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

Re: Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Virginia Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia (WC Docket No. 02-214)

Today we grant Verizon authority to provide in-region, interLATA service originating in the State of Virginia. I support this Order and commend the Virginia State Corporation Commission for their hard work.

Nevertheless, I concur in this Order because of concerns with two issues: (i) the statutory analysis on the standard for reviewing the pricing of individual unbundled network elements ("UNEs") in Section 271 applications and (ii) the application of our complete-as-filed requirement.

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. As I have stated in the past, I disagree.[1]

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.[2] The 271 process requires that the Commission ensure that the applicants comply with all of these 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,"[3] in accordance with section 251(c)(3) of the Act.[4]

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[1] See Statement of Commissioner Kevin J. Martin, *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),* October 3, 2002 (*Approving in Part and Concurring in Part).*

[2] See 47 U.S.C. 271.

[3] See 47 U.S.C. 271(c)(2)(B)(ii) and 47 U.S.C. 252(d)(1).

[4] See 47 U.S.C. 251(c)(3). Requires that incumbent local exchange carriers provide "…nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory…"

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."[5] 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 element's 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 every element—and particularly the price of any element that someone specifically alleges is not based on cost –is actually based on cost.

In defense of its statutory interpretation, the Commission argues that because the general statutory provisions refer to the term network elements in the plural, the Commission is not required "to perform a separate evaluation of the rate for each network element in isolation."[6]

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 an interpretation runs contrary to those principles.

The decision attempts to find additional 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. First, I am not sure that an outside party's inconsistency could absolve the Commission of its obligation under the Act--in this case-- to evaluate individually the checklist compliance of UNE TELRIC rates on an element-by-element basis.[7]

Moreover, it is the Commission's failure to respond to specific allegations and facts regarding an individual element that fails to meet the statute's requirements. I appreciate that the Commission may be able to base an initial conclusion on the

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[5] 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).*

[6] 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).

[7] 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 second 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.

apparent compliance with its rules at a general level. When specific allegations to the contrary are presented, however, I believe the Commission has an obligation to do more than merely rely on those generalized findings. Rather it must respond to the specific facts raised.

I do not believe the Commission can meet its statutory duty—to make an affirmative finding that the rates are in compliance with Section 252—by merely relying again on generalized findings in the face of specific allegations to the contrary.

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 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.

The complete-as-filed requirement provides that "when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight."[8] Here, we waive the complete-as-filed requirement twice and rely on data filed by the applicant well after the comment date.

We first waive the complete-as-filed requirement on our motion in response to comments that contend that Verizon's application was not complete when filed because Verizon had not memorialized its Interconnection Agreements--as required by the Wireline Competition Bureau's *Virginia Arbitration Order*--prior to its filing of its section 271 application.

On August 1, 2002, Verizon filed its 271 application for Virginia. On September 3, 2002, Verizon filed its interconnection agreements with the Bureau. On October 8, 2002, the Bureau approved and deemed effective Verizon's interconnection agreements.

I support our decision to waive the complete-as-filed requirement and rely on these interconnection agreements filed by the applicant after the comment date because of unique circumstances. In this case, a contributing factor to Verizon's failure to file its

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[8] *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order, 16 FCC Rcd 6237, 6247 (2001) *aff'd in part, remanded in part sub nom.* Sprint Communications Co. v. FCC, 274 F.3d 549 (D.C. Cir. 2001).

interconnection agreement in conjunction with its 271 application was the Commission's own failure to resolve outstanding interconnection arbitration issues on a timely basis.

Under Section 252(b)(4)(C) state commissions must conclude the resolution of any unresolved arbitration issues "not later than 9 months" after a local exchange carrier receives a request for negotiation of interconnection agreement.[9] Under this process, parties are permitted to seek arbitration "during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation…"[10] Depending on the timing of the arbitration request, State commissions are essentially required to arbitrate and "conclude the resolution of any unresolved issues" within a 4 to 5 month window.[11] If, however, a state commission fails to carry out its arbitration responsibilities the Commission must "issue an order preempting the State commission's jurisdiction…within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission" and act for the State commission.[12]

On January 19, 2001, the Commission granted the petition to take over the Virginia arbitration and also issued an order delegating to the Wireline Competition Bureau ('Bureau") the authority to serve as the Arbitrator.[13] The Bureau, acting through authority expressly delegated from the Commission, stood in the shoes of the Virginia State Corporation Commission to address separate petitions for arbitration filed by AT&T, Cox, and Worldcom.[14] At this point in the process, State commissions are required to complete the arbitration within 4 to 5 months. It took the Wireline Competition Bureau, however, nearly 18 months to reach a <u>partial</u> decision in response to the parties request for arbitration.[15] Thus it took this agency

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[9] *See* 47 U.S.C. 252(b)(4)(C).
[10] *See* 47 U.S.C. 252(b)(1).
[11] *See* 47 U.S.C. 252(b)(4)(C).
[12] *See* 47 U.S.C. 252(e)(5).
[13] *Petition of Worldcom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.* CC Docket No. 00-218, Memorandum Opinion and Order, 16 FCC Rcd 6224 (2001); *Arbitration Procedures Order*, 16 FCC Rcd 6233 (2001). At the time of the *Arbitration Procedures Order*, the Commission delegated its authority to the Chief of the Common Carrier Bureau. Since then, the Bureau has been renamed the Wireline Competition Bureau. *See In the Matter of Establishment of the Media Bureau, Wireline Competition Bureau and Consumer and Governmental Affairs Bureau,* Order 17 FCC Rcd 4672 (2002).
[14] *Procedures Established for Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and Worldcom*, CC Docket Nos. 00-218, 00-249, 00-251, Public Notice, DA 01-271 (rel. Feb. 1, 2001)
[15] *See* In the Matter of Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; In the Matter of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.,

nearly triple the amount of time to reach a partial decision, in comparison to the timeframe for completed state arbitration decisions. I am disappointed with the inordinate delay that the Bureau has had in resolving these issues. As a result of this delay, consideration of the interconnection agreements in this instance will serve the public interest.[16]

I wish to emphasize again that, absent the kind of extremely unique circumstances at issue here, the Commission should avoid relying on late-filed information. We have continued to take such information into account with greater frequency, and I fear that we may be moving in the wrong direction. In particular, I am concerned that relying on this information may burden commenters—particularly those opposing an application. Commenters need adequate time to evaluate and analyze new information, especially if it affects significant aspects of an application. When we accept late-filed information, we create additional burdens for them.

As I have noted previously, we would be better served by emphasizing the importance of having all of an applicant's supporting information in the record when the application is filed rather than granting the waivers that have become more routine. While I acknowledge that any rule will probably necessitate some exceptions, we appear to be failing to make any significant improvements in this area.

For these reasons, I concur in this Order.

CC Docket Nos. 00-218, 00-249, 00251, Memorandum Opinion and Order, DA 02-1731 (rel. July 17, 2002). As of this date, the Bureau has only resolved issues that do not relate to the rates that Verizon may charge for the services and network elements that it will provide to the requesting carriers under the interconnection agreements at issue.

[16] Based on special circumstances, today's decision also waives the complete-as-filed requirement to consider rate reductions filed by Verizon on day 63 of our review. The special circumstances at issue arise because commenters only made specific allegations concerning some of the factors and calculations underlying Verizon's rates in reply comments on day 42 of our review. Verizon's submission was thus necessarily filed late. Verizon submitted new switching rates in order to meet a non-loop benchmark analysis to New York rates. Commenters were then given an opportunity –albeit a brief one – to comment on Verizon's limited rate changes, which were consistent with what many of them advocated.