

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Application by Verizon New Jersey)
Inc., Bell Atlantic Communications,)
Inc. (d/b/a Verizon Long Distance),)
NYNEX Long Distance Company) CC Docket No. 01-347
(d/b/a Verizon Enterprise Solutions),)
Verizon Global Networks Inc., and)
Verizon Select Services Inc., for)
Authorization to Provide In-Region,)
InterLATA Services in New Jersey)

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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New Jersey BPU Section 271 Approval Press Release	New Jersey Board of Public Utilities, <i>Board OKs Verizon Request to Enter Long-Distance Market</i> , Press Release #02-02 (Jan. 9, 2002), available at < http://www.bpu.state.nj.us/wwwroot/communication/02-02.pdf >.
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EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Introduction and Summary

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996¹ (“the 1996 Act”), submits this evaluation of the application filed by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., on December 20, 2001, to provide in-region, interLATA services in New Jersey.

This application to the Federal Communications Commission (“FCC” or “Commission”) is Verizon’s first for the state of New Jersey, and follows its successful applications for long

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

distance entry in Pennsylvania, Connecticut, Massachusetts, and New York.² Verizon also has filed an application for Section 271 authority in Rhode Island, which the Department recommended that the FCC approve, as well as an application for such authority in Vermont, which the Department is now evaluating.³ The record in this matter suggests that Verizon has succeeded in opening its local markets in New Jersey to competition in most respects. Subject to the Commission satisfying itself as to the pricing issues discussed below, the Department recommends approval of Verizon's application for Section 271 authority in New Jersey.

I. New Jersey Board of Public Utilities Review

For the most part, conditions in the New Jersey local telecommunications markets appear favorable to fostering competition. The New Jersey Board of Public Utilities ("BPU") has facilitated the development of these conditions by establishing carrier-to-carrier wholesale performance measurements, which incorporate regional improvements from New York and Pennsylvania⁴; conducting extended pricing proceedings that resulted in the establishment of

² See *FCC Pennsylvania Order*; *FCC Connecticut Order*; *FCC Massachusetts Order*; *FCC New York Order*.

³ See DOJ Rhode Island Evaluation at 6-7 ("Evidence available to the Department indicates that Verizon has generally succeeded in opening its local markets in Rhode Island to competition. Subject to the Commission satisfying itself as to the pricing issues mentioned above, the Department recommends approval of Verizon's application for Section 271 authority in Rhode Island."). The FCC is due to issue an order addressing Verizon's Rhode Island application on February 24, 2002.

The Department's Evaluation of Verizon's application for long distance entry in Vermont is due to be filed on February 21, 2002, and the FCC is due to issue an order addressing that application on April 17, 2002.

⁴ New Jersey BPU Consultative Report at 1-2, 4; New Jersey BPU Revised C2C Guidelines Order at 3-4, 7-9 ("incorporat[ing] revisions to the existing metrics to measure VNJ's provision of 2 Wire xDSL loops and 2 Wire xDSL line sharing . . . encompass[ing] agreements that were reached by all parties to the New York Carrier-to-Carrier Working Group"); *KPMG Final Report* at 356 ("The NJ BPU adopted the New Jersey Carrier-to-Carrier Guidelines on May 25, 2000, consisting of 207 metrics, incorporating metrics from Pennsylvania and New York.").

wholesale rates, including recently revised recurring and non-recurring charges for unbundled network elements (“UNEs”)⁵; and adopting a Performance Incentive Plan intended to ensure that an appropriate level of wholesale performance is maintained once Verizon’s Section 271 application is approved.⁶ The New Jersey BPU’s review of Verizon’s state Section 271 filing included a comprehensive, independent third-party test by KPMG Consulting “of the readiness of Verizon NJ’s OSS [operations support systems], interfaces, documentation, and processes to support local market entry.”⁷ Verizon achieved a perfect score on the test, which evaluated more than 500 aspects of its systems.⁸ On January 9, the New Jersey BPU voted to recommend that the FCC approve Verizon’s state Section 271 application.⁹

II. The Department’s Evaluation

In assessing whether the local markets in a state are fully and irreversibly open to competition, the Department looks first to the actual entry in a market.¹⁰ But the Department

⁵ See generally New Jersey BPU Summary UNE Pricing Order.

⁶ See New Jersey BPU Incentive Plan Order; New Jersey BPU Consultative Report at 2, 76-77. Cf. DOJ Pennsylvania Evaluation at 14-17 (stating concerns regarding structure of the Pennsylvania Performance Assurance Plan).

⁷ KPMG Final Report at 15.

⁸ *Id.* at 22 (“Initially there were issues on a number of test points; however[,] prior to test completion all issues were resolved by Verizon NJ. Therefore, all 536 test points were 100% satisfied.”).

⁹ New Jersey BPU Section 271 Approval Press Release at 1-2.

¹⁰ See DOJ Pennsylvania Evaluation at 3-4 (“The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry. Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state.” (footnote omitted)). Verizon argues that the level of actual local competition in New Jersey, particularly in the residential market, is “legally irrelevant.” Verizon Br. at 80. The recent remand of the *FCC Kansas/Oklahoma Order* suggests otherwise. *Sprint Communications Co. v. FCC*, 274 F.3d 549, 555, 561-62 (D.C. Cir. 2001) (upholding FCC’s Track A analysis and noting that the 1996 Act is “aim[ed] directly at stimulating competition,” such that an

does not broadly presume that all three entry tracks -- facilities-based, unbundled network elements, and resale -- may be open on the basis of an aggregate level of entry alone.¹¹

Together, Verizon and CLECs serve a total of approximately 7.2 million lines in Verizon's New Jersey service area.¹² Of the total lines in Verizon's service area, 40 percent, or approximately 2.9 million, serve businesses, and 60 percent, or approximately 4.3 million, serve residential customers.¹³ For business and residential customers combined, on the basis of data provided by Verizon, CLECs using all modes of entry serve approximately 564,000, lines, or nearly 7.8 percent, of all lines in Verizon's service area.¹⁴

Competitors have made progress in penetrating the business market in New Jersey. CLECs serve approximately 17.4 percent of all business lines in Verizon's service area in the state.¹⁵ CLECs serve approximately 12.4 percent of all business lines using primarily their own

analysis of the actual competitive landscape is relevant, if not determinative). Although the Department recognizes that a market can be open to competition even if no firm attempts to enter, it views actual entry as one type of evidence relevant to the issue of whether a BOC has opened its local markets to competition. *See* DOJ Massachusetts I Evaluation at 4 ("Small market shares held by competitors or even the absence of entry, *standing alone*, are neither conclusive evidence that a market remains closed to competition nor a basis for denying an application under section 271." (footnote omitted) (emphasis added)).

¹¹ *See, e.g.*, DOJ Georgia/Louisiana Evaluation at 7 ("Although the Department presumes that fully facilities-based competition is not hindered in a competitively significant manner based on the entry recorded in Georgia, the amount of entry does not justify extending such a presumption to other modes of entry in Georgia."); DOJ Missouri I Evaluation at 6-7 ("The Department presumes that opportunities to serve business customers by fully facilities-based carriers and resellers are available in Missouri, based on the entry efforts reflected in SBC's application. There is significantly less competition to serve residential customers. There also is less competition by firms seeking to use UNEs, including the UNE-platform, and there are some indications that a failure by SBC to satisfy all of its obligations may have constrained this type of competition." (footnotes omitted)).

¹² *See* Verizon Line Counts *Ex Parte* at 1; Verizon Taylor Decl. Attach. 1 at 3 tbl.1. These totals do not include lines served by the other incumbent local exchange carriers in New Jersey, Sprint and Warwick Valley Telephone Company.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.* (CLECs serve approximately 507,000 business lines).

fiber optic networks that are either connected directly to the customer premises or connected through loops leased from Verizon.¹⁶ CLECs resell Verizon's services to serve approximately 4.3 percent of all business lines and use the UNE-platform (a combination of loop, switch, and transport elements) to serve less than one-tenth of one percent of such lines.¹⁷

By contrast, CLECs serve approximately 1.3 percent of all residential lines in Verizon's New Jersey service area.¹⁸ Virtually all CLEC residential service is provided via resale.¹⁹ CLECs provide less than one-tenth of one percent of all residential lines using the UNE-platform and even fewer such lines with facilities-based service.²⁰

The amount of entry by facilities-based carriers and resellers in business markets in New Jersey and the absence of complaints regarding these modes of entry lead the Department to conclude that in New Jersey, opportunities to serve business customers by fully facilities-based carriers and resellers are available. Although there is significantly less competition to serve residential customers by means of facilities and the UNE-platform, the Department does not believe there are any material non-price obstacles to competition in New Jersey.²¹ As noted,

¹⁶ *See id.* (CLECs serve approximately 360,000 business lines using at least some of their own facilities).

¹⁷ *See id.* (CLECs serve approximately 126,000 business lines via resale and approximately 21,000 such lines through the UNE-platform).

¹⁸ *See id.* (CLECs serve approximately 57,000 residential lines).

¹⁹ *See Verizon Taylor Decl. Attach. 1 at 3 tbl.1* (CLECs serve approximately 56,000 residential lines via resale).

²⁰ *See Verizon Line Counts Ex Parte at 1; Verizon Taylor Decl. Attach. 1 at 3 tbl.1* (CLECs serve approximately 800 residential lines through the UNE-platform).

²¹ The Department's Evaluation of Verizon's Section 271 application for Pennsylvania questioned whether Verizon produced an electronic wholesale bill that was accurate and auditable. DOJ Pennsylvania Evaluation at 11. The problems observed in Pennsylvania may also be present in New Jersey because Verizon uses the same billing system there. *See Verizon McLean/Wierzbicki/Webster Decl. ¶ 108.* In New Jersey, Verizon relies on the same manual adjustment process relied on in Pennsylvania to produce electronic bills that match the

Verizon has submitted evidence to show that thorough, independent testing of virtually all aspects of its OSS in New Jersey demonstrated them to be highly satisfactory.²² Moreover, there have been few complaints regarding Verizon's New Jersey OSS.

The low levels of CLEC penetration of residential markets in New Jersey and, in particular, the lack of entry by means of CLECs' own facilities and by means of the UNE-platform, may reflect the higher UNE pricing that was in effect for most of the period preceding this application as opposed to the UNE prices on which the application is based.²³ The New Jersey BPU issued a summary order significantly reducing UNE rates three days before Verizon filed this application.²⁴ However, the New Jersey BPU has not yet issued a final order "fully

paper bills. *Id.* ¶¶ 113-15; *see* New Jersey BPU Consultative Report at 40-41 (finding wholesale billing to be nondiscriminatory, but conditioning approval on Verizon's commitment to continue manual adjustment until it can produce accurate electronic bills). Verizon relies on KPMG's testing to substantiate that it provides nondiscriminatory OSS, but KPMG tested the accuracy of its paper bills only. Verizon McLean/Wierzbicki/Webster Decl. ¶ 113; *KPMG Final Report* at 343, 347-52. However, Verizon engaged PricewaterhouseCoopers ("PwC") to test its assertion that the electronic bill modified by manual adjustment matches the paper bill, and PwC concluded that Verizon's assertions were fairly stated. Verizon McLean/Wierzbicki/Webster Decl. ¶¶ 115-16.

Few New Jersey CLECs have indicated that problems with Verizon's wholesale billing system have led to significant competitive harm. *See* AT&T Kirchberger/Nurse/Kamal Decl. ¶¶ 108-11 (noting potential competitive harm due to inaccurate wholesale billing without asserting AT&T has suffered such harm); *see also* New Jersey BPU Consultative Report at 39-40 (summarizing CLEC claims about billing); *cf.* Verizon McLean/Wierzbicki/Webster Decl. ¶¶ 121-24 (claiming investigation of CLEC billing complaints revealed few inaccuracies). But given the level of competitive entry in New Jersey, it is difficult to assess whether Verizon's electronic wholesale billing system is working properly. The *FCC Pennsylvania Order* states the Commission's intent "to monitor Verizon's post-approval compliance" with respect to "non-discriminatory access to its wholesale billing functions." *FCC Pennsylvania Order* ¶ 42. Given the relative lack of commercial usage of Verizon's OSS systems in New Jersey, the Department believes such monitoring may also be appropriate in New Jersey.

²² *See supra* note 8.

²³ Verizon asserts that the low level of CLEC penetration of residential markets in New Jersey is due to the particularly low retail rates for residential service in New Jersey. Verizon Br. at 82. Commenters argue that the per-line revenue opportunity in New Jersey is actually comparable to that in other states, despite the low retail rates for local residential service. *See, e.g.,* WorldCom Huffman Decl. ¶ 15.

²⁴ New Jersey BPU Summary UNE Pricing Order; *see* New Jersey BPU Pricing Order Press Release at 1-2 (New Jersey BPU reduced UNE rates an average of approximately 40 percent statewide to "effectively 'jumpstart' local competition in the state"); New Jersey BPU Consultative Report at 2 ("[T]he Board reduced the rates of the components of the UNE-Platform by over 40%, answering the complaints from CLECs that New Jersey

setting forth the Board's analysis of the issues, the positions of the parties, and the reasoning underlying the Board's determinations."²⁵ Verizon has committed to implementing the new rates by January 20, 2002 with an effective date retroactive to December 17, 2001, the date of the Summary Order, but Verizon has not addressed the possibility of appeal.²⁶ Although the reduced recurring rates appear to be generally within the broad range of TELRIC previously described by the FCC,²⁷ the non-recurring charges ("NRCs") for "hot cuts"²⁸ seem to have been increased so that they are now significantly higher in New Jersey than in New York or Pennsylvania.²⁹ No

UNE rates were a bar to entry into the State."). *But see infra* note 31 (facilities-based CLECs claiming new non-recurring charges may inhibit their ability to compete).

²⁵ New Jersey BPU Summary UNE Pricing Order at 2; *see also* New Jersey CTA Comments at 5-9 (noting that motions for reconsideration or appeal cannot be filed until a formal Final Order is issued); WorldCom Comments at 4 (same).

²⁶ Verizon UNE Pricing Letter at 1-2. The New Jersey BPU appears to have conditioned its approval of Verizon's application on a commitment *not* to appeal the rates. New Jersey BPU Section 271 Approval Tr. at 62 ("[T]he rates are in place, but the rates still could be challenged and we have said that we are conditioning our approval based on the continuation and effect of those rates."); *see also* New Jersey BPU Section 271 Compliance Letter at 1 ("[A] Verizon challenge of the validity or effective date of the rates or any attempt to increase or otherwise change these rates, will call into question whether modified rates would be TELRIC compliant, and, therefore, also call into question the Board's finding of compliance with Checklist Item 2."); New Jersey BPU Consultative Report at 24 (same).

²⁷ Verizon Garzillo/Prosini Decl. ¶¶ 40-45 (comparing New Jersey's new UNE rates to those in New York and Massachusetts when Verizon's applications for Section 271 authority for those states were granted). *But see FCC Massachusetts Order* ¶¶ 29-30 ("If the New York Commission adopts modified UNE rates, future section 271 applicants could no longer demonstrate TELRIC compliance by showing that their rates in the applicant states are equivalent to or based on the current New York rates, which will have been superseded" and modified New York rates could also "undermine Verizon's reliance on those rates in Massachusetts."). On January 23, 2002, the New York PSC "voted to approve significant reductions in the prices" for UNEs. New York PSC UNE Pricing Press Release at 1.

²⁸ "Hot cuts" involve physically disconnecting the customer's existing in-service loop from the incumbent's switch and reconnecting the loop to the CLEC's switch.

²⁹ AT&T Comments at 11-12 (claiming hot cut NRC raised by Summary Order); AT&T Sczepanski Decl. ¶ 7 tbls.1 & 2 (comparing hot-cut NRC charges in New Jersey - \$159.76, Pennsylvania - \$4.07, Maryland - \$16.22, Virginia - \$13.49, and Delaware - \$22.52); Conversent Comments at 3 (claiming hot-cut NRC raised by Summary Order); XO Comments at 18-19 (New Jersey non-recurring charge ("NRC") for a hot cut that does not require a premises visit is \$159.76; the comparable NRCs in New York and Pennsylvania are \$29.75 and \$70.94, respectively.). It is unclear whether the forthcoming New York PSC pricing decision, *see supra* note 27, order will affect the New York hot-cut NRCs.

justification for this difference is presented in the current record.³⁰ Several facilities-based CLECs have asserted that the new hot-cut NRCs will inhibit their ability to compete in the local telecommunications market.³¹ As it has stated previously, the Department will “rely upon the Commission for its ultimate determination of whether the prices supporting this application are appropriately cost-based.”³²

III. Conclusion

The record in this matter suggests that Verizon has succeeded in opening its local markets in New Jersey to competition in most respects. Subject to the Commission satisfying itself as to

³⁰ See DOJ Kansas/Oklahoma Evaluation at 12 (“In the absence of persuasive evidence of differences in costs between states, substantial differences in prices should trigger a more careful scrutiny by the Commission.”); *FCC Kansas/Oklahoma Order* ¶ 82 (agreeing with DOJ that comparisons of rates between states can be useful), ¶ 101 (discussing the “reasonable differences in judgment” and other “legitimate factors” for the disparity between non-recurring charges in Oklahoma and Texas); *Sprint Communications vs. FCC*, 274 F.3d at 560 (upholding FCC’s finding that the Oklahoma non-recurring rates comply with TELRIC).

³¹ See AT&T Huels Decl. ¶ 9 (describing effect of new NRCs on AT&T’s entry plans); Cavalier Comments at 5 (“[U]nless Verizon substantially lowers its New Jersey hot cut NRC, Cavalier will not attempt to gain any additional customers in New Jersey.”); Cavalier Snyder Decl. ¶¶ 6, 9-11 (Cavalier competes using hot cuts in Virginia where NRC is \$13.49-\$32.50; given New Jersey NRC of \$159.76 to \$233.12, “it is not economically feasible for Cavalier to expand its successful facilities-based UNE-L local telephone business plan into New Jersey”); Conversent Comments at 6 (“Conversent cannot reasonably pay \$300-\$400 for hot cuts for a customer with 5 to 6 business lines. . . . [It would be necessary for [Conversent] to abandon in New Jersey its present business plan [focusing on small- and medium-sized business customers] if Verizon implements the new hot cut prices.”).

³² DOJ Missouri I Evaluation at 1-2.

the pricing issues discussed above, the Department recommends approval of Verizon's application for Section 271 authority in New Jersey.

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