STATEMENT OF COMMISSIONER KEVIN J. MARTIN,
APPROVING IN PART AND CONCURRING IN PART

Re: Application by Verizon New England Inc., Verizon Delaware 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., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware (WC Docket No. 02-157)

Today we grant Verizon authority to provide in-region, interLATA service originating in the States of New Hampshire and Delaware. I support this Order and commend the New Hampshire Public Utilities Commission and the Delaware Public Service Commission for their hard work.

I must concur, however, with the decision's statutory analysis on the standard for reviewing the pricing of individual unbundled network elements ("UNEs") in Section 271 applications. In today's action, the Commission finds that the statute does not require it to evaluate individually the checklist compliance of UNE TELRIC rates on an element-by-element basis. The Commission concludes that because the statute uses the plural term "elements," it has the discretion to ignore subsequent reference to prices for a particular "element" in the singular. I disagree.

Bell operating companies seeking to enter the long distance market must meet the requirements of the fourteen point checklist contained in section 271 of the Act.[1] The 271 process requires that the Commission ensure that the applicants comply with all of the checklist requirements. One of the items on the checklist requires that the Commission: (i) verify that the Bell operating company provides nondiscriminatory access to network elements; and (ii) ensure that rates are just and reasonable based on the cost of providing "the network element."[2]

The pricing standard for network elements analyzed during the 271 checklist review process resides in Section 252. Under this section, states must set unbundled network element rates that are just and reasonable and "based on the cost of providing the network element."[3] The clearest reading of this section would seem to require that the Commission ensure that the rates charged for any particular element is based on that elements' cost. Previously, the Commission has determined that this requirement is satisfied by compliance with TELRIC principles for pricing. Thus the most straightforward reading of our statutory obligation is to make sure that the price of any

[1] See 47 U.S.C. 271.
[2] See 47 U.S.C. 271(c)(2)(B)(ii) and 47 U.S.C. 252(d)(1).
[3] Section 252(d)(1) states that in relevant part, that "[d]eterminations by a state commission of… the just and reasonable rate for network elements for purposes of [section 251(c)(3)]…shall be based on the cost…of providing the…*network element (emphasis added).*

element—and particularly any price that someone alleges is not based on cost –is actually based on cost.

In defense of its statutory interpretation, the Commission argues that because the relevant statutory provisions do not refer to the term "network element" exclusively in the singular, the Commission is not required "to perform a separate evaluation of the rate for each network element in isolation."[4] Typical statutory construction requires specific directions in a statute take precedent over any general admonitions. Contrary to such accepted principles of statutory construction, the order suggests that general language referring to the network elements (in the plural form) in sections 252 and 271 trumps the language addressing the specific pricing standard in section 252 that requires a determination on the cost of providing the network element. In my view, such interpretation runs contrary to those principles.

In addition, the decision attempts to find additional legal support for its statutory interpretation by noting that the only party that raised this legal issue on the record also takes the position that some degree of aggregation is appropriate in conducting a benchmark analysis. I fail to see how this inconsistency is relevant to the issue of whether the Commission is obligated under the Act to evaluate individually the checklist compliance of UNE TELRIC rates on an element-by-element basis.[5]

Finally, in circumstances where a party challenges the pricing of an individual element within an aggregated rate benchmark containing several elements, I do not believe that it would be overly burdensome for the Commission to review the compliance of those elements on an individual basis.

In my view, Section 252(d)(1) sets forth the pricing standard used for determining TELRIC compliance in Section 271 applications. That standard explicitly requires that we examine UNE rates by each individual "network element." I believe we should not ignore such an explicit Congressional mandate.

For these reasons, I concur in this Order.

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[4] Section 271(c)(2)(B)(ii) requires that the Commission determine whether an applicant is providing "[n]ondiscriminatory access to network elements in accordance with the requirements of ..." the pricing standard enunciated in section 252(d)(1).

[5] Despite references in the decision to the Commission's long-standing practice of benchmarking and statements regarding rationale provided in prior orders to support the Commission's statutory interpretation - - this is the first time that the Commission has addressed whether it has the authority, under 252(d)(1) and 271, to permit rate benchmarking of nonloop prices in the aggregate rather than on an individual element-by-element basis.