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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Joint Application of NorthPoint)
Communications, Inc. and Verizon)
Communications for Authority Pursuant to)
Section 214 of the Communications Act of)
1934, as Amended, To Transfer Control of)
Blanket Authorization To Provide Domestic)
Interstate Telecommunicatoins Services as a)
Non-Dominant Carrier)

CC Docket No. 00-157

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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The Commission's analysis of this license transfer application must be undertaken with one salient fact in mind—Verizon has a bad habit of making promises to the Commission that it simply does not keep.

In 1999, Verizon (then Bell Atlantic) promised the Commission that it had satisfied the section 271 competitive checklist by putting in place the systems and procedures to handle commercial volumes of competitive LEC orders in New York. In exchange for that promise, the Commission granted Verizon authority to enter the long distance market in New York. Did Verizon keep its promise? No. Within weeks, Verizon demonstrated that it had not been telling the truth – its OSS in New York caused competitive LECs to lose untold thousands of customers because Verizon's OSS could not handle commercial volumes of orders.¹ The New York Public Service Commission and the Commission each fined Verizon for its broken promises, but those fines represent a few hours of income for Verizon and do nothing to repair the damage to competitive LECs. Should the Commission have done a better job of ensuring that Verizon proved it could keep its promise before granting its regulatory wishes? Yes.

In the summer of 2000, Bell Atlantic and GTE promised the Commission that they would comply with the Commission's line sharing UNE and collocation requirements, if only the Commission would first approve the merger of the two carriers. In exchange for that promise, the Commission approved the merger of Bell Atlantic and GTE, despite serious protest from Covad and other competitive LECs that neither incumbent had taken the steps necessary to implement line sharing by the Commission's

¹ *In the Matter of Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York*, File No. EB-00-IH-0085, Acct. No. X32080004, FCC 00-92, (rel. Mar. 9, 2000).

June 6, 2000, deadline. Did Verizon keep its promise? No. In its application for long distance authority for Massachusetts, Verizon concedes that as of September 14, 2000 – more than three months after the Commission’s deadline – Verizon had prepared only 70% of the central offices requested by competitive LECs for line sharing in Massachusetts.² Indeed, of all of the line sharing orders submitted by Covad in Massachusetts as of that date, not a single one had been provisioned. And in September of this year, the Commission entered into a \$2.7 million dollar consent decree with GTE arising out of the contention of Covad and other competitive LECs that GTE had refused to provide cageless collocation in compliance with the Commission’s rules.³ Promises of line sharing collocation compliance, relied on expressly by the Commission in approving the Bell Atlantic/GTE application, were broken almost immediately after the merger was approved. Given these broken promises, should the Commission have accepted Verizon’s promise that it would make line sharing and collocation available to competitors after its merger application was approved? No. Should the Commission have done a better job to ensure that Verizon’s promise was kept before granting its regulatory wishes? Yes.

Now, Verizon is before the Commission with its application to acquire NorthPoint Communications. Verizon has made more promises to the Commission in support of that application. Simply put, Verizon promises that its acquisition of NorthPoint will create a “most separate” separate advanced services affiliate. This “most separate” affiliate, Verizon contends, will offer a heretofore-unavailable protection to unaffiliated

² Application by Verizon New England for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 00-176, Brief filed Sept. 22, 2000.

competitive LECs – an affiliate whose parent wholesale arm operates at a true arms’ length. The “new” NorthPoint, the incumbent LEC claims, will provide a benchmarking opportunity that existing incumbent separate affiliates cannot, because NorthPoint is a separate company, with separate operations and employees and funding.

Verizon the promise-breaker has made yet another promise to the Commission – approve this merger, and we will operate NorthPoint as the separate affiliate the Commission wishes every incumbent LEC has in place. But Verizon simply does not keep its promises. It therefore is for the Commission to avoid mistakes of the past – to put mechanisms in place to ensure that Verizon’s acquisition of NorthPoint is not just a promise of a pro-competitive acquisition, but rather that it truly is pro-competitive. Should the Commission put the mechanisms in place to ensure that Verizon will keep its promise before granting Verizon its regulatory wishes? The answer is a clear and unequivocal yes.

Since passage of the Telecommunications Act of 1996, hardly an earnings season has passed without out Bell Atlantic/NYNEX/Vodaphone-Airtouch/GTE/Genuity/OnePoint/NorthPoint being before this Commission, asking for a finding that its latest idea is in the public interest. As the second largest provider of DSL service in Verizon’s territory (behind only Verizon itself) and as the victim of repeated anticompetitive actions and breaches of contract by Verizon that violate the antitrust laws and the Communications Act, Covad suggests herein several steps the Commission should take to ensure that consumers in Verizon’s territory enjoy the fruits of competition in the advanced services marketplace. This merger is not about cable modems – it is

³ *In the Matter of GTE Service Corporation*, File No. EB-00-IT-0113, Acct. No. X32080012, FCC 00-281 (rel. Aug. 1, 2000).

about policing compliance with the market-opening provisions of the 1996 Act, advancing the public interest, and ensuring that the Commission stop taking Verizon's promises to abide by those provisions at face value.

Provide Incentive for true structural separation of Verizon ILEC assets

The structural separation argument of the Verizon/NorthPoint application is misplaced. While this acquisition does appear to accomplish the goal of essentially creating a "tracking stock" for Verizon's DSL services, that tracking stock by itself will do little to prevent, deter, and detect discrimination.

The theory of structural separation as a regulatory tool is that such separation will help prevent, deter and detect discrimination. The Commission has adopted and applied this tool in several contexts, including the *Computer Inquiries* (separation of basic and enhanced services) and the wireless industry (LEC/CMRS separation). Beginning with voluntary commitments made in the crucial days of its New York 271 application and in the Bell Atlantic/GTE merger conditions, Verizon has repeatedly acknowledged before this Commission that structural separation is in the public interest.

Yet the type of structural separation proposed in this transaction does not do the job. The "new NorthPoint" is far from the "most separate" affiliate that would allay the Commission's concern about discrimination and enforcement. Make no mistake about what is happening here – Verizon wants this Commission to bless the unconditional transfer of an in-region DSL customer base that it acquired through anticompetitive tactics⁴ into a "most separate" affiliate that apparently will be regulated by the

⁴ By refusing and delaying provision of collocation space. By pre-emptively conditioning the market by promising DSL to end-users without delivering—forcing new entrants like Covad to compete on price against a mythical Bell Atlantic provider. By denying line-sharing to CLECs while using line-sharing

Commission as a non-dominant carrier.⁵ Without modification, the proposal appears to be a Trojan Horse⁶—it provides sufficient “feel-good” rhetoric of policing nondiscrimination but it will in actuality decrease the Commission’s ability to enforce those requirements.

In the context of unbundling and interconnection, the theory of structural separation only works by ensuring that the entity that runs the “incumbent ILEC” assets or network does not have a financial interest in the success of the “retail operation”.⁷ There are two goals of structural separation: to remove the financial incentive for the ILEC to discriminate (and indeed provide financial punishment for discrimination), and to help police and detect such discrimination (because books of account will be clear).

The “new NorthPoint” does not accomplish those goals. The whole point of structural separation is to deter, police and detect discrimination by Verizon the ILEC in favor of NorthPoint. But since Verizon the ILEC will own a majority stake of NorthPoint, Verizon will financially benefit from this discrimination.⁸ In addition, the

exclusively to build-up its market share. By failing to provide loops in a timely manner consistent with its contractual commitments. And by rebuffing at every turn Covad’s attempts to enforce those contract and antitrust rights in federal court.

⁵ Covad strongly believes that the “new” NorthPoint should be regulated as a dominant carrier, because it will be majority-owned by a Tier I incumbent ILEC.

⁶ See <http://hsa.brown.edu/~maicar/WOODENHORSE.html> (with particular regard to the Trojan deliberations initiated by Cassandra).

⁷ Several different forms of ILEC separation have been proposed, including “LoopCo” (separate ownership of loops, collocation and rights of way), to “NetCo” (separate wholesale operation from retail operation). The theory of structural separation applied to local telecom networks has been debated for several years. See, e.g., Roy L. Morris, “A Proposal to Promote Telephone Competition: The LoopCo Plan,” <http://members.aol.com/RoyM11/LoopCo/Article.html> (1998); J. Duvall, “Evolution of Competition in the Market for Local Telecommunications Services: A Proposal for Industry Organization in the 21st Century,” (presented before USTA Industry Consolidation Conference, June 1987); Bolter, McConnaughey and Kelsey, *Telecommunications Policy in the 1990’s and Beyond* 384 (1990);

⁸ The Commission cannot rely on the fact that Verizon and NorthPoint will have separate shareholder bases as a means of detecting, deterring or policing discrimination. Indeed, both classes of

transfer of Verizon's DSL asset and employment base to an unregulated NorthPoint (discussed below) will actually lessen the Commission's and state PUCs' ability to police and detect such discriminatory conduct.

The "new NorthPoint" is most certainly not the "most separate affiliate" that it claims to be. Covad instead proposes that the Commission consider "true structural separation" in its consideration of this transaction. True structural separation would provide for separate equity ownership of Verizon's ILEC assets and operations from Verizon's retail assets and operations. If true separation were established correctly, the shareholders of the Verizon ILEC assets would benefit principally by selling access to and use of the ILEC network (loops, collocation, UNE-P, etc.) and would *not* benefit by favoring one entrant over another. True structural separation would isolate the core source of Verizon's market power—its control of the retail and wholesale uses of its local network infrastructure.

The Commission could take steps to accomplish true separation in several ways. Rather than accepting the structure of Verizon and the "new NorthPoint", the Commission could require that Verizon divest its in-region local exchange assets into a separately traded company. In the alternative, the Commission could provide a financial or other incentive for Verizon to undertake such a restructuring. For example, such incentives could include—

shareholders will benefit from discriminatory conduct that favors NorthPoint. Verizon will be required to report NorthPoint results in its Consolidated Financial Statements to Verizon shareholders, and NorthPoint shareholders will of course benefit from such discrimination. Since both shareholder classes will benefit by Verizon discrimination, the separate equity ownership is fundamentally irrelevant to the Commission's public interest determination.

- Different levels of performance penalties for a truly separate Verizon ILEC than the current proposal;⁹
- Different reporting obligations if Verizon adopts true separation (e.g., quarterly rather than monthly over less metrics); and
- Adjustments in time deadlines for DSL loop and line sharing OSS requirements.

In the last year, Verizon has dangled “structural separation” before this Commission four times in order to advance its regulatory agenda—first in the context of its New York 271, then in regarding its merger with GTE, and now in this application and its pending Massachusetts 271. After years of denial, Verizon has accepted the notion that the public interest is served by structural rules. However, when it comes to its substantive proposals, the affiliates proposed by Verizon, including the “most separate new NorthPoint”, do not do the job and indeed serve only to provide regulators rhetorical comfort. In order to deter, police and detect discrimination by the Verizon ILECs, *only separation of the Verizon ILEC assets and operations from its retail assets and operations will work*. All other proposals are a Trojan Horse.

Verizon must be subject to concrete and specific loop and line sharing provisioning intervals, and a “parity or better” standard as to NorthPoint.

Covad first proposed that the Commission adopt a concrete loop provisioning interval over two years ago.¹⁰ A loop provisioning interval, as Covad explained in its

⁹ A significantly higher cap and per-incident penalty for the current structure is justified because the structure makes retains the incentive for the Verizon ILECs to discriminate and makes discrimination more difficult to detect. Under true separation, independent Verizon ILEC shareholders would be in a position to detect and deter discrimination through shareholder derivative suits, which would justify lower caps and penalties overall.

recent comments in support of the ALTS petition for declaratory ruling seeking such an interval, is the single most important pro-competitive tool that the Commission could adopt.¹¹ A clearly-defined and written loop provisioning interval would promote competition in several ways. Rather than face separate negotiation and arbitration of intervals in dozens of states, a clear interval would provide competitive LECs a benchmark of performance throughout the Verizon region under which business and entry plans could be made. In addition, a clear, easily-determined interval would promote enforcement of breaches through liquidated damages clauses and private litigation. In particular, the Commission would ensure that Verizon would be unable to continue the pattern of deny, delay, and degrade that prevents competitive LECs from competing effectively.

A loop provisioning interval would also assist this Commission in two important ways. First, it would bring and immediate end to the “he said – she said” battle of loop performance data in the context of section 271 applications. No longer would the Commission be forced to evaluate mounds of loop data from Verizon and competitive LECs, each arguing that the loop intervals demonstrate compliance (or lack thereof) with the nondiscrimination requirements of the 1996 Act. As recent Section 271 applications have revealed, without a concrete rule, the definition of “nondiscriminatory” in the loop provisioning arena is difficult to establish. If a loop is delivered in five days, or six days, or seven days, is that nondiscriminatory? Were the Commission to put a concrete loop

¹⁰ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of Covad Communications Company (Sept. 25, 1998).

¹¹ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of Covad Communications Company (June 23, 2000).

provisioning interval in place, and include a line sharing interval as well, those questions would be easily answered.

Second, the Commission would provide itself a concrete enforcement mechanism. Covad has experienced incredible frustration in seeking enforcement action against incumbent LEC loop provisioning practices. In particular, the Commission has consistently refused to take any enforcement action against discriminatory loop provisioning practices that Covad has brought to its attention. With a concrete loop provisioning rule in place, the Commission's enforcement efforts can focus on the simple and narrow question of whether the incumbent LEC delivered a loop, or a line sharing UNE, within the time period specified by the federal rule. Competitive LECs will thus be able to rely, for the first time, on enforcement by the Commission of the market-opening provisions of the Act.

The most pro-competitive benchmark that the Commission could put in place in the context of the Verizon/NorthPoint merger is a loop provisioning benchmark and reporting requirements. As discussed below, the Commission should not be fooled by the creation of a "new" NorthPoint, because the structure of the transaction actually serves to *promote* and *reward* discriminatory conduct by Verizon's ILEC operations, rather than deter it. After this acquisition, Verizon will continue to have both the ability and the incentive to provide better loop provisioning performance to NorthPoint than to unaffiliated competitors like Covad—as a result, the Commission must ensure that the proper mechanisms are in place to prevent such discriminatory favoritism from occurring. Simple promises are not enough.

Covad proposes the following Verizon-wide provisioning benchmarks:

- All Verizon ILECs must provide loops to unaffiliated carriers within three calendar days for loops that do not require conditioning, and within 10 calendar days for loops that require conditioning.¹²
- All Verizon ILECs will provide the line-sharing UNE (sometimes referred to as the “High Frequency Portion of the Loop”, or “HFPL” UNE) in one business day, reflecting the minimal provisioning work (simply a cross connect or two) that Verizon must undertake to provision line-sharing.
- If Verizon’s monthly NorthPoint performance reports¹³ reveal that NorthPoint receives a superior interval, it should be required to step up its performance to all other CLECs as well.
- Terms and conditions of access obtained by NorthPoint in other ILEC regions, through both voluntary and arbitrated agreements must be made available to competitors in the Verizon ILEC regions.¹⁴

¹² The interval established by the Commission must be measured concretely to avoid providing the incumbent LECs any opportunity to wiggle out of the otherwise procompetitive requirements. The interval must be measured from the time the competitive LEC submits the order to the incumbent LEC. Submission of the order is marked by the time that the competitive LEC delivers the order to the incumbent – not the transmission of a notice from the incumbent that the order has been received. In this way, the incumbent is not granted the ability to delay the interval by simply taking two or three days to transmit confirmation. The interval cannot be tolled by intervening “queries” from the incumbent – another favorite delay tactic. For example, incumbents may choose to send an order back to the competitive LEC because the order states “Street” instead of “Str” – not because the incumbent’s systems can’t process the order, but rather because the incumbent is seeking to delay the provisioning of the loop. Incumbent LECs must not be permitted to toll the interval by “querying” the order back to competitors. If an incumbent LEC needs clarification on an order, the incumbent must seek such information from its own databases, which contain all information on addresses and loop location, and the order must be corrected by the incumbent – using the vast information resources available to it – and not simply rejected back to the competitive LEC. The loop order is “complete” when a functional loop is delivered to the competitive LEC’s point of interconnection and the competitor is notified electronically that the loop has been delivered.

¹³ See below.

¹⁴ This condition would advance the Commission’s stated goal of promoting ILEC “best practices” throughout the nation. It is important that this expanded pick-and-choose condition clearly cover agreements that Verizon/NorthPoint adopts through voluntary negotiations or through operation of Section 252(D) rights. Covad is concerned that in non-Verizon regions, Verizon/NorthPoint will free-ride off of the arbitration and negotiation success of other CLECs like Covad and Rhythms NetConnections while it

Detailed monthly reporting to both competitive LECs and the FCC is vital to ensure that Verizon keeps its promises.

Verizon's promises are not enough to protect competition. The Commission must back up the obligations it imposes on Verizon with concrete reporting requirements so that competitive LECs and the Commission can see what is really happening in the market. The Commission must require Verizon to report, on a carrier by carrier basis, its performance in loop delivery, repair and maintenance, OSS, and collocation practices throughout its territory. Specifically, Verizon must report to requesting CLECs a comprehensive set of monthly performance metrics addressing all aspects of the loop delivery process, OSS performance, and collocation provisioning. In addition, Verizon must make available to all carriers and the Commission the exact same reporting data as to Verizon and NorthPoint. Only through such a comparison can the Commission and competing carriers ensure that Verizon is not using NorthPoint as a discriminatory tool.

It is important that these performance measurements be reported in a manner that permits other CLECs to compare those results to their own results on an "apples to apples" basis. For example, the reports should be broken down by Verizon ILEC, geographic area and service provided, to detect any particular regional differences or other issues (for example, provision of ISDN loops for IDSL service) in performance. On the other hand, Verizon's overall, nationwide performance to NorthPoint must be clearly presented as well. Disaggregated reports may be useful to detect regional or other performance issues, but aggregated, national reports may be more important for detecting general, statistically significant performance issues.

simultaneously denies those same terms and conditions in-region. In the SBC/Ameritech and Bell Atlantic/GTE mergers, the Commission has made attempts to address this issue through merger conditions, but those conditions have to date been inadequate.

Performance data must also include the performance that Verizon gave to NorthPoint in the six month period before the merger was announced. This additional data will provide all parties with a concrete baseline as to whether Verizon improved its provisioning performance only as to NorthPoint, and will provide further evidence of discriminatory practices.

Finally, the Commission should clarify that the Verizon performance reports and penalty system shall exist in addition to and are not a substitute for other legal procedures available to competitive carriers, such as negotiation, mediation and arbitration pursuant to Sections 251 and 252, private litigation, including claims for breach of contract, antitrust and Section 207, Section 208 complaints before the FCC, and proceedings before state PUCs. Covad is concerned that Verizon will utilize any Verizon/NorthPoint performance reporting regime as the “ceiling” of its legal obligations – as a result, the Commission needs to make clear to Verizon that any conditions attached to the merger shall be cumulative to all of the other enforcement tools available to competitive LECs and regulators.

OSS requirements

A “truly separate” separate affiliate providing DSL services on behalf of Verizon would use exactly the same systems, methods, and procedures for provisioning service as do competing carriers. The Commission must make it clear that Verizon must make the OSS features, functions and capabilities available to the new NorthPoint available to competing carriers. The Commission has repeatedly ordered ILECs to provide CLECs unmediated, direct access to the “raw” information and OSS systems. With this acquisition, this requirement is more important than ever.

Indeed, the Commission must make sure that Verizon not use the presence of the “new NorthPoint” as a crutch for offering only mediated access to CLECs. For example, Verizon could develop a proprietary, non-industry standard interface tailor-made for NorthPoint’s DSL services—an interface that would not match any backoffice OSS of any other competitive LEC, and that no competitor would ever use. Yet Verizon would try to make the argument that it is in compliance with its OSS obligations by virtue of the availability of that exact same OSS interface to unaffiliated carriers.

The Commission must make clear that the OSS nondiscrimination obligations apply not the particular software that Verizon chooses to use to interface with NorthPoint, but rather to the means by which Verizon and NorthPoint interact electronically. Thus, if Verizon and NorthPoint can electronically bond their OSS pre-order and order transactions, then Covad must have the opportunity – through industry standard OSS interfaces of Covad’s choosing -- to accomplish the same level and functionality of bonding. Verizon cannot be permitted to offer a “take it or leave it” solution that construes its OSS obligations as only offering the same software as it offers NorthPoint. The Commission must make clear that the OSS nondiscrimination obligations apply to *all* of the functionalities and capabilities that NorthPoint derives from Verizon. Verizon should be free to use a non-industry standard OSS with NorthPoint, but it should not be permitted to use that non-standard OSS as a tool of discrimination to avoid its obligation to grant unaffiliated carriers identical OSS capabilities. In addition, a focus upon *all* OSS functionalities necessarily includes more than electronic systems—it also involves the allocation of and time of personnel at Verizon’s wholesale support centers.¹⁵

¹⁵ As a result, Verizon should not be permitted share employees with the new NorthPoint. An installation service technician, for instance, should not be permitted to represent Verizon for one hour when

Finally, the Commission should establish firm deadlines for Verizon's EDI capability. It has been four years since the Commission ordered "electronic bonding" of OSS in the *First Local Competition Order*, three years since the OSS requirements of the *Bell Atlantic/NYNEX Merger Order*, and nearly one year since the *UNE Remand Order*. Verizon's obligations have been clear for some time now—and it is now time for the Commission to get serious about enforcing those obligations.

In particular, the Commission must establish a schedule that will assure that Verizon implements an immediate EDI capability for any requesting carrier, and that business rules and other procedures to actually use EDI be in place in the same time period. Within sixty days of the close of the merger, Verizon must actually implement (not plan to implement, nor agree to plan, nor plan to establish a group to plan) EDI OSS capabilities, including any and all OSS functionalities requested by competitive LECs, with any CLEC that has requested such functionality. That OSS capability must include real-time, read-only access to all of the loop prequalification information that Verizon possesses anywhere in its network, an obligation that the Commission has imposed repeatedly on Verizon, but that Verizon continues to insist in state regulatory proceedings is inapplicable to most of the information it possesses. Any and all OSS changes Verizon makes for NorthPoint must be disclosed to unaffiliated carriers sufficiently far in advance to ensure that such carriers can implement the same changes as NorthPoint in the same time period – NorthPoint cannot be permitted to derive any "head start" advantages from its incumbent owner.

he or she installs a loop and then represent NorthPoint for the second hour when he or she installs a DSL line. Similarly, an employee at Verizon's wholesale support center should not be permitted to work for NorthPoint for one hour (submit orders), and then represent Verizon for the next hour (provide firm order commitments, or FOCs). A ban on shared employees would prevent these abuses.

Access to Remote Terminals and “Project Pronto”-type architectures

Verizon has taken steps in various state regulatory proceedings to avoid its obligation to provide remote terminal access to competitive LECs. As the Commission stated clearly in the *UNE Remand Order*, incumbent LECs must provide access to remote terminals for collocation, access to UNEs, and interconnection.¹⁶ In addition, the Commission recently granted SBC a waiver of conditions originally imposed in the SBC/Ameritech merger docket.¹⁷ Specifically, the Commission permitted SBC to own certain line cards and packet switches used in the provisioning of advanced services only if it took several steps to facilitate competitive LEC access to all the features and functionalities of remote terminal equipment.

Verizon is subject to the same requirement pursuant to the conditions imposed on the combined Bell Atlantic and GTE. But Verizon is only subject to those conditions in the event it chooses to vest ownership of certain advanced services equipment in the integrated incumbent LEC, rather than its affiliate. Thus, the “new NorthPoint” may provide Verizon a vehicle to avoid making available the pro-competitive options (remote terminal collocation, spare copper preservation, plug and play service availability) that SBC has agreed to provide. As a result, competitive LECs may be unable to compete for customers served via remote terminals and other intermediate or remote facilities.

The Commission must ensure that Verizon does not use its purchase of NorthPoint to extend its monopoly bottleneck into remote terminals. By requiring

¹⁶ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999).

¹⁷ *In the Matter of Ameritech Corp., Transferor, and SBC Communications, Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and*

Verizon to provide access to its remote terminals similar to the SBC/Pronto decision while at the same time it implements the same remote terminal solutions for unaffiliated carriers as it does for its NorthPoint affiliate, the Commission will ensure that consumers served over remote facilities will benefit from competition, rather than suffer under monopoly. Specifically, Verizon must commit to immediately provide the same broadband service offering as SBC in the Project Pronto proceeding, priced at UNE rates, and available pursuant to the nondiscrimination obligations of sections 251 and 252.

At the same time, competitive LECs cannot simply start offering service over fiber the same day that Verizon announces that the equipment is available. Rather, carriers must have an opportunity to understand what equipment is being deployed in which locations and to influence how it will be configured. The Commission must require Verizon to provide the same network planning services to competitors as it does to its own NorthPoint affiliate, to ensure that Verizon does not give a first to market advantage to NorthPoint.

Virtual to Cageless Collocation Conversions throughout VZ Region.

Despite the repeated efforts by this Commission, the collocation wars still rage in the Verizon region. Verizon should not be permitted to reap the benefit of its strategy to deny, delay and degrade CLEC access to central offices by simply transferring equipment its ILEC personality placed in a central office to its new CLEC persona.

After years of denying cageless and other cost-saving collocation measures to competitive LECs,¹⁸ Verizon has hit on a fascinating tool of discrimination that is

310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Communications Act, CC Docket No. 98-141, Second Memorandum Opinion and Order, FCC 00-336 (rel. Sept. 8, 2000).

¹⁸ For example, in its antitrust suit against Verizon, Covad's complaint cites collocation fee estimates received from Verizon in excess of \$400,000.

impeding competitive LEC access to the fairly priced collocation space guaranteed by the Commission in recent rulemakings. In the wake of the Commission's March, 1999, cageless collocation order, Covad began to seek cageless collocation space in offices that Verizon had previously claimed were "no space" offices. In such no space offices, Covad had been forced to apply for virtual collocation space, an arrangement that typically denies Covad the access to its equipment that it needs in order to offer customers the quality of service they demand. As a result of the Commission's order, space that Verizon had been labeling unsuitable for collocation was suddenly available. "No space" offices now had space. In offices where Covad had secured virtual collocation, Covad now had the opportunity to purchase a cageless arrangement that would ensure access to equipment.

But Verizon had a trick it wanted to try. Rather than permit Covad to migrate its virtual arrangement into a cageless arrangement, Verizon required Covad to (1) rip out all of its in-service equipment from the central office, (2) reapply for collocation space, (3) await the multi-month provisioning interval, (3) reinstall its equipment in the same office. Recognizing that this process not only drove up Covad's costs, but knocked its customers out of service (making it more likely they would buy Verizon DSL), the New York PSC ordered Verizon to permit Covad to migrate its virtual collocation arrangements to cageless arrangements.¹⁹ Does Verizon permit such migration in states other than New York? Of course not. Will it permit such migration for its affiliate, the "new NorthPoint"? Of course. The Commission must explicitly require Verizon to end this facially discriminatory practice and permit no-cost virtual to cageless migration.

“Fresh Look” for captured Verizon DSL customers prior to merger closing.

Verizon has built its in-region DSL market share on the backs of anticompetitive and discriminatory conduct. Verizon delayed and increased the cost of Covad and CLEC collocation, forced Covad into arbitration as to whether it even had an obligation to provide xDSL-capable loops, denied Covad and other CLECs access to line-sharing, overcharged for power in collocation spaces, and has provided utterly inadequate performance in providing UNE loops, transport and line sharing. And after Covad and other began the process of entering Verizon’s market, Verizon began to roll-out its own DSL product at the same time it was throwing up these roadblocks. As a result, Verizon has built up a substantial share of line-shared DSL customers that CLECs like Covad never had a chance to compete fairly for.

As the Commission recognized in the *Line Sharing Order*, Verizon’s practice of providing shared-line DSL to its customers while denying CLECs the same functionality conferred on Verizon a discriminatory competitive advantage. The ability to offer DSL service on the same loop as voice would have afforded Covad significant cost savings and time-to-market improvements, because such a loop would already be functional and installed, and the cost of the upper frequencies of the loop would be \$0. Verizon knew that offering access to “line sharing” capabilities would enhance competition in its region, so it denied line sharing capabilities to Covad and other competitive carriers. At the same time, Verizon used line sharing for its own retail DSL offering, enjoying the incredible cost, facilities, and service advantages of linesharing while denying the same to competitors. Verizon thus successfully leveraged its voice monopoly into the

¹⁹ Case No. 99-C-0715 and Case No. 95-C-0657, State of New York Public Service Commission, Order Directing Tariff Revisions, Aug. 31, 1999.

advanced services market. In so doing, it was able to acquire thousands of DSL customers that Covad would be unable to acquire, by offering lower retail prices (thanks to a \$0 loop cost Verizon gave itself that compared with the \$20 or more standalone loop cost for Covad). In addition, Verizon was able to offer service much faster, because it need not install a loop before turning up service. All of these factors permitted Verizon to acquire consumers who were captives of its voice monopoly and who had no choice of DSL provider.

By the time the Commission finally adopted line sharing rules, which became effective on June 6, 2000, Verizon had captured countless thousands of captive consumers thanks to its monopoly practices. As noted above, Verizon has still not completed the work necessary to provide line sharing capabilities to competitive LECs, despite the passage of the Commission's deadline over three months ago. Thus, Verizon continues to utilize its monopoly control over the local loop to capture even more consumers for its DSL service.

It is Covad's understanding that many of those customers (both end-users and ISPs that resell Verizon's DSL service) are "locked-in" to long-term contracts with Verizon, complete with early termination penalties. As a result, Verizon has used its in-region monopoly power to attractive a captive (and attractive, "early adopter") customer base that no other CLEC, including Covad, was able to compete for.

Now, Verizon is asking that the Commission permit it to transfer this entire customer base to a new, essentially unregulated company, the "new NorthPoint." Verizon should not be permitted to reap the benefits sown by its anticompetitive conduct. Indeed, because Verizon's DSL customers were captured by Verizon as a direct result of

its anticompetitive conduct – in particular, line sharing for itself while denying the same capability to competitors, a practice that the Commission concluded must be remedied by federal rule – those customers must now be given the choice of DSL providers that Verizon unlawfully denied them.

Consumers who were once denied choice by a monopolist cannot be forced to accede to the involuntary transfer of their service from Verizon to NorthPoint. The Commission must require Verizon to implement a “fresh look” period, wherein customer of Verizon DSL will be given the opportunity to switch – for no charge, no early termination penalty, and no service interruption – from Verizon DSL to another DSL service provider.

This fresh look process will ensure that consumers are not twice bitten by the same anticompetitive behavior. The fresh look provisions adopted by the Commission must include notice obligations (ballots), provisions that ensure Verizon customers will not be not subject to early termination or other equipment or service penalties, and other mechanisms that ensure that Verizon affords consumers a full and fair opportunity to choose their DSL provider, where such a choice was denied them in the past.


Asset transfer, employee, master service, and joint marketing policies must be disclosed and submitted for comment prior to merger approval.

The merger application is woefully imprecise in describing the particular assets that will be transferred from Verizon to NorthPoint. There is no description of the central office equipment that may or may not be transferred,²⁰ no detailed description of how

²⁰ This issue could have particular relevance to the Commission’s pending *Collocation Remand NPRM*. In that docket, Verizon/Bell Atlantic/GTE has consistently argued that CLECs not be permitted to collocate “switching” equipment in its central offices. Indeed, GTE was the primary plaintiff in the D.C. Circuit case that is now requiring the Commission to re-examine this rule. Will Verizon/Bell Atlantic/GTE maintain its current litigation position if it transfers equipment that contains “switching functionality” to the

employees will be assigned to or perform work for one or the other affiliates,²¹ no description of or access to any master services agreement between the parties, and no description of joint marketing guidelines. As a result, the Commission must ensure that all agreements pertaining to these and other aspects of this merger are publicly available prior to merger approval. In particular, the Commission must closely oversee the transfer of assets from Verizon to NorthPoint and must monitor such transfers to ensure that NorthPoint is not unfairly capitalized by virtue of captive ratepayer-financed equipment. All agreements between Verizon and NorthPoint, especially and wholesale or master services agreements, must also be subject to public review and comment. The Commission should make clear that withholding any agreements between Verizon and NorthPoint from public review would be a *per se* violation of the Commission's merger approval process.

Respectfully submitted,



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new NorthPoint? Will Verizon/Bell Atlantic/GTE be held accountable for taking one position in litigation and executing a different strategy in this merger?

²¹ As discussed above, because of the strong possibilities of serious abuse, Covad strongly believes that the Commission should bar common employees between Verizon and the new NorthPoint.