@verizon.com

Ex Parte

June 27, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., S.W. – Portals
Washington, DC 20554

Application by Verizon New York Inc. for Authorization To Provide In-Region, InterLATA Services in State of Connecticut, Docket No. 01-100; Application of Ameritech and SBC Communications For Consent to Transfer Control, CC Docket No. 98-141and 98-184; Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98

Dear Ms. Magalie,

At the request of Ms. Dorothy Attwood, Chief of the Common Carrier Bureau, we are providing the attached paper in the above proceedings. The twenty page limit associated with CC Docket No. 01-100 does not apply.

Please feel free to contact me with any questions.

Sincerely,

Dee May

Attachment

cc: D. Attwood
K. Farroba
C. Libertelli
M. Carey
B. Olson
G. Reynolds
C. Pabo
A. Johns
S. Pie

The following question has arisen in the wake of the D.C. Circuit's decision in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*ASCENT*"): Does anything in that decision alter the preexisting rule that an ILEC has no obligation to provide line-sharing services to other carriers (including its own advanced services affiliate), and no obligation to provide its own xDSL services at retail or wholesale, in circumstances where it does not provide voice services to end users? The answer is no.

I. The 1996 Act And FCC Orders Confirm That An ILEC Has No Obligation To Provide Line-Sharing Services Or xDSL Services Where It Does Not Provide Voice Services To End Users

a. The Telecommunications Act of 1996 requires an ILEC (and any successor or assign) to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail" to end users (*i.e.*, "subscribers who are not telecommunications carriers"). 47 U.S.C. § 251(c)(4)(A). The issue here concerns the resale obligations of ILECs, such as Verizon, and their advanced services affiliates, such as Verizon Advanced Data Inc. ("VADI"). VADI offers xDSL services to end users by purchasing the same line-sharing service from Verizon as other xDSL providers. Like a number of other ILECs, Verizon makes its line-sharing service available *only* where it provides retail voice services for particular end users. Where Verizon does not provide those voice services, its line-sharing service is unavailable, and VADI cannot and does not provide xDSL services, either at retail or for resale.

That arrangement is entirely consistent both with section 251(c)(4) itself and with the Commission's own rulings on the scope of an ILEC's line-sharing obligations. First, section 251(c)(4) limits an ILEC's resale obligations to services that the carrier in fact

"provides" to end users. VADI does not and (as discussed below) cannot "provide" xDSL services to end users for whom a CLEC is the voice carrier, because Verizon offers line-sharing services to VADI and other data carriers only where it remains the voice provider for the relevant end users.

The Commission's orders make abundantly clear that Verizon and other ILECs are *entitled* to place that limitation on their line-sharing services. First, in the 1999 *Line Sharing Order* itself, the Commission exempted any ILEC from the obligation to provide line-sharing services where a CLEC has replaced the ILEC as an end user's voice provider. Third Report and Order and Fourth Report and Order, *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999), at ¶ 72. The Commission explained that, "in the event that the customer terminates its incumbent LEC provided voice service, for whatever reason, the competitive data LEC is required to purchase the full stand-alone loop network element if it wishes to continue providing xDSL service." *Id.* That determination is controlling here: once an end user has terminated voice service with the ILEC "for whatever reason," the ILEC is relieved of any line-sharing obligation whatsoever.

The Commission's *Texas 271 Order* both reaffirms that conclusion and takes it one step further, clarifying that an ILEC may sever an end-user's xDSL service once the ILEC loses that end user as a retail customer of its voice services. In that proceeding, AT&T had complained that "when a SWBT customer who had been using SWBT's local voice service and xDSL service combined over a single copper loop chose to switch voice service to AT&T, SWBT informed the customer that its xDSL service would be disconnected unless the customer switched voice service back to SWBT." Mem. Opinion

and Order, *Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 (2000), at ¶ 330 n.917. Specifically, AT&T had claimed that SWBT's practice of not providing its xDSL service to customers who received voice service from another carrier was unreasonable, and amounted to the equivalent of an "unreasonable restriction on resale." *See* Comments of AT&T Corp. in Opposition, CC Docket 00-4 (filed Jan. 31, 2000). The FCC disagreed, however. Citing the *Line-Sharing Order*, the Commission found that, in disconnecting the customer's xDSL service, SWBT had acted well within its rights under the 1996 Act, because nothing in the Commission's orders "obligate[s] incumbent LECs to provide xDSL service under the circumstances AT&T describes." *Id.* at ¶ 330.

The Commission reaffirmed each of these conclusions in its recent *Line Splitting Order*. *See* Third Report and Order on Reconsideration in CC Dkt No. 98-147, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC No. 01-26 (Jan. 19, 2001). There the Commission required ILECs "to permit competing carriers to engage in line splitting using the UNE-platform where the competing carrier *purchases the entire loop* [as a UNE] and provides its own splitter." *Id.*, at ¶ 19 (emphasis added). But it confirmed, once more, that an ILEC is obligated to provide line-sharing services *only* where it "provide[s] voice service to an end user." *Id.*, at ¶ 17. And, as in the *Texas 271 Order*, the Commission determined that nothing in its prior orders requires ILECs "to provide xDSL service when they are no[] longer the voice provider" for particular end users. *Id.*, at ¶ 26.

b. In sum, both the statutory language and the Commission's consistent orders on this subject are unambiguous in preserving both an ILEC's right to condition the provision of line-sharing services on the ILEC's retention of those end users as retail voice customers. Moreover, the Commission's position on that issue makes abundant policy sense whether the relevant CLEC voice provider serves the end user through network elements or through resale. As the Commission observed in the *Line Sharing Order*, "the complexities involved with implementing line sharing dramatically increase where more than two service providers share a single loop." *Line Sharing Order*, at ¶ 74. Requiring an ILEC to provide line-sharing when a reseller provides the voice service would place at least three carriers -- the reseller, the ILEC, and the data carrier (including any advanced services affiliate) -- all on a single line. Any such requirement would raise the same types of profound operational issues that the industry has only recently begun to confront in the context of ILEC-facilitated line splitting (and that the Commission itself recognized may take some significant amount of time to resolve through industry collaborative efforts).

In the ordinary line-sharing context, the ILEC maintains a retail business relationship with the end user; on resold lines, by contrast, that relationship would be severed, and the ILEC would serve as a wholesale provider to both the reseller or resellers and the xDSL provider. That three-carrier (and in some cases four-carrier) sharing arrangement would confront the industry with such operationally complex questions as these:

- What business and OSS relationships need to be established between the reseller and the data carrier to coordinate service with the end user customer and the ILEC?
- What carrier is entitled to access the end user's customer records, how does that change if there are two different resellers providing voice and data respectively, and who pre-qualifies the line?
- Under what circumstances can the data carrier place an order with the ILEC to add xDSL service to a line where the voice service is provided by a reseller?
- Which carrier would have primary responsibility for coordinating end user trouble reports (related to voice and/or data) and other maintenance problems that affect the common loop facility?
- How does this change if there are two different resellers providing voice and data service respectively over a line?
- How would end user and carrier requests for service changes that affect the loop facility be handled, and which carrier would be responsible for coordinating the change?
- How should disconnection of an end user's resale voice service affect the data provider's data service?

Reconciling the individual business agendas and relationships among these multiple carriers can not take place in a vacuum and would require a collaborative industry effort to define the precise nature of the business relationships among the various carriers on the line. Once those business relationships are defined, Verizon would have to undertake a

dramatic and very costly revision of the methods and procedures currently deployed for ILEC-based line sharing.

More generally, in designing those existing methods and procedures, ILECs throughout the United States have relied extensively on the Commission's current position that an ILEC has no obligation to provide line-sharing where it is not an end user's voice provider. A policy reversal by the Commission on that issue now, quite apart from questions about its legal merits, would require ILECs to invest tens of millions of dollars (and perhaps more) to reconfigure their operations to meet these sudden new obligations. That is reason enough for the FCC to stand by its previous, and entirely correct, position.

II. The *ASCENT* Decision Has No Bearing On The Line-Sharing And Resale Obligations At Issue Here.

The *Line Sharing Order*, the *Texas 271 Order*, and the *Line Splitting Order* confirm that an ILEC as such has neither a line-sharing obligation nor an obligation to provide its own xDSL service where it loses an end user as a voice customer; in none of those orders did the Commission's treatment of the relevant issues turn on whether the ILEC had created a separate affiliate to provide advanced services to the ILEC's end users (even though the ILEC at issue in the *Texas 271 Order* had in fact created such an affiliate). For that reason and others, the D.C. Circuit's recent decision in *ASCENT* leaves the Commission's position on these issues wholly undisturbed.

ASCENT holds that an ILEC's advanced services affiliate, if it qualifies as a successor or assign of an ILEC, is subject to the normal obligations that apply to an ILEC under section 251(c). *See ASCENT*, 235 F.3d at 666-68. *ASCENT* does not subject such an affiliate, much less the ILEC itself, to obligations *beyond* those that are applicable to

ILECs that themselves provide advanced services without creating a separate affiliate. Put another way, after *ASCENT*, the use of a separate advanced services affiliate may provide fewer regulatory benefits to an ILEC, but it obviously does not *enlarge* the set of substantive regulatory burdens under section 251(c). Thus, because an ILEC that *itself* provides xDSL services need not provide either line-sharing or its own xDSL service where it is no longer the voice provider, the creation of a separate affiliate to provide xDSL services does not suddenly obligate the ILEC (or its corporate family) to provide line-sharing in those same circumstances.

Of course, in this case, that conclusion is only reinforced by (but not dependent upon) the technical limitations and regulatory requirements that VADI labors under as a separate affiliate.. Here, VADI is "the carrier" that provides xDSL services; because it is deemed to be a "successor or assign" of an ILEC, therefore, VADI itself is treated as an ILEC (*see* 252(h)(1)(B)(ii)) and must make the services that *it* provides available for resale to the same extent as any other incumbent. And here, VADI does not (and cannot) provide service where another carrier provides voice service on the line. Consequently, there is no service to resell.

Indeed, that conclusion, at least with respect to Verizon, follows *a fortiori* from the reasoning of the *Line Sharing*, *Line Splitting*, and *Texas 271 Orders*. On their face, those *Orders* confirm that, under the FCC's existing rules, once an end user chooses a CLEC as its voice provider, an ILEC is generally free to disconnect that end user's xDSL service even when it *could* continue providing that service. *See, e.g.*, *Texas 271 Order*, at ¶ 330 n.917; *Line Splitting Order*, at ¶ 26. Here, in contrast, Verizon does not offer xDSL services at all, and VADI *cannot* obtain line-sharing, and therefore cannot provide

xDSL services, where another carrier is the voice provider, because Verizon follows the voice-carrier limitation endorsed in the *Line-Sharing Order*. Moreover, the Bell Atlantic/GTE Merger Conditions affirmatively limit VADI to obtaining from Verizon only those line-sharing services that also are available to other CLECs. *See* Mem. Op. And Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control*, 15 FCC Rcd 14032, App. D ¶ 4(f) (2000) (Verizon must "permit unaffiliated telecommunications carriers to order such facilities and services under the same rates, terms, and conditions, and to utilize the same interfaces, processes, and procedures as are made available to the separate Advanced Services affiliate"). Here, Verizon's line-sharing services are not available to *any* carrier in circumstances where Verizon is not the voice provider, and the Merger Conditions' nondiscrimination requirement plainly does not permit an exception to be made for VADI alone.

Finally, for several independent reasons, it is inconsequential that in other contexts the Commission has found that section 251(c)(4) "requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings." *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499 (1996), at ¶ 877. *First*, Verizon and VADI do not in fact bundle voice and xDSL services for their end users. The Commission has consistently defined "bundling as the offering of two or more products or services at a single price, typically less than the sum of the separate prices." *1998 Biennial Regulatory Review -- Review of Customer Premises Equipment and Enhanced Services Unbundling Rules, etc.*, CC Docket Nos. 96-61 and 98-183, & 15 (rel. Mar. 30, 2001). The Commission also has explained that bundling "is

different from 'one-stop' shopping arrangements in which customers may purchase the components of a bundle, priced separately, from a single supplier." *Id.* Here, however, the voice services and DSL services are offered, ordered and priced separately, and the obligation to provide the separate components of "bundled service offerings" is thus wholly inapposite. *Second,* that obligation is particularly irrelevant here given the Commission's repeated and highly specific determinations that ILECs may deny line-sharing to CLECs -- and may generally disconnect an end user's xDSL services altogether -- where the ILEC loses the end user as a retail voice customer. *Finally,* it would be especially inappropriate to apply that obligation where, as here, compliance would place an ILEC or its affiliate in direct violation of an independent legal prohibition imposed by the Commission itself.

ATTACHMENT 2

Packet Switching Timeline

November 1999:	FCC's *UNE Remand Order* released which provided for packet switching as a UNE.
March 21, 2000:	Negotiations between Sprint Communications Company, L.P. and GTE Florida (now Verizon Florida, Inc). The initial contract included no reference to packet switching.
May 2000:	Verizon Florida, Inc. provided a draft contract that included a provision referencing UNE packet switching, which would be available to Sprint Communications Company, L.P. pursuant to circumstances described in FCC Rule 51.319(c)(5), set forth in the *UNE Remand Order.*
September 2000:	VADI certified as an ALEC in Florida.
January 2001:	*ASCENT Decision* issued.
April/May 2001:	Sprint Communications Company, L.P. disputed Verizon's language with respect to the packet switching issue, and asked that new language be inserted. Actual language may not have been provided until May 23, 2001.
June 1, 2001:	Sprint files for arbitration with Verizon in Florida.
June 11, 2001:	Sprint discovers Verizon position regarding VADI as a result of Verizon answer filed in Pennsylvania arbitration.

Attachment 3

EX PARTE OR LATE FILED

ORIGINAL

Gordon R. Evans
Vice President
Federal Regulatory

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MAY - 1 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 1, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

EX PARTE

RE: Bell Atlantic/GTE Merger Order (CC Docket No. 98-184)

Dear Ms. Salas:

The attached letter and declaration should be placed in the record of the above captioned proceeding.

Pursuant to Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this letter are being submitted to the Office of the Secretary. Please associate this notification with the record in the proceeding indicated above.

If there are any questions regarding this matter, please call me at 202 515-2527.

Sincerely,

Gordon R. Evans

Attachment

No. of Copies rec'd 0+1
List A B C D E

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April 26, 2001

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5-C450
Washington, D.C. 20554

Dear Ms. Attwood:

I am writing to seek the Commission's concurrence to accelerate the Verizon incumbent telephone companies' right to provide advanced services directly, without using the separate advanced services affiliate that was required by the Bell Atlantic-GTE merger order.[1] The separate affiliate requirement will automatically terminate no later than nine months after the D.C. Circuit's decision in *ASCENT v. FCC*, and it is consistent with the public interest to lift this restriction immediately.

The merger conditions themselves already specify the requirements that will apply upon the termination of the separate affiliate requirement, and eliminating the separate affiliate requirement now will serve the public interest by allowing Verizon to bring these services to the public more quickly and without the additional costs that a separate affiliate necessarily entails. Moreover, because the conditions themselves already specify the requirements that apply upon the termination of the separate affiliate requirement, no competitor will be harmed by allowing Verizon to provide these services free of this requirement now.

First, if the Commission does not act, Verizon will be required to start to turn away new customers in New Jersey before the end of the automatic sunset period. The New Jersey Board of Public Utilities has not approved Verizon New Jersey's application to transfer advanced services assets to the separate affiliate. Now that the separate affiliate requirement will terminate, there would seem to be no reason for the Board to divert resources from other pressing matters to approve that transfer. Thus, Verizon New Jersey is continuing to provide advanced services (as permitted), but it may not purchase any new advanced services equipment under the terms of the Merger Conditions. As a result, it is already out of capacity

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[1] *GTE Corp.*, 15 FCC Rcd 14032, App. D (2000) ("Merger Conditions").

in two central offices, and expects to be out of capacity — and unable to fill customer orders — in 70 more in the coming months.[2]

Second, the separate affiliate requirement is hindering Verizon's deployment of new technologies and next generation networks. As I indicated in my April 9 letter to you, Verizon is installing more fiber-fed DLC equipment in its local feeder plant and is considering deployment of DSL capabilities on that architecture in certain locations where it is upgrading existing remote terminals. Verizon could utilize this architecture to offer a wholesale DSL packet transport service to other carriers, as well as to provide retail DSL service to consumers.

To do this, Verizon must procure, install and test advanced services equipment (such as OCDs for our central offices and integrated DSL-capable cards for remote terminals), which could not be done by a Verizon local exchange carrier under the Merger Conditions.[3]

Verizon has discussed this wholesale DSL packet transport offering with other carriers at a number of industry meetings. One issue of particular concern to many of the carriers is timing — when would Verizon commit to providing the service and how long would it take from that commitment for the service to be widely available. If the separate affiliate requirement is determined to remain in effect until the date by which it automatically terminates, installation of this equipment and the services they can provide will be delayed. Allowing Verizon to install and to begin the testing process would significantly reduce the time it would take Verizon to bring such a service on line.

Third, the separate affiliate requirement is making doing business more complicated for large business customers with sophisticated networks and complicated advanced services needs for products such as ATM and Frame Relay. For customers like this, it is important that Verizon be able to provide an integrated solution over a network that it controls just as our competitors already are able to do.[4] For instance, large customers want a single point of

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[2] Dowell Dec. ¶¶ 3-7 .

[3] Merger Conditions § I.3.d.

[4] It is well recognized that there are pro-competitive benefits to serving customers using a carriers own integrated facilities. For example, the Commission has cited the enhanced ability of parties to serve "multi-location customers over their own networks," enabling "such customers to receive higher quality and more reliable services." *Application of WorldCom, Inc and MCI Communications Corp. For Transfer of Control,* 13 FCC Rcd 18025, ¶ 199 (1998). Indeed, competitors have cited these benefits as advantages of their own offerings. In WorldCom's words, "only one company" has a seamless global "wholly owned" network that provides a fully-integrated bundle of services. MCI WorldCom two-page advertisement, Wall St. J., Nov. 5, 1998, at B19-19. Similarly, AT&T touts its data network with its own local ports "all over the world," which is "a big plus in attracting the large corporate customers that are the grand prize for telecommunications companies." Seth Schiesel, *AT&T Buying I.B.M. Network,* N.Y. Times, Dec. 9, 1998 at C1.

contact for all of their voice and data needs. This single point of contact needs the ability to not only take and process orders, but also to process trouble reports, test circuits and answer billing questions. These customer requirements are either prohibited or greatly hampered by the separate affiliate regime, which adds an additional layer of complexity to the already complicated service arrangements that big business customers demand. And it is a layer of complexity that our competitors do not have, since these kinds of complex arrangements for big business customers typically are provided by competitors using their own network facilities.

The fourth reason is that structural separation increases costs. The additional tax burden that results from the structural separation requirement alone amounts to tens of millions of dollars. The reason is that, in several states, Verizon will be unable to take advantage of the losses of its start-up advanced services business when figuring its state income taxes. The maintenance of a separate affiliate adds costs to Verizon's advanced services in other ways as well, as the separate affiliate requirement results in additional unnecessary duplication and expense. Even by a conservative estimate, the structural separation requirement increases tax and operational expense by an estimated $48 million per year (in addition to literally hundreds of million more in costs that already have been incurred).[5] These extra tax and operational costs that are either passed on to consumers or siphon away funds that could be used to more broadly and more quickly deploy these services.

Of course, as required by the merger conditions, Verizon advanced services operation would continue to use the same standard wholesale interfaces, processes and procedures that are available to other CLECs.[6] Therefore, the merger conditions already specify the requirements that apply, and there are no adverse effects of terminating the structural separation requirement now rather than in nine months.

Prompt elimination of the structural separation requirement will, therefore, permit Verizon to bring more services to more consumers more quickly and more economically. Verizon's advanced services operation will use the same ordering interfaces when dealing with its telephone companies as other advanced services providers, so there is no possible anti-competitive effect.

Thank you for your consideration of this matter. If you have any questions, please give me a call.

Very truly yours,

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5 Dowell Dec. ¶ 8.

6 Merger Conditions § 12; Dowell Dec ¶ 9.

Attachments

cc: Carol Mattey
Michelle Carey
Glenn Reynolds

DECLARATION OF GEORGE DOWELL

1. My name is George Dowell. I am the Vice President for Strategic Planning and Implementation of Verizon Advanced Data Inc. ("VADI"), Verizon's separate data affiliate. My responsibilities currently include directing the program teams that develop and implement all of the operating support systems, processes, and work centers necessary for VADI to provision and maintain DSL and other advanced services throughout the areas in which Verizon's local telephone operating companies provide local exchange service. I have more than 18 years experience in the telecommunications industry, in a variety of engineering and operations positions working for NYNEX, Bell Atlantic, and now VADI. Prior to assuming my current responsibilities, I was Vice President for Operations Excellence for Bell Atlantic.

2. The purpose of this declaration is to explain that how eliminating the nine-month transition period contained in paragraph 11 of Section I of the Bell Atlantic/GTE merger conditions will benefit consumers. Eliminating this waiting period will allow Verizon to continue to deploy advanced services in New Jersey and will allow Verizon to avoid significant costs caused by the separate affiliate requirement.

3. Continuation of service in New Jersey. The Merger Conditions required that Verizon New Jersey (as well as the other Verizon incumbent local exchange carriers) provide interstate and intrastate advanced data services such as ADSL, ATM and Frame Relay through a structurally separate affiliate on or before December 27, 2000.

4. Verizon New Jersey filed a petition with the New Jersey Board of Public Utilities ("Board") on August 7, 2000 for approval to transfer to VADI assets owned by Verizon New Jersey and used exclusively to provide advanced services. *Verizon New*

Jersey Inc.'s Transfer of Advanced Data Services Assets to Verizon Advanced Data Inc., Docket No. TM00080538 (August 7, 2000). Because this petition had not been approved, Verizon New Jersey filed a petition with the Commission on December 18, 2000, seeking a waiver of the advanced services affiliate requirement pending Board approval of the asset transfer. Pursuant to the Merger Conditions, Verizon is permiteed to operate as it had, as if the transition period had not expired.[1] The Commission has not done so to date.

5. Accordingly, at the present time Verizon New Jersey continues to provide advanced services in New Jersey. VADI does not provide any advanced services in New Jersey nor has it filed tariffs for those services. It has no customers in New Jersey.

6. Although Verizon New Jersey continues to offer ADSL and other advanced services in New Jersey, the Merger Conditions bar it from purchasing any new advanced services equipment. Rather, the Merger Conditions state that VADI must own all advanced services equipment purchased after September 27, 2000.[2]

7. In connection with discussions concerning the pending transfer, Verizon New Jersey has described to VADI capacity problems in the Verizon New Jersey network. In order to continue to meet customer demand throughout New Jersey, Verizon New Jersey needs to obtain additional plug-in cards for central office equipment and other advanced services equipment. Two Verizon New Jersey central offices have run out of capacity already and are now closed to new orders due to unavailability of equipment. If Verizon New Jersey is not allowed to purchase new equipment, it will run out of capacity in more than seventy central offices and will be unable to fill new customer orders for ADSL

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[1] Merger Conditions ¶ I.6(f).

within the next four months. Several of these offices will be out of capacity in the next two weeks. Also, ten central offices will be out of capacity for ATM or frame relay service within three months. ATM service is used for backbone transport of ADSL. Therefore, unless relief is obtained, Verizon New Jersey will soon be forced to stop deploying ADSL in most of the State.

8. Elimination of costs. Accelerating the sunset of the separate affiliate merger conditions also will reduce the added costs that are inherent in separation and ultimately are borne by consumers. At that time, Verizon could share resources between its advanced services and other operations that it currently cannot share. For example, Verizon would not be required to have duplicate engineering personnel or to store customer records on duplicate systems. Rather, it would share these and other resources just as its competitors may do today. Of course, under the terms of the Conditions, Verizon's advanced services unit would still have to submit orders using the same interfaces, processes and procedures as CLECs use, and any additional costs incurred by the need to do so would not be avoided. In addition, in several states, Verizon will be unable to take advantage of the losses of its advanced services affiliate when figuring its state income taxes as it otherwise would be able to do. I estimate that these cost savings would exceed $48 million annually. Eliminating these costs would give Verizon more flexibility in pricing these competitive services.

9. Ordering processes. As provided for in the merger Conditions, Verizon's advances services business would continue to use the wholesale ordering process for line sharing and other components of advanced services even after the end of the separate

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[2] *Id* ¶ I.3(d).

affiliate requirement. For example, when VADI receives an order today, it uses the CORBA interface (one of the pre-ordering interfaces Verizon offers to all CLECs) to obtain pre-ordering information. VADI has elected to obtain a limited extract file of the loop qualification data for working telephone numbers from the LiveWire database that Verizon has made available to CLECs. VADI downloads a copy of the loop extract file electronically from the Verizon local telephone operating companies in the same manner as the file is made available to CLECs. This extract is currently provided in the former Bell Atlantic serving territories and will be available in the former GTE serving territories effective May 15, 2001. Once VADI determines that an end user's loop is qualified for DSL service, its employees and sales agents enter the ordering information into VADI's internal ordering system. VADI then submits the wholesale orders to the Verizon local telephone operating companies using the same interfaces as are available to other CLECs. VADI submits its orders to the Verizon local telephone operating companies over the EDI interface, although at times it uses the Web GUI interface. Both the EDI and Web GUI interfaces are available to all CLECs. After VADI submits the order to the ILEC, VADI will receive a firm order confirmation or a reject from the Verizon local telephone operating companies through these same interfaces. Likewise, once the separate affiliate requirement terminates, Verizon's advanced services business will continue to use the interfaces and processes available to CLECs as required by the terms of the Merger Condition.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April __, 2001

George Dowell

Attachment 4

DOCKET NO. 24306

PETITION OF SPRINT COMMUNICATIONS COMPANY L.P., D/B/A SPRINT FOR ARBITRATION WITH VERIZON SOUTHWEST INCORPORATED (F/K/A GTE SOUTHWEST INCORPORATED) D/B/A VERIZON SOUTHWEST AND VERIZON ADVANCED DATA INC. UNDER THE TELECOMMUNICATIONS ACT OF 1996 FOR RATES, TERMS AND CONDITIONS AND RELATED ARRANGEMENTS FOR INTERCONNECTION	§ § § § § § § § § § § § § §	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

ORDER NO. 2
ORDER ON MOTIONS TO DISMISS

I.

On June 22, 2001, Sprint Communications Company, L.P. (Sprint) filed with the Public Utility Commission (Commission) a petition to arbitrate unresolved rates, terms, conditions, and related arrangements of a proposed renewal of its interconnection agreement with Verizon Southwest, Inc. (Verizon) and Verizon Advanced Data Inc. (VADI)[1] under section 252(b)(1) of the Federal Telecommunications Act.[2] Sprint, in its petition, advanced 22 issues for the arbitration. Verizon and VADI subsequently moved for dismissal arguing that certain issues were not appropriate for arbitration.[3] Specifically, Verizon argues that issues 1, 4, and 8 of Sprint's petition should be dismissed. VADI contends its negotiations with Sprint are not yet ripe for compulsory arbitration and asks that VADI be dismissed as a party to this arbitration.[4] VADI's motion is concomitant with resolution of Verizon's motion to dismiss issue 1. As stated by Sprint, the issues are:

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[1] VADI is a facilities-based local exchange carrier providing DSL, frame relay, and ATM cell relay services. VADI is the advanced services affiliate of Verizon. VADI Initial Brief in Support of Motion to Dismiss at 1 (July 16, 2001).

[2] 47 U.S.C. 252(b)(1); P.U.C. PROC. R. 22.305.

[3] *See* P.U.C. PROC. R. 22.305(f).

[4] *Compare* 47 U.S.C. 252(a) (voluntary negotiations) *with* 47 U.S.C. 252(b) (compulsory arbitration).

Issue 1: Should Sprint's notice to and negotiation with Verizon Southwest require that VADI be required to be made a party to the interconnection agreement and this arbitration and be bound by the outcome?

Issue 4: What level of compensation is appropriate under the application of the FCC's recent ISP Remand Order for Internet service provide[d] traffic?

Issue 8: Should Verizon be required to provide unbundled packet switching to Sprint at remote terminals and central offices?

On July 10, 2001, the parties conducted a pre-hearing conference regarding the motions to dismiss. After the pre-hearing conference, all of the parties filed further briefs and reply briefs on the motions. For the reasons set out below, we deny Verizon's and VADI's motions to dismiss.

II.

Issue 1: Parties to the Proceeding

Verizon and VADI contend that issue 1 is not proper for arbitration because VADI cannot be a compulsory party in this proceeding. Verizon and VADI explain that under FCC order they are separate, distinct legal entities.[5] As such, they contend that Sprint must strictly follow the requirements of the FTA in order to compel arbitration with VADI, and in this case Sprint has not done so. Under the FCC's order, Verizon was required to have a separate advanced services affiliate, VADI.[6] Consequently, Verizon and VADI claim that VADI is not a proper party because Sprint has not satisfied the FTA's notice and negotiation provisions. These provisions, they state, are prerequisite to VADI's compulsory participation. They contend that Sprint's request for negotiation under the FTA with Verizon is not tantamount to a request to VADI and that Sprint's negotiations with Verizon did not trigger any of VADI's obligations under the FTA.

Sprint, on the other hand, contends that VADI is a proper party to this arbitration and that Verizon and VADI should be treated as the same entity for the purposes of a binding agreement

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[5] *In re Application of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order*, 15 FCC Rcd 14032 at ¶¶ 260-72 (2000).

in this proceeding. Both Verizon and VADI, although legally distinct entities, should be bound by this proceeding because both have the same interconnection, negotiation, and arbitration obligations under the FTA. In addition, Sprint argues that Verizon was on notice that packet switching would be a part of the negotiations as early as September 1999 which is prior to the creation of VADI. Packet switching implicates VADI's assets and facilities after their transfer from Verizon to VADI in September 2000. Consequently, both Verizon and VADI were on notice that they both must negotiate packet switching and both are now proper parties to this arbitration proceeding.

The parties disagree on the effect and impact of their voluntary negotiations prior to this proceeding, but Verizon and Sprint agree on the factual summary outlined below.[7]

September 1999 — Sprint and Verizon begin interconnection negotiations. The initial proposed agreement does not include a packet switching provision.

November 1999 — The FCC releases its Remand Order that sets forth conditions for unbundled packet switching.

January - May 2000 — Verizon provides Sprint with a draft contract that includes a provision referencing packet switching. The offered contract language states

> "The Packet Switching UNE is defined as the basic packet switching function of routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells, or other data units, and the functions that are performed by the DSLAM. Verizon reserves the right to provide packet switching as a UNE only under the circumstances described in Rule 51.319(c)(5)."[8]

June 2000 — FCC approves the merger of GTE and Bell Atlantic. The merger requires the merged entity, Verizon, to establish a separate data, advanced services affiliate, VADI.

August 21, 2000 — VADI receives its certificate of operating authority in Texas[9]

September 2000 — Verizon's packet switching assets are transferred to VADI

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[6] *Id.* at ¶¶ 260, 263 (2000).

[7] Prehearing Conference Transcript at 38-39 (July 10, 2001); Verizon Southwest's Opening Brief on its Motion to Dismiss Sprint Issues 1,4 and 8 at 4-5 (July 16, 2001); Sprint's Brief as Directed pursuant to the Prehearing Conference at 11 and 23 (Exhibit 1) (July 16, 2001).

[8] *See* 47 C.F.R. 51.319(c)(4) and (5).

[9] *Application of Bell Atlantic Network Data, Inc. for a Certificate of Operating Authority*, Docket No. 22741, Notice of Approval (August 21, 2000).

January 20, 2001 Verizon and Sprint agree to change the start date of negotiations to January 20, 2001.

April –May 2001 Sprint requests that Verizon's packet switching language be modified. Sprint sent the following language to Verizon on May 23, 2001:

> "VERIZON shall make available to Sprint the unbundled Packet Switching Network Element at any technically feasible point, including Verizon's Remote Terminals and Central Offices. If VERIZON'S Tariff does not contain rates, terms and conditions for the Packet Switching Network Element, the rates, terms and conditions in accordance with which VERIZON will make available the Packet Switching Capability network element shall be negotiated in good faith by the Parties."

June 21, 2001 Sprint sends a letter requesting negotiations with VADI.[10]

June 22, 2001 Sprint petitions the Commission for compulsory arbitration with Verizon and VADI.

Under section 252(a) of the FTA, "Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier [ILEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier."[11] "During the period from the 135th to the 160th day (inclusive) after the date on which the an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any party to the negotiation may petition a State commission to arbitrate any open issue."[12] Section 251(c) of the FTA outlines the specific obligations of an ILEC when in arbitration.[13] The definition of an ILEC includes an entity that is the "successor or assign" of an previously determined ILEC.[14]

Sprint argues that it has properly sought compulsory arbitration with Verizon and VADI on the open issue of unbundled packet switching because packet switching became a part of the parties' negotiations in May 1999. Sprint states that VADI was created after this date and should not be able to escape its obligations because the ILEC created an affiliate who controls the assets to effectuate packet switching obligations under the FTA. Sprint claims that it only became

[10] Petition for Arbitration of Sprint at 247 (Exhibit 5) (June 22, 2001).

[11] 47 U.S.C. § 252(a)(1).

[12] 47 U.S.C. § 252(b)(1).

[13] 47 U.S.C. § 251(c). For example, Incumbent Local Exchange Carriers, Verizon, and requesting telecommunications carriers, Sprint, are obligated to negotiate in good faith. 47 U.S.C. 251(c)(1).

[14] 47 U.S.C. § 251(h)(1).

aware of Verizon's position requiring it to negotiate separately with VADI in June, 2001. Should Sprint be required to negotiate separately, Sprint argues, it will belie the FCC's purposes of requiring the affiliate in the merger order and it will allow the ILEC to impede interconnection and unbundling agreements simply be creating affiliates. Further, only an ILEC is obligated under the FTA to negotiate and VADI is a Competitive Local Exchange Carrier rather than an ILEC.

Sprint advances a case decided this year in support of its position.[15] Sprint outlines that because of *ASCENT*, VADI is a "successor and assign" of Verizon under the FTA and is therefore an ILEC for the purposes of negotiation and arbitration. Sprint argues that *ASCENT* eliminated the separate advanced services affiliate structure and stands for the proposition that for the purposes of sections 251 and 252 of the FTA, VADI and Verizon must be treated as the same entity. VADI and Verizon counter that *ASCENT* merely provides that VADI has the same obligations under the FTA as the ILEC, Verizon. VADI states that because it is a legally distinct entity, Sprint must strictly follow the procedures for requesting negotiation under the FTA. The negotiation and notice requirements of the FTA, VADI maintains, do not disappear simply because the court found that it has the duties of an ILEC. VADI contends that a request for negotiation to Verizon is not a request to VADI; Verizon cannot enter into an agreement to bind VADI. VADI argues that it did not receive a request for negotiations from Sprint until June 21, 2001. VADI claims, therefore, that Sprint may not petition for arbitration until 135 days after the June 21, 2001 request. Sprint's petition for arbitration is not proper under the procedures of section 252 of the FTA and VADI should be dismissed from this proceeding.

We believe that *ASCENT* provides strong justification to include VADI as a party to Sprint's arbitration petition here. *ASCENT* found that an ILEC's wholly owned advanced services affiliate, which was required by the FCC, was indeed a "successor and assign" of the ILEC from which it was separated.[16] As a "successor and assign" of Verizon, VADI is also treated as an ILEC under section 251(h). The *ASCENT* decision went on to provide that the affiliate was not exempt from the "duties of *that* ILEC parent" under sections 251 and 252 of the FTA.[17] Sprint first requested negotiations with Verizon in September 1999 one year before

[15] *Association of Communications Enter. v. FCC*, 235 F.3d 662 (2001) (*ASCENT*).

[16] *ASCENT*, 235 F.3d at 666-668.

[17] *ASCENT*, 235 F.3d at 668 (emphasis added). In fact, the court also noted that the FCC could just as well have determined that the affiliate was itself a part of the ILEC. *ASCENT*, 235 F.3d at n. 9.

VADI became a legally distinct entity. Consequently, just as Verizon, the ILEC parent, is a proper party to this proceeding VADI, the advanced services affiliate which has the same duties and obligations of the ILEC parent, is also.

Verizon and VADI respond that VADI cannot be a proper party nor can packet switching be an issue for this arbitration because Sprint did not negotiate the issue of unbundled packet switching until May 2001 well after VADI had become a separate legal entity. They continue that VADI not Verizon is the entity with which Sprint must negotiate packet switching. Verizon and VADI assert that because VADI was not on notice that packet switching was included in the section 252 negotiations with Verizon, VADI should be entitled to its own separate, distinct request for negotiation because it is now a distinct legal entity. Verizon further argues that packet switching was not requested by Sprint in the negotiation until April or May 2001, and therefore, the issue is not yet appropriate for compulsory arbitration.

We disagree with Verizon and VADI. First, the issue of packet switching was a part of the negotiations as early as January or May 2000. Verizon complains that this fact is inconsequential because A) the May 2000 language was put forth by Verizon and not at the request of Sprint, and B) the language by its terms could not have triggered the obligation of Verizon to provide unbundled packet switching.[18] Whether the provision regarding packet switching was put forth by Verizon or Sprint, it nevertheless presented, or "put on the table" the issue of packet switching to the parties. The fact that the language was in a draft agreement exchanged between the parties is itself evidence that the provision was a part of the negotiation process. Further, whether the provision would actually operate to require Verizon to perform is immaterial to whether the parties raised a specific topic in negotiation. Moreover, simply because Sprint chose to wait until May 2001 to question the Verizon language is no substantiation that the issue was not brought up as an subject, concern, or matter in the parties' negotiation. Because the language was not disputed until a later date does not necessarily signify that the issue was not raised in the parties' negotiation.

Second, because we find that unbundled packet switching was an issue in Verizon's and Sprint's negotiations in May 2000, VADI is also obligated to engage in compulsory arbitration

[18] Verizon vigorously contends that because the requirements of the FCC's rule regarding unbundled packet switching were not present, its May 2000 language would not have required it to provide the service. Verizon, therefore, argues that because the language would never have triggered Verizon's obligation, packet

on this issue. VADI was not created until well after the May 2000 packet switching language was offered. Therefore, when VADI became a "successor and assign" of Verizon's 252 obligations, VADI succeeded to Verizon's obligation to negotiate and then arbitrate the unbundled packet switching issue.

Third, the FTA allows a carrier to bring to the state commission, upon the expiration of 135 days, any open issue after "a request for negotiation under this section."[19] There is no question that Sprint requested negotiation with Verizon in September 1999. There is also little doubt to us that unbundled packet switching is an open question with the parties given the disagreement over the language in the draft agreements. Consequently, we believe that Sprint has brought an open issue as to both Verizon and VADI after "a request for negotiation."

Finally, while all parties and the arbitrator's recognize that Verizon and VADI are at this time legally distinct entities, their separate affiliate structure may not exist in the future.[20] In fact, Verizon is currently seeking to reintegrate VADI into the ILEC and to accelerate the time frame in which Verizon may provide advanced services directly.[21] We believe that these circumstances also weigh in favor of denying the motions to dismiss and accepting Sprint's petition to compel arbitration with Verizon and VADI on unbundled packet switching.

We find that VADI is a proper party to Sprint's petition for arbitration. Verizon and VADI will, therefore, be bound by the agreement reached in this proceeding. Additionally, unbundled packet switching is a proper issue for arbitration. We deny VADI's motion to dismiss and deny Verizon's motion to dismiss issue 1. We believe that our findings here are dispositive for issue 1 and we need not further consider this issue in this proceeding.

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switching was not an issue for the parties in negotiation until Sprint challenged the language in April or May of 2000. *See* 47 C.F.R. 51.319.

[19] 47 U.S.C. § 252(b)(1).

[20] *See Petition of IP Communications Corporation to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket No. 22168, and *Petition of Covad Communications Company and Rhythms Links, Inc. against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration under the Telecommunications Act of 1996 regarding Rates, Terms, Conditions, and related Arrangements for Line Sharing*, Docket No. 22469, Arbitration Award at 78-79 (July 13, 2001) (citing *ASCENT*, 235 F.3d at 662).

[21] *Tariff Filing of GTE Southwest Incorporated, d/b/a Verizon Southwest, to remove its Broadband Services from the Texas Facilities for State Access Tariff to Comply with the GTE/Bell Atlantic Merger Agreement, Pursuant to P.U.C. SUBST. R. 26.207*, Docket No. 23336, Letter from Mr. Carl E. Erhart Requesting Abatement (June 22, 2001). *Sprint's Petition for Arbitration* at 237-239 (Exhibit 4) (June 22, 2001) (Letter from Gordon R. Evans, Vice President, Federal Regulatory, Verizon to Dorothy Attwood, Chief, Common Carrier Bureau, CC Docket No. 98-184 (filed April 27, 2001)).

Issue 8: Unbundled Packet Switching

Because we find that Sprint properly sought arbitration for unbundled packet switching, we must address Verizon's motion to dismiss issue 8. Verizon argues that as a matter of law the issue of unbundled packet switching should be dismissed from this arbitration because the elements set out by the FCC that would obligate Verizon to provide unbundled packet switching to Sprint are not satisfied and could never be satisfied.[22] Furthermore, Verizon states that it has not currently deployed a packet switching architecture; thus, issue 8 is irrelevant to this arbitration. Verizon also argues that Sprint now asks the Commission to grant it relief that is not allowed by the plain language of the FCC's rule regarding unbundled packet switching.

Sprint contends that Verizon's arguments for dismissal ignore *ASCENT* and the fact that unbundled packet switching could be obtained from VADI. Sprint opposes Verizon's interpretation and application of the FCC's conditions for unbundling. Sprint also states that Verizon's motion is premature. The issue of packet switching is substantive, relates to the merits of the positions taken in arbitration, and is not appropriately addressed at this stage in the proceeding. Lastly, Sprint argues that the Commission has the authority to arbitrate unbundling issues and should consider its arguments concerning the application of the FCC's standards.

We find that issue 8 and Verizon's and VADI's obligation and capability to provide unbundled packet switching is an open issue for arbitration.[23] First, VADI is a party to this proceeding, and it is the entity that may likely provide the services Sprint seeks. We have not yet heard from VADI regarding this matter. Second, we believe that many factual and legal issues remain open as to the obligation of Verizon and VADI to offer unbundled packet switching. For example, the Commission must have competent, factual evidence to apply the conditions that Verizon maintains must exist before it is obligated to provide unbundled packet switching.[24] Sprint states that it wishes to bring forward further factual and legal arguments regarding this issue. Consequently, we do not believe that as a matter of law, we can say that packet switching is not an open issue subject to arbitration in this proceeding. Furthermore, the appropriate

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[22] 47 C.F.R. 51.319(c)(5) (providing conditions for when an ILEC shall be required to provide nondiscriminatory access to unbundled packet switching).

[23] See 47 U.S.C. § 252(b)(1).

[24] P.U.C. PROC. R. 22.305(h), (m), (o), (p), (s).

language that the parties will incorporate into their agreement has not yet been determined. The scope and details of the packet switching language is certainly appropriate for arbitration.

We deny Verizon's motion to dismiss issue 8. We assure the parties, however, that we intend to resolve each issue set forth in the petition pursuant to the requirements of section 251 of the FTA, including the regulations prescribed by the FCC.[25]

Issue 4: Reciprocal Compensation for ISP Traffic

Verizon argues that issue 4 in Sprint's petition for arbitration must be dismissed. Verizon contends that Sprint seeks to have the Commission set appropriate rates for reciprocal compensation for Internet Service Provider (ISP)-bound traffic in violation of a recent FCC order.[26] Verizon argues that the *ISP Remand Order* governs inter-carrier compensation for ISP-bound traffic and that the FCC has assumed exclusive jurisdiction over the issue to the exclusion of state commissions. Verizon maintains that this commission is foreclosed from arbitrating the issue that Sprint advances: the FCC unambiguously found that ISP-bound traffic is interstate, "information access" traffic that is not subject to reciprocal compensation.[27] Furthermore, the FCC exercised its authority under section 201 of the FTA thereby taking this kind of traffic out of the purview and obligations of section 251 and 252 of the FTA.[28] According to Verizon, the FCC has stated that state commissions no longer have authority to address compensation for ISP-bound traffic. Consequently, Verizon argues that the Commission does not have jurisdiction over ISP-bound traffic and posits that the Commission cannot interpret or rule on the application or effect of the *ISP Remand Order* in this proceeding. Verizon takes the position that the interconnection agreement need only reference the *ISP Remand Order* and define the boundary between A) the local traffic subject to reciprocal compensation under the Act and B) the Internet-bound and other traffic that is not internet-bound.

Sprint opposes Verizon's motion to dismiss issue 4. Sprint explains that it is not asking the Commission to ignore or go outside the parameters established in the *ISP Remand Order*.

[25] 47 U.S.C. § 252(b)(4)(C); 47 U.S.C. § 252(c); P.U.C. PROC. R. 22.305(s).

[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 and *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order (released April 27, 2001) (*ISP Remand Order*).

[27] *Id.* at ¶¶ 52, 65, 82.

[28] 47 U.S.C. § 201, 251(b)(5) and (g).

Sprint contends that it is not asking the Commission to set rates or otherwise contradict the *ISP Remand Order*. Sprint states that it is merely seeking Commission involvement in creating contract language to effectuate the FCC's decision. The parties have not yet agreed to definitive language with respect to ISP traffic. Sprint also points out that the *ISP Remand Order* deals only with the rates for compensation and that section 251 and 252 of the FTA remain the controlling statutes for carrier facility interconnection.

We find that issue 4, as explained in Sprint's briefing, is an open issue subject to arbitration.[29] Issue 4 will focus on the appropriate language to be used in the parties' agreement. The parties' language will, of course, be subject to the *ISP Remand Order* or any appropriate, controlling law.[30] We acknowledge that the *ISP Remand Order* establishes the rate or compensation regime for ISP-bound traffic, but it does not prohibit the Commission from addressing the verbiage to be used by the parties in their agreement under section 252 of the FTA.[31] Again, Sprint may bring any "open issue" to the Commission.[32] While the *ISP Remand Order* may have settled compensation in regard to ISP traffic, the parties have not settled their dispute over the agreement's language. The scope and details of the language implementing the FCC's compensation structure is certainly appropriate for arbitration. Further, the Commission must ensure that arbitration conditions meet the requirements of section 251.[33] Section 251 specifically obligates telecommunications carriers to establish reciprocal compensation arrangements.[34] One such arrangement can be a provision in an agreement not to compensate ISP-bound traffic as reciprocal. Another can be the parties' language in regard to compensation of ISP-bound traffic in general. As explained in its briefing, we do not believe that it is appropriate to dismiss from arbitration issue 4. We deny Verizon's motion to dismiss.

III.

We deny Verizon's and VADI's motions for dismissal in their entirety. VADI is a proper party to this proceeding and will be bound by its outcome. Issues 4 and 8 are proper issues for

[29] 47 U.S.C. § 252(b)(1).
[30] 47 U.S.C. § 252(b)(4)(C); 47 U.S.C. § 252(c); P.U.C. PROC. R. 22.305(s).
[31] *See ISP Remand Order* at ¶¶ 78 n. 149, 79, and 82.
[32] 47 U.S.C. § 252(b)(1).
[33] 47 U.S.C. § 252(c)(1).
[34] 47 U.S.C. § 251(b)(5).

arbitration. Verizon may, therefore, supplement its response to Sprint's petition for issues 4 and 8. VADI must file its response to Sprint's petition no later than August 20, 2001.[35]

SIGNED AT AUSTIN, TEXAS on the 7th day of August, 2001.

FTA § 252 ARBITRATION PANEL

DON BALLARD
ARBITRATOR

KARA SHELDON
ARBITRATOR

Staff Arbitration Advisor

Betsy Tait

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[35] *See* P.U.C. Proc. R. 22.305(b).

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Sprint Communications	:	
Company, L.P. for an Arbitration	:	
Award of Interconnection Rates, Terms	:	Docket No. A-310183F0002
and Conditions Pursuant to 47 U.S.C.	:	
§252(b) and Related Arrangements With	:	
Verizon Pennsylvania Inc.	:	

RECOMMENDED DECISION

Before
MARLANE R. CHESTNUT
Administrative Law Judge

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APPENDIX A - Witnesses and Exhibits

I. HISTORY OF THE PROCEEDING

On May 15, 2001, Sprint Communications Company, L.P. (Sprint) filed with the Pennsylvania Public Utility Commission (Commission) a Petition requesting arbitration of interconnection agreements with Verizon Pennsylvania, Inc. and Verizon North, Inc. (collectively, Verizon). The Petition, which listed approximately 28 unresolved issues, was filed pursuant to §252(b) of the Telecommunications Act of 1996, 47 U.S.C. §252 et seq. (TCA of 1996), and Commission Orders entered June 3, 1996 and September 9, 1996 at Docket No. M-00960799, Implementation of the Telecommunications Act of 1996.

By Hearing Notice dated May 23, 2001, a pre-arbitration conference was scheduled for June 8, 2001 and the matter was assigned to me. I issued Prehearing Orders #1 and #2 on May 23, 2001 and June 12, 2001, respectively.

On June 11, 2001, Verizon filed an Answer to the Petition. This Petition listed an additional 16 issues.

Pursuant to the schedule adopted at the pre-arbitration conference, both parties submitted initial offers on July 5, 2001. An arbitration conference was held on July 11-12, 2001, in Philadelphia. Both parties presented witnesses. Admitted into the record were various exhibits. On July 20, 2001, both parties submitted their final offers. Accompanying Sprint's final offer were additional exhibits; these exhibits will be admitted into the record. In response to my request at the arbitration conference, Verizon supplied the response to Sprint Exhibit 4, and an affidavit which purports to respond to Sprint Exhibit 12. These exhibits also will be admitted into the record. Appendix A lists the witnesses and exhibits.

While both parties agreed that many of the issues and sub-issues contained in their respective final offers had been resolved in principal (and would be addressed by the filing of a Joint Stipulation of Resolved Arbitration Issues on July 31, 2001), numerous issues and sub-issues remained outstanding. These issues are addressed below. The Stipulation was filed on August 3, 2001. Also on August 3, 2001, Verizon submitted new proposals on several issues. Sprint objected to my consideration of these new proposals, for several reasons.

Finally, it should be noted that the FCC's Bell Atlantic/GTE Merger Order at 46-47 requires that Verizon (formerly Bell Atlantic/GTE) make out-of-region interconnection agreements (ICAs) available that an ILEC (not Verizon) develops for a Verizon affiliate, at the request of that affiliate, where it operates as a new local telecommunications carrier. The FCC also required that Verizon make available any in-region, voluntarily negotiated post-merger ICAs to which Verizon is a party.[1] The effect of these conditions is that if Verizon does not enter into voluntarily negotiated ICAs, it avoids the possibility that another carrier can MFN that agreement. Conversely, arbitrated ICAs or terms are not available for MFN adoption by another carrier in its interconnection agreement with Verizon. This MFN concern was expressed a number of times by Verizon.[2]

Because of the extremely short time period allowed for preparation of this Recommended Decision, my discussion is necessarily abbreviated. This should not be taken as evidence that any position or argument presented by either of the parties was not fully considered.

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1 GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum and Order, FCC 00-221, June 16, 2000 (Bell Atlantic/GTE Merger Order).

2 See, Tr. 156, 167, 208.

II. DISCUSSION

Issue #1: Terms and Conditions

This issue involves the transport and termination rates and charges that Verizon must pay for access to Sprint's facilities in order to interconnect. Sprint's position is that it should be permitted to charge the rates and charges established in its tariff, even when such rates are higher than those charged by Verizon for the same or similar services. Verizon's position is that an incumbent's rates are presumptively just and reasonable and should be used, unless the CLEC submits an appropriate cost of service study, which Sprint has not done.

Sprint's position is reasonable and should be adopted. First, there is no question that as a matter of law it is obligated by Section 1303 of the Public Utility Code, 66 Pa.C.S.A. §1303, to charge its tariffed rates for service, not the rates and charges contained in Verizon's tariff. Second, each and every authority cited by Verizon as support for its position recognizes that the CLEC can, if it does not wish to adopt Verizon's rates and charges, charge rates that are either negotiated or supported by a cost study. These authorities include the Federal Communication Commission's (FCC) Local Competition Order, a Massachusetts D.T.E. arbitration order and the Commission's Global Order. See, respectively, Implementation of the Local Competition Provisions in the Telecommunications Act of 1966, FCC Docket No. 96-98, First Report and Order, ¶1085, 11 FCC Rec. 15499 (1966); In re Petition of Sprint Communications Company L.P. pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of an interconnection agreement between Sprint and Verizon – Massachusetts, MA D.T.E. Docket No. 00-54 at 21-22; and Joint Petition of Nextlink Pennsylvania, et al. for Adoption of Partial Settlement, Docket Nos. P-00991648 and P-00991649, Commission Opinion and Order entered August 26, 1999, Appendix D, §§53.59(a) and (c).

Use of an incumbent's rates for transport and termination has been accepted by the various regulatory bodies as a proxy, not necessarily a cap. A CLEC can choose to adopt an ILEC's rates, which are presumptively reasonable, so as to avoid the necessity of presenting an appropriate cost study. However, this is a rebuttable presumption – an ILEC clearly has the right to charge higher rates if they are cost-justified or negotiated. Of course, any proposed or existing tariff is subject to challenge. If an ILEC in that situation is unable to support its higher rates, then presumably it will not be permitted to included them in its tariff.

Issue #3: Resale of Vertical Features

This issue here is whether Sprint should be permitted to purchase vertical features at a wholesale rate for resale. Verizon's position is that Sprint may purchase vertical features (custom calling features such as various call forwarding options) for resale at the retail – not wholesale – price, because Verizon does not offer such services on a stand-alone basis (i.e., without dial-tone) to its own customers.

Sprint witness Burt[3] explained that Sprint intends to provide a suite of services called "Unified Communications" which is designed to "provide consumers with the ability to take messages from a voice device, whether it be a wire line telephone, wireless telephone, a pager, e-mails, getting access to the internet, and really combining all of those services so that you can access any one of them from any one of the others, if that makes sense." Tr. 233.

Sprint's position should be accepted with respect to this issue.

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[3] James R. Burt is employed by Sprint Communications as Director of Regulatory Policy.

Section 251(c)(4) of the TCA provides in relevant part that each ILEC has the duty:

> (A) To offer for resale at wholesale prices any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) Not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . .

This aversion to resale restrictions was recognized by the FCC, which has concluded that resale restrictions are "presumptively unreasonable." Local Competition Order, ¶939. See also ¶871 of that Order, where the FCC found "no statutory basis for limiting the resale duty to basic telephone service."

Verizon's position is that it has no legal obligation to sell discounted vertical services to Sprint because it does not offer these services at retail on a stand-alone basis. I disagree.

As convincingly explained by Sprint in its Petition for Arbitration, Initial Offer and Final Offer, local dial tone and vertical features are effectively two separate retail offerings. They are tariffed separately, priced separately, provisioned separately and billed separately. Vertical services are telecommunications services which are sold to end-users, thus making them a retail service subject to §251(c)(4).

It cannot be disputed that there is no technical impediment to the resale of vertical features on a stand-alone basis. See, Tr. 237, where Verizon witness Muller[4] admitted that Verizon's refusal was based purely on its legal position, not on operational

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4 Marlene Muller is employed by Verizon Maryland as a Senior Specialist.

or technical concerns. In fact, Verizon offers these services to its wireless customers, as well as to Enhanced Service Providers (ESPs), although not at a discount. As stated by Sprint in its Initial Offer at 12, "However, simply because Verizon does not offers a discount to certain end users (as in the case of ESPs) does not alter the essential nature of these services as separate retail services and does not alter Verizon's statutory resale obligation."

In its Final Offer at 10, Verizon states "That other ILECs allegedly do what Sprint requests misses the mark. No evidence was presented by Sprint at the arbitration conference which would suggest that other ILECs have the same tariff as Verizon. Put another way, other ILECs may in fact offer vertical features to Sprint at a discount precisely because they *do* offer vertical features on a stand-alone basis in their respective tariffs – a dispositive fact under controlling law that does not exist here."

This argument itself misses the mark. A utility's tariff cannot itself frustrate statutory rights and obligations. To accept Verizon's argument would be to elevate form over substance. First, regardless of the tariff, it is clear that dial tone and vertical services are in fact two separate offerings, as discussed above. Second, to allow Verizon to arbitrarily – for reasons that are not technical or operational – bundle services with dial tone so as to avoid the resale obligations associated with those services would be in derogation of the efforts of Congress, the FCC and this Commission to encourage local telephone competition.

Verizon has failed to rebut the presumption that this resale restriction is unreasonable. The position it has taken clearly results in unnecessary impediments to local telephone competition in Pennsylvania. Verizon is considering the offering of a single-number feature, whereby a single universal number unites various communications devices (business and home telephones, cellular telephones and pagers) so that when the

single number is called, up to three other numbers will ring simultaneously.[5] Sprint should be able to offer the same type of service.

Finally, Verizon points out that it has not conducted a cost study for discounting vertical features. Therefore, Sprint's compromise position, explained in its Final Offer at 14, should be accepted. Verizon should make these vertical services available for resale to Sprint on a stand-alone basis (without dial tone) on an interim basis at the full wholesale discount until such time as Verizon files the appropriate cost studies that establish that a recalculation of the wholesale discount rate is justified and appropriate. Also, the billing options available to ESPs, expressed at page 14 of Sprint's Final Offer, should be made available to Sprint as well.

Issue #5: Loop Qualification Database

The issue here is whether Sprint should be required to use Verizon's database for loop qualification as part of the pre-ordering process for ordering DSL loops.

Verizon's position is that Sprint should be forced to utilize Verizon's database for pre-ordering loop qualification, which was developed in consultation with other CLECs in a New York collaborative. It points out that it makes sense to have all CLECs utilize this database, for which rates have been approved by the Commission, and that there are problems associated with Sprint's Sapphyre system.

Sprint modified its initial position (that it be permitted to utilize either Verizon's loop qualification database or its own system for prequalifying loops) to instead suggest that it utilize Verizon's system for the first six months of the term of the ICA (paying the applicable charges), and thereafter choose which system to use.

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[5] Sprint Exhibit 1, Initial Offer, Verizon's response to Sprint 1-6.

As discussed in more detail below, Sprint's proposal should be adopted.

In its Final offer, Verizon advances three reasons why Sprint should be forced to utilize Verizon's database. First, it asserts that the Sapphyre and GSAM systems utilized by Sprint are inaccurate. It states that "Sprint's witness admitted on the record that neither the Sapphyre nor the GSAM loop qualification databases that Sprint wants to use are 'flawless.'" Frankly, I am surprised that Verizon made this statement, which is clearly taken out of context. Sprint witness Nelson[6] actually pointed out at Tr. 138 that both companies' prequalification systems are not flawless: "Is our system flawless, no. Is Verizon's database system flawless, no. Neither one of them are perfect." In fact, to her credit, Verizon's own witness Clayton[7] agreed at Tr. 138-39: "I would agree. Our systems are not flawless . . ."

Although in its Final Offer Verizon describes the deficiencies associated with the Sapphyre system, Ms. Clayton admitted that she had reviewed the system well over a year ago. Sprint witness Nelson explained at Tr. 133 that it is a different system than that she examined: "[Ms. Clayton] had identified Sapphyre as it existed a year or so ago. They way we refer to Sapphyre, we actually have a diskette we can send an end user, plug into their modem, it's an online test. That's the Sapphyre we talked about today. The moniker is the same. I think it has changed as far as the system. So this is actual loop qualification that is performed, giving feedback and then we can determine whether DSL would work in that line or not." In fact, Ms. Clayton expressly admitted

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6 Mike Nelson is employed by Sprint as Director of Local Market Development.

7 Rose Clayton is employed by Verizon as Product Manager of DSL and Line Sharing.

that Verizon had made no attempt to examine the accuracy or appropriateness of Sprint's systems. Tr. 122-23.

Thus, Verizon's statement about the alleged deficiencies of the Sapphyre system contained in its Final Offer at 16-17 must be completely disregarded. Further, its footnote 18 at page 16, in which it disclaims any knowledge whatsoever about the GSAM system (other than an internet reference to weapons and the weather system satellite that serves southeastern Australia) is intentionally misleading in light of its own witness Clayton's description at Tr. 123 of the GSAM system as ". . . more of a geometric qualification tool, almost like a triangulation qualifications tool. I am less familiar with that method of prequalifying loops."

I am surprised that Verizon, before completely rejecting use of Sprint's proposed loop qualifying system, did not even attempt to find out about the system or its accuracy as part of its negotiations. Clearly, having each loop checked on-line – rather than having to have recourse to either Verizon's mechanized database or a manual examination of the engineering plants contained in a particular central office – is a reasonable way of determining whether that particular loop is suitable for DSL service.

Verizon's second objection, that acceptance of Sprint's position would "create new problems and impose new costs," is similarly without merit. I just don't believe that it would be necessary to "cull out all Sprint orders by hand . . ." (Final Offer at 19) in order to allow a CLEC to use its own qualifying system in the pre-ordering stage. Since other CLECs have requested to use Sapphyre (Tr. 123), it may be that Verizon should address this anyway, in order to make its system more acceptable to the CLECs generally. On the other hand, if there is a reasonable cost which can be attributed to the measures necessary to accommodate Sprint, then it may be reasonable to have Sprint bear those costs. Of course, this could have been addressed as a negotiated contract term.

This is not to minimize Verizon's valid concerns. I again repeat my belief that a uniform system that is designed to address the concerns of all CLECs (so that CLECs are not put in the position of having to obtain their own systems) – is preferable. Sprint feels that its system is better and more efficient – that may well be true, perhaps other CLECs feel that way as well. Perhaps the system which arose from the collaborative process should have incorporated from the beginning a process to deal with the situation where a CLEC does not choose to use Verizon's qualification database.

Clearly, both parties fundamentally should want the same result – a reasonable system for provisioning DSL loops. As pointed out by Sprint in its Final Offer (p. 15) and elsewhere, "Sprint has just as much incentive as Verizon to ensure that its loop qualification systems are accurate . . ."

Both parties agree that if a CLEC assumes the responsibility for pre-ordering loop qualification, then the performance metrics relating to those issues should be waived. I agree. This is done elsewhere, as explained by Sprint witness Nelson at Tr. 142: "That is exactly what has happened, we have a Sprint Las Vegas local telephone company and that's exactly what the resolution we resolved out there with the CLEC, if we do not use, if the CLEC did not use the ILEC prequalification system, then those loops were outside of the performance measurement."

As to Verizon 's concerns with other CLECs opting in, if their qualification systems are accurate, then this should not be a problem.

Verizon's third and final point is that its rates have been approved by the Commission in its Interim Opinion and Order, <u>Further Pricing of Verizon Pennsylvania, Inc.'s Unbundled Network Elements et al.</u>, Docket No. R-00005262 (June 8, 2001). Of course, the Commission has not accepted that these rates are cost justified.

For loops for which DSL is ordered, Verizon charges a mechanized qualification database charge of $.44 per loop, monthly, for the life of the loop. Sprint witness Nelson described this effect at Tr. 135:

> Part of it is, if their loop qualifications database, they were charging me two cents a month or 10 cents a query, maybe we might have a different attitude about it. Right now in Pennsylvania it's 45 cents a month, times hundreds of loops, and hundreds of months, ends up being a lot of money. And in some states like Massachusetts there is no charge for that. We have states like Maryland, where it's 45 cents a query and 45 cents times the life of a customer . . . Another point, there are many ILECs that have loop qualifications systems but do not make their use mandatory. Our own local telephone company within Sprint has a system, it's not mandatory. GTE has a system, but it's not mandatory.

Yet, it is clear that it is not simply a desire to avoid these costs that is the basis for Sprint's position. Mr. Nelson later made it clear that Sprint wants to avoid an unnecessary process (having to access Verizon's database) and that it has more confidence in its own prequalification systems. Tr. 139. Obviously, unsatisfied with Verizon's efforts, Sprint went ahead and deployed its own testing network

In summary, it is clearly anti-competitive to force CLECs to utilize a prequalification process they neither need nor want, and to incur substantial costs as well. Sprint has modified its initial offer, so that for the first six months of the contract it will only use Verizon's loop pre-qualification process (and pay the appropriate fees) and thereafter will have the option of using its own loop pre-qualification system. This is reasonable, as it will give Verizon an opportunity to make whatever changes are necessary to its system.

Issue #8: Packet Switching

Sprint has considerably modified its original request, which was addressed to packet switching at both central offices and remote terminals. Now, as set out in its Final Offer, Sprint is suggesting that packet switching at the remote terminal be addressed in either a separate proceeding or in the on-going Commission workshop, Collaborative to Address the Design and Deployment of Fiber and Next Generation Digital Loop Carrier and Equal Access to Digital Subscriber Lines over Fiber at Docket No. M-00001353, and that Verizon/VADI be required to unbundle packet switching at the central office only, with the parties being given a limited period of time to negotiate terms and conditions. Verizon has refused, based on the following: (1) packet switching does not currently exist as a network element in either Verizon PA or Verizon North's network. VADI (Verizon Advanced Data, Inc.) is the only Verizon entity with the authority to own and operate advanced services equipment (such as packet switches); (2) Sprint has not shown that the FCC's four-part test applicable to the unbundling of packet switching has been met; (3) Sprint has failed to establish its right pursuant to an "impair" analysis, which in any case is inappropriate; and (4) technical problems with Sprint's ION service offering undermine its assertions that it has a present need to access packet switching.

Sprint's compromise proposal, that the issue of packet switching at remote terminals be deferred and that the issue of unbundled packet switching at central offices be the subject of further negotiations between itself and Verizon and/or VADI (its affiliate), should be accepted.

The threshold issue to be addressed concerns the status of VADI. I agree with Sprint that VADI's ownership of the packet switching assets and its status as a separate corporate entity is not determinative for arriving at an interconnection agreement in this case.

First, the Ascent decision[8] cited by both parties makes it clear that Verizon cannot avoid its statutory obligations by relying on VADI's separate corporate status. The Court there stated at 2001 U.S. App. LEXIS 217, *17: ". . . to allow an ILEC to sidestep §251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme" and further, at *18, ". . . the [FCC] may not permit an ILEC to avoid §251(c) obligations as applied to advanced services by setting up a wholly-owned affiliate to offer those services."

This is in accord with the Commission's statement, cited in Sprint's Initial Offer at 29, in the Structural Separations Order entered May 24, 2001 at Docket No. M-00001353, that: "Moreover, as expressed in Ordering Paragraph No. 8, we expect that Verizon shall adhere to its Section 251 obligations notwithstanding the creation of any other affiliates, as those obligations are interpreted by the FCC and the courts." Order on Reconsideration at 23.

Second, VADI is not an ILEC. It is a CLEC (or DLEC) and a reseller. Therefore it has no obligation to negotiate or enter into an interconnection agreement with Sprint or any other CLEC.

To require Sprint to negotiate separately with VADI would result in it being forced to conduct two separate negotiations with Verizon affiliates to achieve "the benefits of competition envisioned under the Act in Verizon's territory." Sprint Initial Offer at 28-29. This clearly is anti-competitive, and hardly what the Commission

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8 Association of Communication Enterprises v. FCC, 235 F.3rd 662 (D.C. Cir. 2001), 2001 U.S. App. LEXIS 217.

intended by ordering the functional separation of Verizon's wholesale and retail operations.

Third, it should be noted that Verizon recently requested that the FCC expedite the sunset of the merger condition giving rise to VADI.[9] Sprint Exhibit 6, Initial Offer. As of the arbitration conference July 11 and 12, 2001, the FCC had not acted upon that request. Tr. 252. Upon approval by the Commission, Verizon could fold VADI back into its ILEC operations. Verizon counsel Conover stated that no decision has been made concerning that. Tr. 251.

Finally, Verizon apparently recognizes its obligation, as its proposed contract language states that "Verizon shall make available to Sprint the Packet Switching Capability network element . . ." Section 1.4(b).

The next issue is what standard should be applied in determining whether central office packet switching should be required to be provided as an unbundled network element. Verizon's position is that the FCC has already concluded (in its 1999 UNE Remand Order[10]) that it need not be provided, unless the four-prong test contained at 47 C.F.R. §51.319(c)(3)(B) is satisfied. It also asserts that even if an "impair" analysis is undertaken, Sprint has failed to establish that it is entitled to packet switching as an unbundled element.

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9 By the terms of the Bell Atlantic/GTE Merger, the FCC's Order provided that the requirement to maintain the affiliate (VADI) would sunset nine months after a final and non-appealable order determining that it is a successor or assign of the ILEC. Both parties agreed this was triggered by the Ascent decision. Tr. 253.

10 In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1966, Third Report and Order and Fourth Further Notice of proposed Rulemaking, 15 C.F.R. 3696 (1999).

Sprint asserts that the four-pronged test applies only to packet switching at remote terminals, and that pursuant to a Rule 51.317 analysis[11] it has shown that it would be materially impaired unless the Commission orders Verizon to unbundle packet switching where it is deployed.

I do agree with Sprint that the FCC's four-pronged test must be read in conjunction with the whole of the UNE Remand Order. The FCC there (at ¶312) expressly recognized that a CLEC has the opportunity to prove to a state Commission that a lack of access to packet switching impairs its ability to offer advanced services.

It is correct that the FCC in its 1999 UNE Remand Order expressly declined to order packet switching unbundled, except in a limited circumstance. While it found that CLECs are not impaired in their ability to serve high-volume customers, it found that they are impaired in their ability to serve small-volume users by reason of the cost and delays associated with collocation. ¶306. However, citing the "nascent nature of the advanced services marketplace," the FCC refused to order "unbundling of the packet switching functionality as a general matter." Id. It went on to explain in more detail at ¶¶316 and 317:

> Despite the encouraging signs of investment in facilities used to provide advanced services described above, we are mindful that regulatory action should not alter the unsuccessful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.

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11 47 C.F.R. §51.317(b)(4).

> Our overriding objective, consistent with the congressional directive in Section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the "Information Age." The advanced services marketplace is a nascent one. Although some investment has occurred to date, much more investment in the future is necessary in order to ensure that all Americans will have access to these services. We remain concerned about the lack of deployment in rural areas. We note that we will carefully monitor the deployment of broadband services to ensure that the objectives of Section 706 and the Act are being met. We decline to unbundle packet switching at this time, except for the limited exception described above.

Obviously, a considerable amount of time (especially in the context of advanced services) has elapsed since the FCC's decision. In fact, the FCC has reopened its examination of the packet-switching issue (including remote packet switching).[12] As there is no indication when, if ever, the FCC will issue its findings, it is not possible in this arbitration to defer to that agency.

The FCC refused to direct that packet switching be unbundled because it did not wish to "stifle competition." The question here is whether this continued refusal will actually work to stifle competition by requiring CLECs to collocate in every central office where they wish to offer advanced services.

Sprint has established that it is indeed impaired as found by the FCC, due to the costs and delay of collocation. Its uncontroverted testimony was that although it was collocating in almost a hundred central offices in order to provide its ION service, there are markets (such as portions of Philadelphia and Pittsburgh, as well as Scranton and Harrisburg) which lack the density to make collocation economically justified. Tr. 273-

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12 Sprint filed comments in January or February 2001. Tr. 355.

75. Obviously, then, residents in those areas will not be able to avail themselves of the innovative advanced services proposed by Sprint. It would be ironic if residents of Pennsylvania – a state which has been nationally recognized as being in the forefront of utility deregulation – would be unable to enjoy the benefits of competition.

I do have some questions how unbundling would be implemented, however. There is no question that Verizon – through assets owned by VADI – does have packet switching functionality at its central offices, as do other CLECs who have collocated DSLAMs in central offices. My understanding is that at the present time, there are no multihosting or shared DSLAMs available, so that Verizon, to provide unbundled packet switching to accommodate Sprint, would have to dedicate a DSLAM to Sprint. If this is the case, then it may well be that unbundling is premature and should not be required at this time.

This, however, was not addressed by Verizon, presumably because of its insistence that it does not own, operate or control packet switching functionality or equipment at its central offices. As a result, the record is devoid of any testimony that there would be difficulty in implementing an ICA which contains the language proposed by Sprint. While I am concerned that the unbundling may not be as simple as it appears, I will take Sprint at its word that it is not requiring Verizon (or VADI) to purchase or deploy new facilities. As stated by Sprint in its Final Offer at 24-25 (footnotes omitted): "To again make clear, Sprint is not seeking that Verizon/VADI deploy new facilities. Sprint does not deny that packet switching (i.e., PARTS) has not been deployed at Verizon's remote terminals. Relative to the central offices, however, the record demonstrates that DSLAM functionality exists today and is presently being employed for the provisioning of advanced services from Verizon's own central offices. We are requesting that Verizon be required to allow Sprint to use the "full features, functionalities and capabilities of that equipment."

I must restate my disappointment that the parties were unable to resolve this issue. For example, Verizon could have agreed that it would provide packet switching functionality at certain identified, limited central offices pursuant to a mutually acceptable schedule, instead of refusing to make any accommodation to Sprint while reserving its legal position.

In conclusion, I am recommending that the Commission adopt Sprint's proposal concerning packet switching at the central offices, and declare that Verizon is required to provide central office packet switching functionality. The parties' positions actually are in agreement after this point – that if the Commission determines that packet switching is a UNE, then the parties agree to negotiate in good faith the rates, terms and conditions (Verizon Final Offer, proposed Part II, Section 1.4(b)). Therefore, I further recommend that a 45-day period be provided for the parties to meet and discuss the technical and operational details of accomplishing unbundling, as well as the rates, terms and conditions. If they are unable to do so, then they can jointly petition the Commission (using the Abbreviated Dispute Resolution Process) for resolution of any outstanding issues. In addition, I recommend that Sprint file a petition with the Commission requesting that the issue of packet switching at remote terminals be addressed either in the pending proceeding at Docket No. M-00001353 or in a separate proceeding (either a collaborative or an investigation).

Issue #12: Definition of Local Traffic

This issue involves the definition of local traffic and telecommunications traffic for purposes of reciprocal compensation. It arose as the result of the ISP Remand Order issued by the FCC on April 27, 2001 and the regulations adopted at 47 C.F.R.

51.701.[13] Both parties agree that the definition of "telecommunications traffic" (which replaces the term "local traffic") should reflect the definition contained in the regulation. Both, however, go beyond this and include other terms, which are not defined.

Sprint's proposal contains a definition of the term "local traffic" which is nowhere defined in the Telecommunications Act or any FCC regulation. Verizon's proposal contains and defines the term "reciprocal compensation traffic," also a term which does not appear in the Act or any regulation. What Rule 701 does is define the terms "telecommunications traffic," "transport," "termination" and "reciprocal compensation arrangement."

It is important not to take the ISP Remand Order (and the regulation which arose from it) out of context. The FCC there was not addressing the issue of defining local traffic generally for reciprocal compensation purposes. Instead, it was reconsidering the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs) only. In fact, it specifically mentioned that it was opening a separate proceeding to examine intercarrier compensation schemes generally.[14]

In order to be consistent with my recommended resolution of Issues 16 and 17, infra, Sprint's proposal should be adopted.

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13 In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1966, Inter-carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Docket Nos. 96-99-68m §34 (ISP Remand Order).

14 Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001) .

Issue #13: Reciprocal Compensation

This issue was withdrawn by Sprint as the result of the FCC's ISP Remand Order.

Issue #14: Geographically Relevant Interconnection Points (GRIP)

This issue involves the terms and conditions governing Sprint's points of interconnection to Verizon's network. Verizon's final offer is the same as its initial offer: that its Virtual GRIP (VGRIP) plan be adopted. Sprint has rejected this because: (1) given that Sprint has existing network points close to, but not at, many of Verizon's tandems, Sprint would still incur transportation costs associated with taking traffic to and from the tandem building or Verizon tandem wire center; and (2) it would permit Verizon to dictate where Sprint can and should deploy facilities and provide service. Sprint also recited its belief that any GRIP plan is unlawful.

Sprint's final offer is a marked compromise from its initial offer. It suggests that the ICA include a provision (Sprint Final Offer Exhibit 16) recently included in a settlement entered into by Sprint and Bell South which encompasses nine states in the Bell South territory. The effect is to grandfather the existing Verizon/Sprint interconnection locations, but to require that any new Sprint facilities must be established within five miles of Verizon's switching center, either tandem or end office switch. In addition, Sprint is required to establish additional interconnection locations if traffic is greater than 8.9 million minutes a months and greater than 20 miles and not in a local calling area.

This proposal is manifestly reasonable and should be accepted. First, it addresses the situation where a CLEC may wish to locate its point of interconnection far from Verizon's switch. In that case, this ICA term would not be available.

Second, it reasonably balances the two valid concerns: First, Section 252(c)(2) of the Telecommunications Act unambiguously requires that an ILEC must allow a CLEC to interconnect at any technically feasible point. 47 U.S.C. §252(c)(2), 47 C.F.R. §51.305. On the other hand, the FCC has stated in the Local Competition Order at ¶199 that a CLEC that chooses a technically feasible but expensive interconnection location must bear the costs of that interconnection, pursuant to §252(d)(1).

This proposal reasonably balances those concerns and therefore should be accepted.

Issues #16 and #17: Charges for Local Calls, Local Call Over Access Trunks

These are interrelated issues (also involving, to some extent, Issues #12 and #28[15]) relating to the charges associated with traffic Sprint feels should be treated as local although carried over Verizon's access facilities, where the originating and terminating points are located within the same local calling area. Sprint wants to use its existing access toll switching and trunking facilities to route multi-jurisdictional traffic, including local traffic within the same local calling area. Specifically, it wants to offer 00-minus service which allows a Sprint subscriber to make voice activated telephone calls.

Verizon's position is that unless the originating and terminating networks are different, then access charges apply. It claims that this "network architecture" analysis (in contrast to the end-to-end analysis proposed by Sprint) is required by 47 C.F.R. §51.701(e), that two state commissions have rejected Sprint's argument, and that

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15 Issue #12 addresses the definition of local traffic. Issue #28 involves Sprint's collocation obligations, if any. Sprint has suggested that if Verizon agrees to Issues 16 and 17, it will agree to Issue #28.

treating these calls as "reciprocal compensation traffic would inflict deep financial wounds upon Verizon." Verizon Final Offer at 71.

Sprint's position clearly should be adopted. First, Sprint has agreements with every other RBOC (Qwest, SBS and Bell South) to deploy wireline 00-minus calling. This means that every telephone customer in the country – except those who are Verizon customers – has the opportunity to enjoy this service.[16] Since the Verizon footprint consists of 40% of the nationwide access lines, Sprint cannot roll out or market this service on either a statewide or national basis. As pointed out by Sprint at 53 of its Final Offer (emphasis in original): "This is an innovative, competitive product offering that could be immediately rolled out ubiquitously to both rural and urban areas in Pennsylvania. Clearly the benefits of bringing choice to telephone consumers in Pennsylvania far outweigh Verizon's stance that any and all 00-minus initiated calls are automatically access chargeable and not subject to reciprocal compensation because 00-minus calls use trunks that Verizon claims Sprint also uses for access."

Second, Verizon's reliance on §51.701(e) is greatly misplaced. First, it arose from an FCC Order (the ISP Remand Order) addressed entirely to the issue of the appropriate rate structure to be used in providing service to ISPs. It made no determination that an end-to-end analysis for the purposes of determining reciprocal compensation traffic is in any way inappropriate. In fact, as explained by Sprint in its Final Offer at 51-52, there are local calls today that are originated on Verizon's network, traverse another carrier's network and ultimately terminate back on Verizon's network that are not access-chargeable. Second, the ISP Remand Order has itself been appealed. Third, while §51.701(e) does define "reciprocal compensation," it does not say that only traffic that originates and terminates on different carrier networks is subject to reciprocal compensation, but rather that such traffic is subject to reciprocal compensation.

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16 Verizon does not offer voice activated or initiated calling to its wireline customers.

End-to-end analysis has been accepted by the FCC, as explained by Sprint and in fact endorsed by Verizon in comments it filed in ISP Remand proceeding (Sprint Final Offer Exhibit 15). It makes sense to use it here, because to the subscriber, this is a local, not toll, call. I can't imagine many people would be willing to pay toll rates for a call that originates and terminates in their local calling area, regardless of what trunk the call was carried over.

With respect to Verizon's fear of "deep financial wounds," it should be noted that Sprint does not seek to charge all 00-minus calls as local, as some of those calls may in fact be interstate. It has offered to pay the appropriate rates for the various types of traffic. As explained in Sprint's Offer at 61:

> From a technical standpoint, the only remaining issue is how to determine if the 00- call is a local call or an access chargeable call. Where measurement capabilities do not exist, billing issues should be resolved through the application of Percent Local Usage (PLU) factors provided by the competitor to the ILEC. This precedent has existed for many years in the routine use of such factors in access charge billing and the same audit and verification processes should be established to ensure the integrity of the billing process. Sprint is currently developing the capability to accurately measure and report all local traffic for this type call. Further, Sprint has offered an additional option for billing this traffic that requires absolutely no impact on Verizon's billing systems. Sprint is agreeable to initially receiving charges, subject to true-up, for these local calls since Verizon billing programs may not have the current capability to utilize PLU factors. Credits for local calls billed at access rates would be provided one month in arrears.

Finally, Sprint is also willing to offer language in the Interconnection Agreement to the effect that if unable to correctly identify the traffic, Sprint will pay

access for the traffic. In addition, Sprint will give full audit rights to Verizon if it seeks to validate Sprint PLU factors as a reasonable safeguard.

In conclusion, acceptance of Verizon's position means that customers in Pennsylvania and the rest of the Verizon footprint would be denied the benefit of new, innovative service offerings. Sprint's proposals are reasonable and should be adopted.

Issues #18 and #19: MAN Commingling and Multiplexing

Issue #18 is Sprint's request to transmit UNE and access traffic over the same facilities. Issue #19 is Sprint's request that Verizon provide UNE multiplexing to Sprint. Sprint has offered to withdraw Issue #19 if the Commission adopts its position on Issue #18.

Verizon has refused, claiming with respect to Issue #18 that: (1) it has no duty to provide commingling since the 8th circuit has ruled that ILECs do not have to provide combinations that do not already exist[17]; (2) Sprint's proposal violates the prohibition against commingling established by the FCC (in its Supplemental Order Clarification[18]) and the Commission (in both the Global Order and the UNE Order[19]); and (3) Sprint's proposal violates §251(g) of the Telecommunications Act and "subverts the

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17 Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000).

18 In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1966, Supplemental Order Clarification, CC Docket No. 98-96, FCC 00-183, June 2, 2000).

19 Joint Petition of Nextlink Pennsylvania, et al. for Adoption of Partial Settlement, Docket Nos. P-00991648 and P-00991649, Commission Opinion and Order entered August 26, 1999; Further Pricing of Verizon Pennsylvania, Inc.'s Unbundled Network Elements, Docket No. R-00005261, Interim Opinion and Order, May 24, 2001.

goals of access reform" as provided in the CALLS Plan adopted by the FCC and to which Sprint is a signatory. Verizon's argument on Issue #19 is that (1) Sprint hasn't met the "local use restriction" set forth in the FCC's Supplemental Order Clarification and adopted by the Commission; (2) it has no legal obligation to provide stand-alone multiplexing, although it is already voluntarily provided on a limited basis (DS3 to DS1 and DS1 to DS0); and (3) to provide Optical Carrier multiplexing, Verizon would have to install new equipment that does not now exist in Verizon's central offices.

Sprint has explained in its Final Offer at 3, footnote 2, that "The ability to employ engineering economic efficiencies enable carriers to compete effectively and to provide the best, lowest cost to consumers. Conversely, the lack of engineering economic efficiencies is the equivalent to a competitive death sentence. Therefore, every carrier attempts to achieve and maintain engineering economic efficiencies." It further explained in its Final offer at 59: "A Metropolitan Area Network (MAN) seeks to utilize fiber rings around various metropolitan areas/networks and to combine various types of traffic (specifically, access traffic, local traffic, transport traffic and wireless traffic) moved on that network by Sprint."

Sprint pointed out (Final Offer at 60) that it is not seeking to ". . . commingle special access services associated with Enhanced Extended Loops (EELs) because Sprint does not seek to also combine a loop connection for transport of traffic. Sprint is not asking Verizon to convert exiting special access circuits to UNE loop/transport combinations." Id. at 60.

With respect to the specific concerns raised by Verizon, Sprint has responded that the FCC order addresses EELs, which are not involved in this issue, that it is not trying to arbitrage access charges, that transmission facilities are clearly a UNE and therefore Verizon cannot impose restrictions on Sprint's use of it, and that other RBOCs (SBS and Qwest) have permitted it.

After extended consideration of this issue, I recommend that Sprint's proposal with respect to Issue #18 be adopted for the reasons set out below. Therefore, it is unnecessary to address Issue #19.

First, it is clear that the FCC's Supplemental Order Clarification is not relevant here. The commingling prohibited by the FCC there was special access and UNE traffic -- here it is switched access and UNE traffic. Verizon's own witness Fox[20] agreed that EELS were not an issue here. See, Tr. 103, where she explained: "And the FCC clearly holds out that switched access from special access service. Yes, it's true that the June second supplemental order clarifies, deals with special access and specifically prohibits commingling of EELs with tariff services. It does not specifically address switched access because I think switched access is being held out on the side, it's subject to access reform."[21]

Verizon's position that Sprint's proposal should be rejected because of the on-going access charge reform (the CALLS program) must itself be rejected. Otherwise, CLECs such as Sprint will be unable to fully utilize their facilities in an economically efficient fashion. Verizon's approach is clear – it will wait for a FCC order to "force" it to address Sprint's request. "To the extent that the FCC rules change and as a matter of policy that we are forced to allow commingling, then we will follow all of the rules and regulations that we need to. Until then it's our position that commingling should be prohibited." Tr. 108.

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20 Susan Fox is employed by Verizon as Product Manager, for Loop Transport, EELs, Unbundled (sic).

21 I would like to make clear that I am not relying on Ms. Fox for an opinion as to legal relevance. She is an expert in the type of actual facilities at issue here, and her testimony should be understood in that aspect.

Sprint is seeking to use its facilities so as to produce economic engineering efficiencies. As Sprint witness Nelson explained at 108: "I am forced to have one set of trunks that are access, and multiplexing equipment associated with that, and then I am forced to have a separate overlay network that is just UNE transport. What we're essentially trying to do is get one pipe, get the UNE services and access services on the same pipe efficiently."

Sprint should be permitted to do so.

Issue #20: Collocation Space Reservation

It is somewhat unusual that this issue has not been resolved, as both parties recognize that the Commission addressed the issue of collocation space reservation in the proceeding at Rhythm Links v. Verizon Pennsylvania, Inc., Docket No. R-00994697, Opinion and Order entered June 8, 2001.

However, Sprint is absolutely correct that the tariff filing which purported to be the compliance filing in response to the Commission's Opinion and Order is completely silent with respect to the Commission's determination as to space reservation.

Since Verizon obviously has no hesitation in ignoring a clear Commission directive, it is clear that the Commission's decision concerning the space reservation policy needs to be articulated in this Interconnection Agreement.

It should be noted, however, that while the Commission did direct Verizon to adopt a two-year reservation period, it also recognized that Verizon may petition the

Commission to "extend the time period beyond two years in situations where it can make an adequate demonstration that additional time is necessary."[22] Opinion and Order at 90.

Therefore, the Sprint proposal should be adopted.

Issue #21: Reallocation of Facilities

This issue involves the changeover of Sprint DSO (voice grade) connections to line-sharing. Sprint's position is that no additional cabling is necessary, that restencilling is adequate and that a minor augment charge of $200, as is the case with other RBOCs, is sufficient.

Verizon's position is that it not possible to reuse the cable, as shown by the experience developed in a New York collaborative. It modified its original position that a fee of $2,050 is required to now permit vendors supplied by Sprint (approved by Verizon) to do the work, along with payment of a fee to Verizon of $550.

Verizon's position is reasonable and should be adopted. It convincingly established that the possibility of reusing the cable was examined in the New York Collaborative and found to be not workable. Permitting Sprint to have the work done by its own vendors puts Sprint in a position to control costs.

There is no support in the record for the fee of $550, which Verizon explains was selected because it is the "lowest current engineering and implementation fee for any collocation arrangement." However, it appears to be reasonable, until an appropriate cost study is provided.

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22 It cautioned Verizon to "exercise reasonableness" in seeking this relief.

Issue #22: Timing of Transport Availability

Sprint explained that currently it is not able to order DSLAM transportation at the same time it orders a collocation arrangement. The result is that the arrangement is completed months before the transportation is available. It notes that both SBC and Qwest (as well as Sprint itself in its ILEC capacity) permit the parallel provisioning of DSLAM transport and collocation cage construction, and requests that Verizon be directed to provide it on or before December 31, 2001. It rejected Verizon's offer to undertake a trial as Verizon was unwilling to make a firm commitment for implementation.

Verizon admitted that parallel provision has not been permitted. Verizon's original position was to wait until completion of the Cavalier trial (which it asserts involves both dark fiber and collocation provisioning). As the result of discussion at the arbitration conference, Verizon in its Final Offer agreed to conduct a test of parallel provisioning within 90 days. At the end of 90 days, Verizon will inform Sprint whether parallel provisioning of collocation and DS-3 transport is possible.

After submission of the respective final offers, Verizon modified its proposal. It now is offering to conduct a trial (no dates are given), and the suggested contract language (Part III, Section 2.6) provides that the parties "will make commercially reasonable efforts to establish such processes by June 30, 2002. In the event either party encounters circumstances that will prevent it from implementing such processes by June 30, 2002, that party will advise the other party of this prior to June 30, 2002 and the parties will agree upon a new commercially reasonable date for implementing the processes."

Sprint has had no opportunity to respond to this latest offer. I indicated that, given the lateness of the submission and the forma in which Verizon's new proposals were submitted, I would not consider them

I am considering this one, however, because the use of a trial was discussed extensively at the arbitration conference held on July 12, 2001. While I agree with the concept of a properly conducted trial (and Sprint did, as well), Verizon's proposed language is still too indefinite. There is no date by which the trial is to start or conclude, only a date for implementation – basically a year from now – that the parties will "make commercially reasonable efforts" to achieve. I recognize that this addresses Sprint's concern that the prior proposal was open-ended – there was a time period for the trial, but not for implementation. Sprint's witnesses indicated that they needed some firm commitment on Verizon's part (which Verizon refused to provide) as to when the parallel ordering and provisioning will be available.

This language leaves open the very real possibility that Verizon will not even undertake this trial until next spring or summer, and then claim that the anticipated process will not be implemented by June 30, 2002.

To expect to have transport available 15 days after completion of the collocation arrangement is hardly unreasonable. Recognizing that Verizon has refused to provide this previously, it also is reasonable to allow it an appropriate time to ensure that it can be implemented successfully. Obviously, this benefits Sprint as well. The time Verizon has given itself for anticipated implementation is clearly excessive. It is not even a firm commitment, and there are no penalties for failure to achieve implementation by any date, whether June 30, 2002 or some other time.

Requiring implementation by December 31, 2001 (or a reasonable delay, if agreed to by Sprint) is reasonable. Therefore Sprint's proposed language should be

accepted. Despite this recommendation, I urge the parties to continue to discuss this item, as it is the interests of both parties that implementation go smoothly.

Issue #28: Collocation Obligations

This issue involves Verizon's request to collocation its facilities in Sprint's switch centers. Although it has no legal obligation to do so, Sprint has agreed provided Issues #16 and #17 are decided in its favor.

As I have adopted Sprint's position on Issues #16 and #17, its proposed language allowing such collocation should be adopted.

III. RECOMMENDED ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That in regard to the unresolved issues between Sprint Communications Company, L.P., Verizon Pennsylvania, Inc. and Verizon North, Inc., the proposed language of each party for inclusion in the proposed interconnection agreements is either approved, modified or rejected consistent with this order.

2. That within 30 days after entry of the Commission's Order in this proceeding, Sprint Communications Company, L.P., Verizon Pennsylvania, Inc. and Verizon North, Inc. shall file with the Commission for approval interconnection agreements consistent with this order.

3. That the following exhibits are admitted into the record: Verizon Exhibit 1 (Robinson statement); Verizon Exhibit 2 (January 29, 2001 letter); Sprint Final Offer and Exhibits 11-17; Verizon Final Offer; Joint Stipulation; and Verizon Latest Proposals.

4. That upon the filing of the interconnection agreements, and their approval by the Commission, this proceeding be marked closed.

Date: August 8, 2001

MARLANE R. CHESTNUT
Administrative Law Judge