**IN THE MATTER OF**

**VERIZON VIRGINIA, INC.** **CASE NO. PUC-2002-00046**

**To verify compliance with the conditions set forth in 47 U.S.C. § 271(c)**

# HEARING EXAMINER'S RULING

**June 10, 2002**

On June 7, 2002, Verizon Virginia Inc. ("Verizon Virginia") filed a Motion in Limine ("Motion") in which it asked that certain CLEC testimony not be considered at the hearings nor given any weight by the Hearing Examiner in his report. Specifically, Verizon Virginia sought to exclude the following testimony from consideration: (i) the Geographically Relevant Interconnection Points ("GRIPs") complaint by Cavalier Telephone, LLC ("Cavalier"); (ii) Verizon Virginia's DS-1 provisioning policy, which is raised by Cavalier, Allegiance Telecom of Virginia, Inc. ("Allegiance"), Covad Communications Company ("Covad"), and NTELOS Network Inc. and R&B Network Inc. ("NTELOS"); (iii) Yellow Pages by Cavalier; (iv) special access by WorldCom; (v) special access billing by Cox Virginia Telcom, Inc. ("Cox"); (vi) payment of reciprocal compensation on internet-bound traffic by AT&T Communications of Virginia, LLC ("AT&T"), Cox, and WorldCom; (vii) arbitration disputes by WorldCom; and (viii) public interest arguments by AT&T.

In its Motion, Verizon Virginia argued that the § 271 process is not meant to resolve all controversies and disputes. In support, Verizon Virginia stated that "the FCC has warned that the section 271 process should not be used as a 'forum for the mandatory resolution of . . . local competition disputes, including disputes on issues of general application that are more appropriately the subject of industry-wide notice-and-comment rulemaking.'"[1] Verizon Virginia contended that disputes, such as those listed above, are irrelevant for this proceeding. Rather, these disputes should be resolved in arbitrations under § 252 or through a complaint under § 208. Therefore, Verizon Virginia asserted that to give any consideration to the above testimony runs the risk of changing the nature of this proceeding from an expedited process focused on Verizon Virginia's performance into a wide-ranging, industry-wide examination of telecommunication law and policy.[2]

In this proceeding, the Commission will develop a record and render a report and recommendations regarding whether Verizon Virginia meets the requirements of § 271(c).

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[1] Verizon Virginia Motion at 2 (quoting *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Texas*, CC Docket No. 00-65, ¶ 23 (2000) ("*Texas Order*")).

[2] Verizon Virginia Motion at 4 (quoting *AT&T v. FCC*, 220 F. 3d 607, 631 (D.C. Cir. 2000).

Among other things the Hearing Examiner's Report will address Verizon Virginia's compliance with: (i) § 271(c)(1)(A), which was addressed in Verizon Virginia's application; (ii) each of the fourteen competitive checklist items codified in § 271(c)(2)(B); and (iii) the public interest. Based upon a review of the standards of review employed by the FCC in several recent § 271 decisions, I generally agree with Verizon Virginia's assessment that this proceeding is not meant to resolve all local competition disputes. Indeed, Verizon Virginia may satisfy the requirements of § 271, but at the same time have unresolved arbitrations and other open issues pending in other proceedings. Section 271 does not appear to hold Verizon Virginia to a standard of perfection. Instead, the basic § 271 standard is whether Verizon Virginia's performance affords an efficient competitor a meaningful opportunity to compete.[3]

On the other hand, the simple fact that a CLEC has filed a complaint should not remove the CLEC's allegation from Verizon Virginia's § 271 proceeding. If a CLEC provides evidence of performance by Verizon Virginia related to a checklist item that indicates that an efficient competitor may not have a meaningful opportunity to compete, such evidence would be relevant and should be considered in the overall evaluation for that checklist item. For example, in Pennsylvania, the FCC considered Verizon Pennsylvania's DS-1 provisioning performance and policy in relation to checklist item 4. Though the FCC found Verizon Pennsylvania's DS-1 provisioning performance to be poor, because of its relative size or importance in Pennsylvania, such performance was not enough to keep the FCC from finding that Verizon Pennsylvania's overall performance satisfied the requirements of checklist item 4.

> We recognize, however, that Verizon's performance with respect to other performance measures for high capacity loops has been poor in Pennsylvania. Verizon's installation intervals for competitive LECs are consistently longer than those for its retail customers, and Verizon has missed a significant percentage of appointments to provision high capacity loops for competitors. High Capacity loops, however, represent a small percentage of all loop orders by competitors in Pennsylvania. Given the relatively low volume of orders for high capacity loops compared to all loop types, we cannot find that Verizon's performance for high capacity loops warrants a finding of checklist noncompliance for all loop types.[4]

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[3] *See*, *e.g.*, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services in the State of New York*, CC Docket No. 99-295, FCC 99-404, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 86 (1999) ("*Bell Atlantic New York Order*"); *Joint Application by BellSouth Corporation, Bell South Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region IntraLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, Memorandum Opinion and Order, Appendix D ¶ 28 (rel. May 15, 2002) ("*BellSouth GALA Order*").

[4] *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC O1-269,

Furthermore, as to Verizon's DS-1 provisioning policies, in Pennsylvania the FCC stated its policy of not dealing with interpretative disputes concerning an incumbent LEC's obligations to its competitors in § 271 proceedings.[5] However, the FCC did not rule out addressing *per se* violations of the Act or its rules in a § 271 proceeding.[6] Thus, in Pennsylvania the FCC was careful to note that its finding that Verizon Pennsylvania's policy did not expressly violate its unbundling rules was based on the record, "as explained to us in the instant proceeding."[7]

As demonstrated by the *Pennsylvania Order*, the weight or usefulness of evidence regarding Verizon Virginia's performance or its policies relative to the competitive checklist is fact specific. Thus, the results or findings from one state may not be directly transferable from state to state. Therefore, I find that the issues raised by CLECs listed above that relate to the competitive checklist, specifically items (i) through (vii) are relevant to this proceeding, will be considered at the hearing and will be addressed in the Hearing Examiner's Report.

As to the public interest issue raised by AT&T, as discussed in the Hearing Examiner's Rulings on AT&T's Motion to Compel, CLECs will be given an opportunity to build a record concerning public interest. Moreover, the FCC's standard of review for the public interest is as follows:

> [T]he public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. For example, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion. Thus, the FCC views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, the FCC may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of the application at issue. Another factor that could be relevant to the analysis is whether the FCC has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines

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Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶ 91 ( 2001) ("*Verizon Pennsylvania Order*").
[5] *Id.* at 92.
[6] *Id.*
[7] *Id.*

> the conclusion, based on the FCC's analysis of checklist compliance, that markets are open to competition.[8]

In fulfilling its consultative role to the FCC, the Commission may provide recommendations or highlight portions of the record that may be relevant to the FCC's public interest analysis. Accordingly,

**IT IS DIRECTED** that Verizon Virginia's Motion in Limine is hereby denied.

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Alexander F. Skirpan, Jr.
Hearing Examiner

[8] *BellSouth GALA Order* at Appendix D ¶ 71 (citations omitted).