

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held March 22, 2001

Commissioners Present:

John M. Quain, Chairman, Statement & Joint Statement & Data Request attached

Robert K. Bloom, Vice Chairman

Nora Mead Brownell, Statement and Joint Statement & Data Request attached

Aaron Wilson, Jr.

Terrance J. Fitzpatrick, Concurring Statement attached

Re: Structural Separation of  
Bell Atlantic-Pennsylvania, Inc.  
Retail and Wholesale Operations

M-00001353

**OPINION AND ORDER**

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## **BY THE COMMISSION:**

### **I. BACKGROUND**

#### **A. Introduction**

Since 1993, when Chapter 30 of the Public Utility Code (Code) was enacted, 66 Pa. C.S. §§3001-3009, this Commission has earnestly desired the same progress in the field of telecommunications competition as has recently been realized in the electric and natural gas industries. *See* 66 Pa. C.S. §§2801-2812; 2201-2212, respectively. It is, therefore, with regret and concern that we note the markedly different posture of the parties in telecommunications as contrasted with the electric and natural gas industries. The entrenched attitudes and unyielding behaviors encountered by this Commission are all the more unacceptable in view of the clear legislative mandates, state and federal, sent to the Commission and known to the parties from 1993 onward. A thorough understanding of those mandates is essential, here.

As with our efforts to restructure the electric and natural gas industries along competitive lines, said efforts in telecommunications had their origins in statutory directives. The United States Congress enacted the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§157 *et seq.* (TA-96), to advance the goal of opening local telecommunications markets to competition.<sup>1</sup> The Pennsylvania General Assembly also passed legislation, which became Chapter 30, *supra*, of the Public Utility Code. Chapter 30 has as its purpose the modernization and restructuring of telecommunications in Pennsylvania. We embraced the goals of these

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<sup>1</sup> *See AT&T Corp v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

significant groundbreaking pieces of legislation. Pursuing what we hoped would be a moderate and cooperative course, this Commission initially attempted to implement TA-96 through the adjudication of several individual telecommunications cases, each focusing upon a particular issue or aspect of telecommunications regulation. However, with the continued attachment of industry participants to old models and extreme positions, it became apparent that it would be necessary to find a more expeditious way to implement TA-96 and to bring local telephone competition to Pennsylvania. Our answer was to combine the issues and produce a comprehensive order which would direct and guide the incumbent local exchange carriers and the many competitive local exchange carriers seeking to enter the local telephone market.<sup>2</sup> Thus, on September 30, 1999, this Commission issued its “Global Order” at docket numbers P-00991648 and P-00991649; *affirmed Bell Atlantic-Pennsylvania, Inc. v. Pa. PUC*, 763 A.2d 440 (Pa. Cmwlth. 2000).

The *Global Order* resolved twenty interrelated issues to “jump-start” competition in the local telecommunications market in Pennsylvania. In the *Global Order*, the Commission concluded that, “structural separation is the most efficient tool to ensure local telephone competition where a large incumbent monopoly controls the market.” (*Global Order*, p. 222). We stated that Verizon Pennsylvania Inc.’s (Verizon) (formerly Bell Atlantic-Pennsylvania Inc.’s) “. . . overwhelming competitive presence and concomitant ability to exercise market power, including the ability to provide itself with anticompetitive cross-subsidies and the opportunity and incentive to discriminate against competing

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<sup>2</sup> Without nondiscriminatory access to wholesale services from the incumbent local exchange carrier (ILEC), a competitive local exchange carrier (CLEC) would be effectively precluded from providing services they would otherwise seek to offer, or have their ability to provide such services materially diminished. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; CC Docket No. 96-98, Third Report and Order; 15 FCC Rcd 3696 (November 5, 1999) (*3<sup>rd</sup> Report and Order*).

telecommunications carriers in the provision of wholesale services,” strongly supported the Commission’s conclusion.<sup>3</sup>

In applying the principles of structural separation to telecommunications providers, the Commission recognized that the record developed in the *Global Order* proceeding did not contain the necessary detail for the Commission to implement immediate structural separation. Accordingly, we directed commencement of a new proceeding to provide us with a complete record which would “allow us to implement separation in a way which guarantees fair competition, while at the same time ensuring that BA-PA [Verizon] can successfully compete without unnecessary financial burdens being placed on it.” (*Global Order*, slip op., p. 233).

## **B. Commonwealth Court Decision**

As noted, the *Global Order* was affirmed, in its entirety, by the Commonwealth Court. The Court concluded that this Commission possessed the requisite

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<sup>3</sup> On page 228 of the *Global Order*, we noted that:

- (1) Bell has a virtual monopoly in Pennsylvania’s local exchange market, controlling over 90% of the local business market;
- (2) Bell controls nearly 100% of the local residential market (as measured by access lines); and
- (3) Bell abused its market power by providing competitors with less than comparable access to its network by engaging in other discriminatory conduct that prevented its customers from switching to a competitor.

statutory authority to direct Verizon to provide retail services through a structurally separate affiliate, operating independently. (763 A.2d 463). Also, the Court acknowledged that a requirement of structural separation may conform with federal law if it is shown that the requirement is competitively neutral and needed to ensure the quality of services and safeguard consumer rights. (*Id.*).

Also, the Court concluded that there was adequate record support for our determination that a structurally separate retail affiliate was necessary based on Verizon's market dominance and substantial evidence of discriminatory access being provided to competitors. (763 A.2d 465).

Finally, the Court, rather than interpret the instant proceeding to examine the "costs and harms" of structural separation as indication of a lack of record support, observed that ". . . the PUC's willingness to monitor the continuing impact of separate marketing is evidence of a responsible approach to supervision rather than a lack of confidence in the basic decision." (763 A.2d 465-466).

## II. HISTORY OF PROCEEDING

### A. Procedural History and Scope of Proceeding

Our *Global Order* directed Verizon to submit a plan for the creation of a separate affiliate to supply retail telecommunication services which will operate independently from Verizon's wholesale operations. (*Global Order*, p. 234).

The *Global Order* also established with specificity the standards that would govern our review of any structural separation proposal. We specifically directed Verizon to identify each component or element of its retail service and to submit a verifiable cost analysis of each component or element. We also directed Verizon to submit a mitigation proposal for each specific retail element for which Verizon asserts that structural separation would cause excessive cost or duplication. Finally, we determined that if Verizon did not provide a verifiable cost analysis and a mitigation proposal for a given retail element, that element would be subject to separation. (*Global Order*, p. 234).

On April 27, 2000, we issued our Order Instituting Structural Separation Proceeding (*Instituting Order*), consistent with the *Global Order*.<sup>4</sup> Ordering Paragraph No. 2 of the *Instituting Order* provided as follows:

2. That within 30 days of the entry date of this order, BA-PA [Verizon] may file an updated structural separations plan and mitigation plan and, at its option, an alternative proposal to structurally separate its retail and wholesale operations; each plan and proposal shall be accompanied by supporting affidavits which shall serve as direct testimony in the subsequent hearings.

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<sup>4</sup> The *Instituting Order* further provides details of appellate litigation and related procedures to said litigation.

Furthermore, we provided clarification to all Parties by our *Instituting Order* that confirmed that the purpose of the proceeding had not changed since issuance of the *Global Order*.<sup>5</sup>

Thus, Verizon was directed to file a structural separation plan and, to the extent applicable, mitigation proposals. Also, at its option, the company was given the opportunity to file an alternative proposal to structurally separate its retail and wholesale operations. The structural separation implementation proceeding was assigned to Administrative Law Judge (ALJ) Wayne L. Weismandel.

## **B. Proceeding Before ALJ Weismandel**

ALJ Weismandel conducted a prehearing conference and established a procedural schedule. As of the date the Recommended Decision was issued in this matter (January 26, 2001) the following were active participants: Verizon, Rural Telephone Company Coalition (RTCC), MCIWorldcom (MCIW), Office of Consumer Advocate (OCA), Pennsylvania Cable Television Association (PCTA), CTSI, Inc. (CTSI), AT&T Communications of Pennsylvania, Inc. (AT&T), Adelphia Business Solutions, Inc. (Adelphia), MGC Communications, Corp. d/b/a Mpower Communications, Corp. (Mpower), ATX Telecommunications Services, Ltd. (ATX), Office of Small Business Advocate (OSBA), Senator Vincent J. Fumo, Senators Roger A. Madigan and Mary Jo White, the Association for Local Telecommunications Services, Inc. (ALTS), Covad Communications Company (Covad), ACSI Local Switched Services, d/b/a e.spire (e.spire), Rhythms Links, Inc. (Rhythms), XO Communications f/k/a NEXTLINK Pennsylvania, Inc. (XO), the Telecommunications Resellers Association, now the Association of Communications Enterprises (ASCENT), Sprint Communications, L.P. (Sprint), The

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<sup>5</sup> See *Instituting Order*, Ordering Paragraph No. 1, p. 6.

United Telephone Company of Pennsylvania (United), Z-Tel Communications, Inc. (Z-Tel), and the Competitive Telecommunications Association (CompTel).<sup>6</sup>

During the course of the proceeding, we issued our *July 20, 2000 Material Question Order*, whereby we denied Verizon's request to expand the scope of this proceeding and affirmed the limited purpose, narrow scope and specific standards governing this proceeding.<sup>7</sup> We again reiterated the element identification, cost analysis, and mitigation procedure that we had previously addressed in our *Global and Institution Orders*:<sup>8</sup>

[Verizon] may advocate alternative proposals regarding the form, nature and details of a structural separation and creation of a retail affiliate that would adequately ensure non-discriminatory access to its wholesale services and facilities, provided that [Verizon] has first made a demonstration that full structural separation would be unreasonably costly, unduly burdensome or confiscatory. Other parties are also permitted to file alternative proposals, in addition to comments to [Verizon's] initial structural separations plan.

(*See July 20, 2000, Material Question Order*, Ordering Para. 3).

By Order entered August 18, 2000, we adopted an Initial Decision of ALJ Weismandel which denied the motion of Verizon seeking to dismiss Senators Fumo, Madigan, and White from the proceeding, and to disqualify their counsel.

After ruling on certain motions regarding discovery and the procedural schedule, evidentiary hearings were held November 15-17; 20-21, 2000.

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<sup>6</sup> Inactive participants are the Office of Trial Staff (OTS), Pennsylvania Utility Law Project (PULP), Cavalier, Network Access Solutions Corporation (NASC), FairPoint Communications Solutions Corp. (FairPoint), GTE North, now Verizon North (GTE), and RCN Telecom Services, Inc. (RCN). *See Recommended Decision*, p. 4, n. 4.

<sup>7</sup> *See Material Question Order*, pp. 13-14.

<sup>8</sup> *Id.*, p. 14.

The testimony adduced at the hearings is summarized by presiding ALJ Weisman, at pages 7-8 of the Recommended Decision.

In support of its position, Verizon filed direct and supplemental testimony sponsored by Jeffrey Ward, Patrick Garzillo, Dr. Kenneth Gordon, Harry M. Shooshan III, Vincent Maisano, and Marilyn DeVito (rebuttal). The OCA sponsored the testimony of Pamela J. Cameron, Ph.D and Barbara Alexander. MCIW sponsored the testimony of Dr. August H. Ankum and Dr. Mark T. Bryant. The OSBA provided the testimony of Stanford L. Levin. CompTel and ATX provided testimony from Joseph Gillan. ACER<sup>9</sup> provided testimony from Terry L. Murray. AT&T sponsored testimony from Lee L. Selwyn. Ronald L. Reeder provided testimony in support of the position of CTSI. Also, Peter Bradford and Richard Silkman submitted testimony on behalf of Senators Mary Jo White and Roger A. Madigan.

Witnesses sponsoring written testimony were made available for cross-examination by active participants. The written testimony of two witnesses was admitted by Stipulation and they were excused from appearing, no active participant having any cross-examination for them (Verizon witness Vincent J. Maisano, sponsor of Bell Atlantic-Pennsylvania, Inc. Stmt. No. 5.0, and CTSI witness Ronald L. Reeder, sponsor of CTSI, Inc. Stmt. No. 1).

Subsequent to the close of the record and the filing of Main and Reply Brief, the Recommended Decision of ALJ Wayne L. Weisman was issued January 26, 2001.<sup>10</sup>

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<sup>9</sup> ACER collectively refers to the following parties: ALTS, Covad, e.spire, and Rhythms Links.

<sup>10</sup> On December 5, 2000, Verizon and Senator Vincent J. Fumo filed a Joint Petition To Adopt Settlement Agreement And to Terminate The Proceeding (Settlement Petition) and also filed a Joint Petition To Stay Proceeding (Stay Petition). By Commission Secretarial Letter dated December 14, 2000, the Stay Petition was denied and a

ALJ Weisman reached fifty-nine Findings of Fact and twenty-two Conclusions of Law. Said Findings of Fact and Conclusions of Law are adopted unless expressly modified in the discussion to follow.

Exceptions were received from the following parties: Verizon, ACER, AT&T (Expurgated and Confidential Versions), MCIW, OCA, and Senator Vincent J. Fumo. Replies to Exceptions were received from Verizon, ACER, AT&T (Expurgated and Confidential Version), CTSI, MCIW, Sprint and United (referred to collectively as Sprint/United) and Senators Mary Jo White and Roger A. Madigan.

On March 9, 2001, AT&T filed a Petition to Reopen the Record for New Evidence on Structural Separation Costs (AT&T Petition hereafter) and proffered an affidavit of Dr. Selwyn.<sup>11</sup> AT&T pleads that reopening of the record in order to re-examine the actual costs of structural separation is required in light of Verizon's claim that full structural separation would cost \$1 billion dollars and an extensive media campaign related to this contention.

On consideration of the AT&T Petition, we shall deny it. The Petition cites no "changed" circumstances in fact or law which would support reopening.<sup>12</sup>

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comment and reply comment procedure was implemented at a separate Docket Number M-00001353F0002, regarding this Settlement Petition.

<sup>11</sup> AT&T relies on 52 Pa. Code § 5.571(d) which permits reopening of the record when conditions of fact or law so require.

<sup>12</sup> We note that AT&T Stmt. 1.0, p. 11, already a part of this record, addresses the foundational support used by Dr. Selwyn to arrive at his newly proposed quantitative assessment of structural separation. Thus, an analysis that purportedly contradicts Verizon's claims was available prior to the close of the record.

### III. SUMMARY OF EVIDENCE AND POSITIONS

#### A. Parties' Positions and Supporting Evidence

##### 1. Verizon

Verizon takes the position that it has conclusively demonstrated that full structural separation is unreasonably costly, unduly burdensome, and confiscatory. It believes it has presented evidence of a one-time cost to implement full structural separation of over \$800 million, and a continuing cost of \$300 million per year. It maintains that the customers will be required to pay these costs. Furthermore, it postulates potential job losses of as many as 7,600 high-paying jobs in Pennsylvania. (*See Verizon Main Brief*).

Verizon further believes that because of the Commission's Performance Metrics Order,<sup>13</sup> the successful completion of Verizon's Operational Support Systems (OSS) test, and increased competition in the local exchange market, the original rationale for instituting structural separation ceases to exist. Verizon points to the proposed settlement between itself and Senator Fumo (a one time advocate of structural separation) as evidence of such change.

Last, Verizon asserts that any further concerns regarding unfair competition and nondiscriminatory access can be adequately addressed by its alternate proposal to operate a structurally separate advanced data service affiliate, subject to a Commission-approved Code of Conduct. The Verizon data affiliate would use the same OSS interfaces and other processes that CLECs use, thereby providing a service benchmark for the fastest growing segment of the local market. (*Verizon M.B.*, pp. 26-31).

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<sup>13</sup> *See Joint Petition of Nextlink, et al.*, Docket No. P-00991643 – Performance Metrics Order (*PMO Order*) (December 31, 1999); *PMO Reconsideration Order* (July 21, 2000).

## 2. Other Parties

Senator Fumo asserts that recent market evidence has demonstrated to him that his efforts at promoting competition have already been successful. Additionally, Senator Fumo points to recent events in New York and Texas as further evidence that market forces, rather than protracted litigation, yield the fastest and most efficient route to full competition.<sup>14</sup>

AT&T takes the position that Verizon has completely ignored the scope and standard established by the Commission for this proceeding and developed a “doomsday” scenario that is nothing more than the most inefficient, duplicative and expensive method of implementing structural separation imaginable. Thus, according to AT&T, the \$1 billion price tag advanced by Verizon should be disregarded and that Verizon’s argument regarding potential job losses is contradicted by testimony from other Verizon witnesses. (*See* AT&T M.B., p. 4).

MCIW presented a proposal to separate Verizon into a wholesale component that would supply loop (and related) facilities to all competitors (LoopCo), and a retail component that would have all of Verizon’s retail operations, plus the other network related functions (RetailCo). (*See* MCIW M.B., p. 5).

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<sup>14</sup> The former Bell Regional Operating Company in the jurisdictions of New York and Texas were granted authority to provide in-region interLATA service after satisfying the provisions of Section 271 of TA-96. *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (December 22, 1999); *See In the Matter of Application by SBC Communications Inc., et al. . . .*, 15 FCC Rcd 18354 (June 30, 2000).

OCA also takes the position that Verizon failed to file the detailed cost analysis of each retail element of its operations as required by the *Global Order*. OCA requests that Verizon's proposal be rejected and proposed an alternative structural separation plan which would allow Verizon to continue to offer current local exchange service, intraLATA toll services, and vertical/optional services. OCA's proposal would require the establishment of a separate retail affiliate to offer advanced data services, as well as interLATA toll and local services, if those services are bundled with advanced services. (*See* OCA M.B., pp. 17-24).

CompTel proposed that only after Verizon has been structurally separated into wholesale and retail affiliates should it be allowed to compete for new customers, offer new services, and earn market share incrementally. It also proposed that the Commission require a substantial share of Verizon's retail stock to be publicly traded, that we require management compensation of the retail affiliate to be directly tied to the performance of the retail affiliate's stock and that we require that the advanced services affiliate continue to acquire all services and functions at nondiscriminatory, cost-based rates, be prohibited from sharing the name or corporate trademark of the ILEC, and from acquiring excessive ownership in the advanced services affiliate. (*See* CompTel M.B., p. 3).

OSBA, asserting that full structural separation is "problematic," and desiring to encourage a gradual transition, rather than a "flash cut," proposed through its witness, Dr. Levin, a plan he referred to as "virtual structural separation." The concept of virtual, as compared to functional, separation involves implementing rules in accounting and operations, as well as regulations that effect a substantial separation of Verizon's wholesale and retail local exchange operations. (OSBA M.B., p. 15).

ACER provides that divestiture is the most effective means of ensuring proper conduct between the retail and wholesale elements of Verizon. (ACER M.B., p. 6). Short of divestiture, ACER proposed a comprehensive set of structural separation rules in

the form of a Code of Conduct. (ACER M.B., p. 7). Thus, pursuant to ACER's position herein, regardless of the form of structural separation adopted by this Commission, it advocates a revised and detailed Code of Conduct similar to that proposed by its witness Murray.

## **B. ALJ Recommended Decision**

The salient points of the Recommended Decision are as follows:

ALJ Weismandel concluded that the purpose of this proceeding was not to revisit the need for retail/wholesale structural separation but, rather, to determine its precise form and nature so as not to be unduly burdensome or costly to Verizon. The proceeding was meant to consider alternative forms of structural separation if Verizon could demonstrate that full structural separation would be unreasonably costly, unduly burdensome or confiscatory.

The ALJ found that, contrary to the directions in the *Global Order*, Verizon failed to produce a detailed plan of structural separation identifying each major element of retail service to be structurally separated. The ALJ also found that Verizon failed to produce current and verifiable cost studies of these retail elements, and, therefore, failed to meet its burden of proof that a full retail/wholesale structural separation would cost \$1 billion. ALJ Weismandel further observed that Verizon's estimate of societal costs was inadequate. He stated that Verizon had "adduced contradictory testimony" concerning the actual number of jobs that would be lost regarding the effect of structural separation on Verizon employment (i.e., one witness testified that a major cost of structural separation for Verizon would be "the need for 3,021 additional people," while another Verizon witness testified that structural separation would result in "the loss of 3,300 direct jobs."). (*See* R.D., p. 19).

Verizon's three-part alternative proposal of (a) creating a separate "advanced services" affiliate, (b) adhering to a Commission-approved Code of Conduct, and (c) providing wholesale services subject to the Commission's established OSS performance standards and remedies were rejected by the ALJ as unresponsive to the directives of the *Global Order*. The ALJ found that Verizon's separate advanced services affiliate proposal does not mitigate any *specific* retail element to be structurally separated as required in the *Global Order*. Instead, it is an alternative to a retail/wholesale structural separation. The ALJ concluded that Verizon's alternative proposal should be denied.

In addition, because Verizon failed to provide the necessary verifiable cost support studies to prove that excessive cost or duplication would be required for any major element to be structurally separated, the ALJ found that the Commission may order the structural separation of needed elements as it deems appropriate. (R.D., p. 24).

The ALJ also recommended that the alternative proposals submitted by the other active participants be rejected. He was of the view that each failed to produce any cost study or analysis and were, therefore, deficient in record support for their direct adoption by the Commission.

Finally, ALJ Weismandel recommended that within thirty days of the entry of the Commission's Order, Verizon should be directed to commence a one-year transition period to create a separate retail affiliate for all retail services.

### **C. Exceptions**

On review of the Exceptions of the participants, we conclude that, for the most part, they reiterate the positions raised in their cases-in-chief. We would only repeat those issues raised in Exceptions which merit further consideration, fully recognizing that

although the contentions of the participants may not be expressly referenced, they have been fully considered.

Verizon contends that the following matters were not addressed by the ALJ: the effect of structural separation on (a) the Cost of Providing Telecommunications Services, (b) the Development of Local Competition, (c) Network Operations; and (d) Minimizing Customer Confusion.

Specifically, Verizon argues that the ALJ failed to address: (1) Verizon's testimony (*see* Verizon Stmt. 3.0 (Gordon) pp. 9-19) that full structural separation would raise the overall cost of providing telecommunications services in Pennsylvania because it "would create a price umbrella that would shield CLEC' inefficiencies (Verizon Exc., pp. 14-15); (2) Verizon's and the OSBA testimony (OSBA Stmt. 1.0 (Levin) pp. 7-8) that the imposition of full structural separation could actually slow the development of local competition (Verizon Exc., p. 15); (3) Verizon's testimony (*see generally*, Verizon Statement 6.0 (Weber)); and (4) the minimized amount of customer confusion that would occur under Verizon's alternative structural separation proposal (Verizon Exc., p. 16).

Verizon further objects to the Recommended Decision by arguing that the ALJ failed to consider our express directive to consider the "passage of time" and "the potential for changed circumstances" since the date of the *Global Order* in assessing what form of structural separation should be imposed. Verizon believes that the ALJ should have considered (1) the current existence of competition in the local market, (2) the experience gained in New York and Texas regarding the explosion of local competition without the imposition of full structural separation, (3) this Commission's implementation of extensive performance measurements and penalties for OSS, and (4) the fact that this Commission has directed extensive third-party, military-style testing of Verizon's OSS systems, which have now been successfully completed. (Verizon Exc., pp. 17-19).

Verizon asserts that the characterization of its alternate proposal as “not a wholesale/retail separation, but ...a line of business split”, is erroneous because: (1) the Commission itself cited as an example the exact proposal that Verizon PA submitted in its April 27, 2000 Structural Separation Order; (2) its proposal is a wholesale/retail split since some portion of what is currently Verizon’s retail advanced data services business would be structurally separated from Verizon PA, which provides the wholesale services on which those advanced data services depend. Furthermore, Verizon objects to the ALJ’s Finding of Fact No. 27 because it alleges that there was no evidence at all in the record to support this finding and the ALJ provided no citation to the record to support it. (Verizon Exc., pp. 19-23).<sup>15</sup>

Finally, Verizon excepts to the ALJ’s mandated timetable for implementation of “full” structural separation and the failure to quantify the cost recovery issues, impact on consumers, and network reliability issues necessitated by structural separation. (Verizon Exc., pp. 23-24).

In its Exceptions, both the Senators and MCIW advocate (1) the appointment of an independent ombudsman (accountable to the Commission) to oversee Verizon’s implementation of structural separation (including the development of the plan); and (2) swift, automatic, and significant penalties for failure to carry out the implementation of a valid structural separation in a timely manner. (MCIW Exc., pp. 4-10). MCIW asserts that the Recommended Decision permits too much discretion on the part of Verizon.

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<sup>15</sup> Finding of Fact No. 27 states that “[t]he establishment of a separate advanced data services affiliate does not mitigate the anti-competitive impact of the dominant market power Verizon currently exercises as a result of its base of legacy monopoly customers.”

## IV. DISCUSSION

### A. Burden of Proof

Pursuant to the *Global Order*, and consistent with 66 Pa. C.S. §315(b), Verizon bore the burden of proof relative to the following parameters of a structurally separate wholesale and retail entity:

- (a) The plan shall be of sufficient detail to identify each component or element of retail service needed to be structurally separate and to allow a current and verifiable cost analysis of each component or element, and to provide the Commission with such cost analysis.
- (b) Where BA-PA [Verizon] is of the belief that excessive cost or duplication will be required for a *specific* element to be structurally separate, it shall file a mitigation proposal for that element. BA-PA [Verizon] shall bear the burden of providing the Commission with the necessary current and verifiable cost support on this issue. Failure to do so shall result in the structural separation of the specific element as the Commission deems appropriate.
- (c) The plan shall meet the structural and transactional requirements similar to those required by TA-96 for a separate affiliate to provide long distance service.

\* \* \*

- (e) Where a party disputes that BA-PA's [Verizon's] characterization of an element is impractical for separation, and BA-PA [Verizon] has provided cost documentation and analysis in support of that argument, the party shall provide appropriate analysis and evidence supporting its position.

- (f) The Commission will review the plan and/or alternate proposals and comments, and order implementation of specific elements where there are no contested facts.
- (g) If the Commission's review reveals disputed facts concerning a specific element of the structural separation, the Commission will refer that element to the Office of Administrative Law Judge for an expedited hearing and recommended solution to be completed and returned to the full Commission within ninety (90) days of referral.

(*Global Order*, pp. 234-235). (Emphasis in original).

ALJ Weismandel was frustrated, as were several of the participants, in attempts to review Verizon's cost figures for "full" (as termed by Verizon), structural separation, based on the failure to correlate costs to identifiable operational elements. (*See R.D.*, pp. 24-25). The presiding ALJ concluded:

Verizon, having taken the blanket position that structural separation in and of itself would require excessive cost or duplication, did not propose a method of mitigation for any *specific* element to be structurally separate. Consequently, Verizon did not bear the burden of providing the Commission with current and verifiable cost support necessary to demonstrate that a mitigation proposal would be preferable to structural separation of any *specific* element, for the simple reason that it did not perform such an analysis (Tr. 469). Verizon's witness Garzillo admitted that the only alternative Verizon ever considered was its advanced data services affiliate proposal. This proposal, which would establish a wholesale affiliate, is not a method of mitigation for any *specific* element to be structurally separate in the creation of a

retail affiliate. It is, instead, an alternative to a retail/whole sale structural separation and completely fails to comply with the Commission's directive.

(R.D., p. 23).

ALJ Weismandel considered Verizon's asserted societal costs pertaining to an alleged loss of jobs and concluded:

56. Verizon adduced contradictory testimony from its own witnesses regarding the effect of structural separation on Verizon employment. One witness (Mr. Garzillo) testified that a major cost of structural separation for Verizon would be "the need for 3,021 additional people", while another Verizon witness (Mr. Maisano) testified that structural separation would result in "the loss of 3,300 direct jobs".<sup>16</sup>

On consideration of the record in this matter, we conclude that Verizon did not meet its burden of proof identified in the *Global Order* and subsequently clarified in the *July 20, 2000 Material Question Order*. We sought to provide Verizon with every opportunity to present this Commission with verifiable cost data to demonstrate that full structural separation would be unreasonably costly, unduly burdensome, or confiscatory. The concern over the verifiable nature of Verizon's cost estimates is well-taken. Verizon could have pointed to an existing retail/wholesale functionality, element, or operation, and projected costs of structural separation based on an affiliate analogue engaging such costs. The nature of detail that this Commission envisioned was not approached until the rebuttal testimony of Verizon witness Garzillo. (R.D., p. 22).

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<sup>16</sup> Several participants, most notably AT&T, assail the Verizon proposal as the most inefficient, duplicative, and expensive method of achieving structural separation. (*See* AT&T M.B., p. 4).

However, our review of the record leads us to conclude that Verizon (1) failed to submit a wholesale/retail structural separation plan that would seek to minimize the cost and duplication of assets and employees, (2) failed to submit a current and verifiable cost analysis for each component or element needed to be structurally separate, and (3) failed to submit mitigation proposals as called for in the Global Order. The *Global Order* required that the cost analysis be “verifiable” so that the underlying source data, back-up information, assumptions and computations could be reviewed and evaluated by the Commission. Verizon failed to meet this critical burden of proof. Indeed, each of the economic witnesses in this proceeding (other than those sponsored by Verizon) testified that the cost analysis submitted by Verizon was not verifiable and, thus, could not be relied upon as an accurate measure of the costs of full structural separation of all retail and wholesale operations.

In addition to maximizing the cost of full structural separation, Verizon also submitted contradictory testimony as to the estimated effect on its workforce. Thus, while Verizon witness Mr. Maisano, union official, estimated a potential job loss of 7,600 jobs, Verizon’s operational expert, Mr. Garzillo, estimated that the additional requirements of full structural separation would require it to hire an additional 3,021 people. (Verizon Stmts. 5.0 (Maisano) and 2.0 (Garzillo)). Given that Mr. Maisano conducted no study to support his estimate and, further, that he applied a “multiplier” of 2.3 to his original estimate, we decline to give any weight to this speculative testimony. Rather, we find more credible the testimony provided by Mr. Garzillo which concludes that full structural separation will require additional personnel to implement.

Notwithstanding the failure of Verizon to meet its burden of proof as to its alternative proposals, this Commission acknowledges that “full” structural separation will

require implementation costs which could be substantial.<sup>17</sup> The parties have convincingly argued that even with the implementation of structural separation of Verizon's wholesale and retail arms, no less regulatory oversight than that currently prevailing will be required to ensure compliance. For these reasons we are willing to consider an effective and less costly means of structural separation which will fulfill the goals of our *Global Order* to remove the incentive and opportunity to engage in discriminatory and unfair competitive conduct.<sup>18</sup>

## **B. Consideration of Alternative Proposals**

In addition to Verizon's proposal, alternative structural separation plans were proposed by ACER,<sup>19</sup> AT&T, CompTel/ATX, CTSI, MCIW, OCA, and OSBA. Finding of Fact Nos. 33-53 outline the alternative proposals presented by certain of the participants.

### **1. Summary of Verizon's Alternative Proposal**

Under Verizon's alternative proposal,<sup>20</sup> rather than separating out its retail elements, Verizon's non-circuit-switched or advanced services (*i.e.* packet switched) line of business would be separated to one or more of its affiliates and would operate as a wholesale transport provider.<sup>21</sup> The entity that currently provides these services is known as Verizon Advanced Data Services, Inc., or VADI.

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<sup>17</sup> However, we, unequivocally repudiate the asserted \$1 billion estimate of Verizon as wholly lacking in evidentiary support.

<sup>18</sup> Verizon was provided notice that “[f]ailure to do so [establish excessive cost or duplication as to a specific element] shall result in the structural separation of the specific element as the Commission deems appropriate.”

<sup>19</sup> ACER, as noted, consists of ALTS, Covad, e.spire, and Rhythms.

<sup>20</sup> See Verizon Statement No. 1.0, Exhibit JWW-1.

<sup>21</sup> This separation was already required by the Federal Communications Commission as a condition of the approval of the Bell Atlantic/GTE merger commitments. See Re: Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control, etc., CC Docket No. 98-184 (rel. June 16, 2000), ¶¶260-278 [hereinafter FCC Merger Order].

In addition, Verizon would transfer its DSLAMs<sup>22</sup> to its advanced services line of business. VADI will not unbundle any of its DSLAMs nor make them available to competitors at cost-based rates. If a customer were to call Verizon and request or inquire about DSL service, Verizon's customer service representative would refer the call to Verizon's advanced service marketing team, and the Verizon customer service representative would not provide the customer with any additional options that are provided by VADI.

Further, Verizon's plan would include a proposed Code of Conduct<sup>23</sup> governing (a) relations between Verizon and the separate advanced services affiliate and (b) its provision of wholesale and retail circuit-based services (including voice services) to govern the relationship between Verizon and VADI. This Code of Conduct, which is different than the existing Code of Conduct found at Appendix C of the *Global Order*, would permit Verizon to package VADI's data services with its circuit-switched services. Finally, Verizon's provision of wholesale services would continue to be subject to the performance standards and remedies established by the Commission. (Verizon Stmt. No. 1, p. 20).

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<sup>22</sup> Digital Subscriber Line Access Multiplexer.

<sup>23</sup> See Verizon Statement No. 1, Exhibit JWW-7.

## 2. Summary of Other Participants' Proposals

### (a) ACER's Proposal

ACER, without proposing the precise form, nature, and details for structural separation of Verizon, proposed "Structural Separation Requirements" in the form of a Code of Conduct to be used in conjunction with some form of structural separation. ACER does not take issue with the Code of Conduct established in the *Global Order*, but proposes a Code of Conduct that goes beyond the scope of the *Global Order's* Code of Conduct. (ACER M.B., pp. 14-30).

The ALJ rejected ACER's proposal. As such, ACER filed Exceptions suggesting that Verizon should be required to develop a new plan within thirty days, rather than obligating Verizon's competitors to fix the plan through further litigation. An independent third party, to be selected by the Commission and paid for by Verizon, should evaluate the new plan within ninety days after it is submitted. ACER also suggests that if Verizon refuses to agree to this arrangement, it should still be required to submit a plan, but also pay substantial penalties under the Public Utility Code for its blatant disregard of the *Global Order* and the Commission's April 27, 2000 Order at this docket. (ACER Exc., pp. 2-3).

**(b) AT&T's Proposals**

AT&T recommended two proposals in this proceeding, one of which provided for a PLR function in the remaining wholesale affiliate (Option 2) and one which did not (Option 1).<sup>24</sup> Both proposals involve full wholesale/retail structural separation and are focused on the traditional local exchange market.

Under Option 1, the remaining wholesale entity would retain its incumbent local exchange carrier status and would remain subject to existing rate and quality of service regulation by the Commission. This regulation would focus on the wholesale affiliate's provision of UNEs, resale and other interconnection issues, as well as access services provided to interexchange carriers. The retail affiliate's noncompetitive services would remain subject to price cap regulation, while its more competitive services would be deregulated. (R.D., Finding of Fact No. 41, p. 16).

Under Option 2, the wholesale company will retain PLR functions for the foreseeable future. Any increase in the package of services required by a given PLR customer would require that customer to move off the PLR to an affiliated or unaffiliated retail provider. The PLR organization would be prohibited from directing such customers to the Verizon retail affiliate and would be required to inform customers that they may order service from any of a number of retail service providers. The wholesale entity would remain subject to regulation as an incumbent for its wholesale services and also its PLR services. (R.D., Finding of Fact No. 43, p. 17). In addition, AT&T proposes that an equal access ballot be conducted at some point after Section 271 approval to promote customer transition into the competitive market. (R.D., Finding of Fact No. 42, p. 16).

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<sup>24</sup> In addition to AT&T's support for a PLR, the following Parties all agree that a Verizon entity should function as a PLR: OCA, CompTel/ATX, and the Senators. (R.D., Finding of Fact No. 54, p. 19).

In drawing from its experience with the Modified Final Judgment Consent Decree, AT&T suggests that shared network facilities agreements can be utilized in order to reduce the estimated cost of implementing a full structural separation alternative. As such, where existing facilities are shared between the wholesale and retail entities, shared facilities agreements between the two affiliates and the use of “duct tape” as a means of demarcation of a boundary between the two can be the basis for a transitional device in instances in which a “flash-cut” separation could be unduly costly or disruptive and until full separation can be achieved. (R.D., Finding of Fact No. 44, p. 17; AT&T Stmt. No. 1.0, pp. 39-42).

Finally, both of AT&T’s options would utilize the existing structure and capabilities of Verizon’s OSS and restructure system utilization on a transitional basis in order to avoid duplication and unnecessary cost. AT&T proposes a gradual transfer of CLECs onto Verizon’s core OSS which is currently utilized by its retail division and which already has the capability to serve all the retail customers in Verizon’s service territory. AT&T’s proposal ultimately would result in the elimination of the separate systems Verizon now uses for its itself and for its retail operations. (R.D., Finding of Fact Nos. 46, 48, 49, and 50, pp. 17-18).

**(c) CompTel/ATX Proposal**

CompTel/ATX recommends that the Commission adopt a plan that will ensure that the two basic forms of discrimination do not occur (*i.e.*, “operational discrimination and “economic discrimination”). With regard to avoiding “operational discrimination,” CompTel/ATX recommends that: (1) Verizon PA be required to establish a separate retail affiliate (Verizon Retail) that will acquire UNEs from the ILEC/wholesale entity like any other CLEC, and (2) that the ILEC/wholesale entity be prohibited from initiating service to any new account, transferring service to a different location, or introducing any new service. (CompTel/ATX Stmt. No. 1, pp. 13-14).

With regard to avoiding “economic discrimination,” CompTel/ATX each propose that the new Verizon retail entity be required to have significant minority shareholder interests. CompTel/ATX advocate that approximately 45% of these shares be publicly traded.<sup>25</sup> (R.D., Finding of Fact No. 53, p. 19).

**(d) CTSI’s Proposal**

CTSI endorsed MCIW’s “LoopCo” wholesaler proposal as discussed below, but also agreed that proposals set forth by AT&T and ATX/CompTel were viable. (R.D., p. 15, Finding of Fact No. 35).

**(e) MCIW’s Proposal**

MCIW proposed the creation by Verizon of a separate LoopCo, which would be regulated as an ILEC, and function as a wholesaler of the local loop. (Finding of Fact No. 34). Specifically, MCIW’s LoopCo proposal would create two affiliates. A RetailCo affiliate would be created that would retain all existing retail customers, all network elements of Verizon, except the local loop (which would be owned by the LoopCo), and all other functions (including operation support systems, personnel, and assets not otherwise assigned to LoopCo). The LoopCo affiliate would own all local loop

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<sup>25</sup> The Senators agree with CompTel/ATXs’ proposal but advocate that 24-33% of these shares be controlled by independent, outside owner(s).

plant, including central office buildings, land, and functions (including operation support systems), personnel, and assets necessary to operate those loop facilities. The specifics of MCIW's proposal were explained in detail by Dr. Ankum in MCIW St. No. 1, pp. 49-55.

The ALJ determined that MCIW's proposed "LoopCo" wholesaler proposal does not address a wholesale/retail affiliate structural separation of Verizon, as required by the Commission. (R.D., p. 15).

**(f) OCA's Proposal**

OCA proposes that the Commission adopt a structural separation plan that allows Verizon to continue to offer local exchange service, intraLATA toll services, and vertical/optional services as it does today, but requires an unregulated Verizon entity to offer interLATA toll and advanced data services through a separate retail affiliate as envisioned by the Commission. The separate retail affiliate (referred to as "Verizon Retail") could include any number of affiliates including Verizon Retail, Verizon Advanced Data Services, or the Verizon interLATA long-distance affiliate. In addition, any Verizon bundled services that combine local exchange service with data and/or toll services would have to be offered by Verizon Retail or another CLEC.

OCA also proposes that Verizon PA not be permitted to market bundled packages in the future that would combine local exchange service with any toll service and/or any advanced data service that must be provided through a separate affiliate. Therefore, if Verizon wishes to bundle its existing local exchange service with either toll and/or advanced data service, it must do so through a separate affiliate such as Verizon Retail. (OCA Main Brief, p. 18).

Under OCA's proposal, Verizon PA would act as the ILEC and would continue to offer tariffed local business and residential service, vertical or optional service,

and intraLATA toll to all of its customers. (OCA St. No. 1, p. 24). Verizon PA would also continue to offer access service and UNEs or other wholesale services to both Verizon Retail and CLECs. Also, consumer protections such as strict PLR, consumer education and policies comparable to those that the Commission has adopted for the electric and natural gas utilities, were proposed by OCA. OCA seeks assurance that all consumers in Verizon's service territory in Pennsylvania can continue to take service at capped tariffed rates in accordance with the *Global Order*. (OCA Main Brief, pp. 17-18).

**(g) OSBA's Proposal**

OSBA proposed a plan of virtual,<sup>26</sup> rather than structural, separation for Verizon's wholesale and retail local exchange business. OSBA's proposal would retain structural flexibility for Verizon, reduce the costs of implementing and operating the structural separation regime, while maintaining the benefits that the Commission anticipates, and make it more likely that Verizon will continue to provide the services demanded by small businesses so that they can remain competitive. (OSBA Stmt. No. 1, pp. 8-9).

Thus, the concept of virtual structural separation involves implementing rules in accounting and operations, as well as regulations that effect a substantial separation, albeit virtual, of Verizon's wholesale and retail local exchange businesses. (OSBA M.B., p. 15).

**C. Disposition and Analysis**

**1. Acceptance of Structural Separation Terms and Conditions**

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<sup>26</sup> On cross-examination, Dr. Levin distinguished his proposal from a proposal advanced by Verizon and, *inter alia*, Senator Fumo in a proposed settlement. *See* Docket No. M-00001353F0002; Tr. 718.

The record in this proceeding can support several of the forms of structural separation proposed by the Parties to this proceeding, including the full structural separation model. Under these circumstances, we must exercise our administrative expertise and discretion wisely to choose the proposal that will maximize the public interest, avoid unreasonable costs and best fulfill the goals of TA-96 and Chapter 30. At the same time, however, we remain committed to an effort to resolve and terminate, to the maximum extent possible, the morass of litigation that has frustrated the introduction of local telephone competition in Pennsylvania.

Therefore, guided by our overall duty to develop sound public policy for the benefit of the citizens and businesses of this Commonwealth, as well as our desire to establish some measure of certainty in this industry, we will first offer VZ the option of accepting a proposed resolution of this matter. In lieu of the further litigation that would likely follow from choosing a single structural separation model, we shall present Verizon with the following options: (a) accept the terms of a functional/structural separation and further conditions set forth herein, or (b) accept the possibility of full structural separation of all retail and wholesale operations upon our further review and consideration of the record in this matter. Acceptance of these terms and conditions will both terminate Verizon's numerous state and federal court challenges to the Global Order and, provided that all terms and conditions set forth herein are executed in good faith, should create the conditions necessary to allow local telephone competition to flourish.

## 2. Structural Separation Terms

After a careful review of the record in this case and examination of all proposals, we believe that, with the addition of certain market opening conditions and termination of Verizon's legal challenges to the *Global Order*, that the following form of structural separation, hereinafter referred to as "functional/structural separation," will enable this Commission to efficiently and expeditiously achieve what has been our ultimate goal since the enactment of TA-96 – that is, to open the local telecommunications market to competition. By this Opinion and Order, we shall adopt a functional/structural separation approach, comprised of two prongs.

First, we adopt, with modification, the plan presented by OSBA. (OSBA Stmt. No. 1, p. 3). The premise of OSBA witness, Dr. Levin's, testimony is that it is difficult for anyone, including regulators, to determine in advance the best or most efficient market structure for a firm. Witness Levin proposed the concept of virtual structural separation, which he explained as follows:

What I mean is that the Commission use the full range of accounting rules at its disposal, coupled with operating rules and regulations, to effect a virtual structural separation of Verizon-PA's retail and wholesale local exchange businesses. In other words, accounts can be kept separate for the wholesale and retail portions of the local exchange business, and rules can be put in place so that competitors are treated in a non-discriminatory manner compared to Verizon-PA's own retail operations.

(OSBA Stmt. 1, p. 9).

Verizon must engage in the functional separation of its wholesale and retail units. This requires Verizon to separate its wholesale and retail divisions through the application of a Code of Conduct, in a way which provides for non-discriminatory access to

its wholesale division by all CLECs. This plan shall encompass personnel, accounting, record keeping and business practices. We envision that the functional separation of Verizon's wholesale and retail units will be analogous to the functional separation we have ordered in the electric and gas industries, which has been implemented successfully. Precise details regarding the functional separation of specific elements shall be addressed in the re-opened Competitive Safeguards proceeding. *See* Docket No. L-00990141.

Secondly, we direct Verizon to create an advanced services affiliate, separate and apart from the retail division of its business, consistent with its FCC obligation in the Bell Atlantic merger with GTE which led to the creation of Verizon. The structural separation of this advanced services affiliate shall remain in effect until such time as the Commission removes such obligation.

In the *Global Order*, we stated that anything less than full structural separation of Verizon would require continuing regulatory oversight, even though part of our goal in deregulating the industry is to reduce oversight. However, the Parties have convincingly argued that even with the implementation of structural separation of Verizon's wholesale and retail arms, no less regulatory oversight than that currently prevailing will be required to ensure compliance. (*See* MCI Exc., p. 1; Fumo Exc., p. 4; OSBA Brief, pp. 8-12; OSBA Reply Brief, p. 1; AT&T Brief, pp. 41-43).

Moreover, Pennsylvania consumers will benefit more from the expeditious implementation of functional separation of Verizon's wholesale and retail divisions set forth herein, with the attached safeguards outlined below, than they would from a physical structural division resulting in the likelihood of additional and prolonged litigation and regulatory micromanagement which even competitors do not view as a successful formula

for bringing local telephone competition to Pennsylvania. (ACER Exc., p. 3; MCIW Exc., p. 2; 10; Senators Exc., p. 8).<sup>27</sup>

We conclude that the OSBA's proposal, and the related conditions, strike the proper balance between the need to implement structural separation in a cost effective manner, provide for maximum consumer choice, and lessen potential customer confusion.

To complement the form of structural separation described herein, the following conditions are indispensable to its effectiveness and, therefore, they shall be attached to the functional/structural separation of Verizon's wholesale and retail operations.

### **3. Required Conditions Under Functional/Structural Separation**

The following conditions shall be attached to the functional/structural separation of Verizon's wholesale and retail divisions.

#### **(a) Competitive Safeguards**

As this Commission has done in the electric industry, a competitive safeguards rulemaking is in place to formulate a comprehensive Code of Conduct, which shall apply to Verizon and all of its present or future affiliates. ACER proposed a code of conduct which we conclude should be reviewed in the context of the rulemaking. ACER also recognized that the competitive safeguards proceeding is the appropriate forum to outline a code of conduct. Accordingly, ACER requested that the Commission enter the record from the structural separation proceeding into the code of conduct rulemaking to ensure consistency. On consideration of this proposal, we agree with ACER's reasoning in

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<sup>27</sup> To the extent Verizon is able to accomplish the functional separation provided for in this Opinion and Order in substantially less time, with substantially less diversion of administrative resources, competitors, also achieve substantial benefits.

this respect. We shall take official notice of this proceeding in the context of the code of conduct rulemaking.

The Code of Conduct rulemaking record shall be re-opened for the purpose of receiving comments and reply comments on the appropriate Code of Conduct to be applied in light of this Commission's determination in the instant proceeding. This shall be done on an expedited basis. Until completion of the final rulemaking in the Competitive Safeguards Proceeding, we expect Verizon to fully comply with the interim Code of Conduct set forth in the *Global Order*.

**(b) Additional Requirements**

Several Parties, including MCIW and AT&T, have suggested that additional requirements be imposed upon Verizon. We find that many of these proposals have merit and, hereby, impose the following requirements:

**(i) Interconnection**

Notwithstanding the creation of affiliates, Verizon shall adhere to its Section 251, 47 U.S.C. §251, resale/wholesale obligations for DSL/advanced services to CLECs, consistent with the interpretation of those obligations by the FCC and any tribunal of competent jurisdiction. (See, AT&T Exc., p. 4).

**(ii) DSLAMs in Remote Terminals**

A competitor's access to DSLAMs plays an important part in the competitor's ability to provide DSL services to its customers. If the end user customer's loop is provisioned using purely copper wires, the CLEC may provide DSL service through DSLAM in its collocations space in Verizon's wire center. However, if that customer's loop is provisioned by interfacing the customer's 4-wire copper twisted pair from the central office to a remote terminal using Digital Loop Carrier (DLC) electronics, the DSLAM capability must be located at Verizon's remote terminal, where the customer's signals are transported via fiber optic cable to Verizon's wire center. CLECs shall have access to DSLAM equipment in remote terminals consistent with an industry standard. That industry standard should be agreed upon by all parties in the context of technical workshops which shall be convened by the Commission within sixty days of the entry date of this Opinion and Order. Those elements which cannot be agreed upon may be presented to the Commission for resolution.

**(iii) Electronic Loop Provisioning**

We recognize that one issue raised in this case involved the manner in which Verizon presently conducts its provisioning of UNE loops. (MCI Stmt. 2.0, p. 17). One alternative method which could address those concerns at least in part is the provisioning of loops using integrated digital loop carrier (IDLC). The benefits of a properly implemented system are three-fold: (1) the speed in which Verizon is able to provision unbundled loops to competitors would significantly improve; (2) the potential error present in the manual process is reduced; and (3) Verizon retail affiliates and CLECs would use the same system. (*Id.*).

A technical trial of electronic loop provisioning shall convene within thirty days of the entry date of this Opinion and Order. The results of that trial shall be filed

with the Commission and, following a comment and reply comment period, the Commission will determine the feasibility of electronic loop provisioning.

**(iv) DSL Over DLC**

A collaborative shall convene to address the design and deployment of fiber and Next Generation Digital Line Carrier (NGDLC) and equal access to DSL over fiber. The Commission's Office of Special Assistants, Law Bureau, and the Bureau of Fixed Utility Services shall coordinate to convene the collaborative. We shall take notice and consider the results of the national (FCC) collaborative that is currently in place to address this issue. *See e.g.*, March 29, 2001 Public Forum on Transmission Capability Between the Central Office and End-Users in Next Generation Networks, CC Docket Nos. 96-98 and 98-147. The results of our collaborative shall be submitted to the Commission no later than September 30, 2001.

**(v) Monthly Meetings**

The parties to this proceeding shall be afforded the availability of monthly meetings, which will be mediated by a Commissioner or a senior staff member, with appropriate waivers, to address operational and performance issues. Informal determinations may be reached as a result of these meetings, to which parties may object by providing formal notice to the Commission.

**(vi) Line Splitting Collaborative**

A collaborative shall commence to address the issue of line splitting. The Commission's Office of Special Assistants, Law Bureau, and the Bureau of Fixed Utility Services shall coordinate to convene the collaborative. The collaborative shall be conducted consistent with the collaborative conducted in New York to address this issue. The Commission shall take notice of the results of the New York collaborative; however, the parties shall negotiate any remaining details which are specific to Pennsylvania. The results of this initiative shall be filed with the Commission and, following a comment and reply comment period, the Commission will determine the feasibility and parameters of line splitting.

**(vii) Withdrawal of Litigation**

Verizon shall withdraw all state and federal courts challenges to the *Global Order*, with the exception of the structural separation issue, and shall provide notice of same to the Commission by no later than April 20, 2001. It is recognized that Verizon's withdrawal of those appeals shall not be deemed to eliminate Verizon's opportunity to contest the Commission's authority to order a more encompassing form of structural separation in a later proceeding. At such time as this Opinion and Order becomes final and non-appealable, Verizon shall withdraw its appeal of the structural separation portion of the *Global Order* within three business days.

**(viii) Performance Measures Remedies**

In addition to the requirements outlined, above, it is necessary to add safeguards to ensure that the transition to a competitive market is successful. In the final Performance Measures Order entered at Docket No. P-00991643, (*PMO Order*), we set forth penalties to be paid by Verizon in the event that it did not comply with the metrics. In

that order, we stated that we would re-examine the effectiveness of the remedies in nine months from the entry date of that Order. In deference to all parties to the *PMO Order* proceeding, whose resources were expended through participation in this proceeding as well as participation in the OSS testing and subsequently in the pending Section 271 proceeding, we deferred to that examination. However, to be effective, those remedies should now be bolstered to assure that Verizon performs in a non-discriminatory manner. Increases in the applicable penalties will provide a further disincentive for Verizon to discriminate.

Therefore, Verizon should consent to an increase in the Tier II liquidated damages contained in the *PMO Order entered December 31, 1999*, as follows:

1. For violations persisting beyond thirty (30) days, but prior to sixty (60) days, liquidated damages shall be increased an additional \$1,000, or 50%, per metric violated, per CLEC affected by the performance deficiency.
2. For violations persisting beyond sixty (60) days, the liquidated damages shall be increased by an additional \$1,000, or 25%, per metric violated, per CLEC affected by the performance deficiency.
3. The increases shall be remitted to the Commission, for the purpose of contracting with an independent consultant to train and to assist Commission staff in the analysis of metric reports. This is intended to ensure Verizon's compliance with the *PMO*.

Additionally, we direct that a proceeding be convened to determine whether any further adjustment of these performance measures penalties may be necessary. The purpose of the performance metrics penalties is to ensure performance by Verizon. Accordingly, this proceeding shall also consider what level of penalties is necessary to achieve this goal. Among these metrics addressed shall be order flow through, Billing

Completion Notices (BCN), and under development (UD) metrics. The proceeding shall result in a report and recommendation to the Commission for decision, no later than September 30, 2001.

Within thirty days of the entry date of this Opinion and Order, Verizon shall report to the Commission, on a monthly basis, all unreported (UR) metrics in which an anomaly is discovered in Verizon's raw data. This information shall remain proprietary, pending further Commission review and analysis of the underlying data.

Finally, we fully expect Verizon to comply with the terms and conditions set forth in the final *PMO*.

**(ix) UNE Rates**

In the rural areas of Pennsylvania, competition is severely lacking. A prospective decrease in UNE rates in Density Cell 4, which encompasses the most rural areas, will provide competitors with the opportunity to deploy services otherwise not affordable in these areas. We are, therefore, ordering a \$0.75 reduction in 2-wire loop rates, in Density Cell 4. The new 2-wire loop rate in Density Cell 4 shall be revised accordingly.

Additionally, we direct that a proceeding be convened to determine whether any further adjustment of UNE rates is necessary. This proceeding shall result in a report and recommendation to the Commission for decision, no later than December 31, 2001.

**(x) Retention of Chapter 30 Obligations**

Before concluding, we note that it was our original intention in the *Global Order* (p. 233) that responsibility for network modernization obligations under Chapter 30 would be placed in the structurally separate wholesale business operation. However, under the functional/structural separation model and attached conditions outlined in this Opinion and Order, the previously established network modernization plan and obligations under Chapter 30 are not altered in any manner and will remain with Verizon.

Therefore, the functional/structural separation plan filed consistent with this Opinion and Order must expressly note that responsibility for network modernization and other obligations under Chapter 30 shall remain with Verizon.

## V. CONCLUSION

The choices before Verizon are clear. We present this form of functional/ structural separation, with conditions, to Verizon for acceptance. If Verizon accepts the conditions as stated herein, and commits to abstain from any legal challenges to this Opinion and Order, Verizon shall so notify the Commission in writing, and shall withdraw, with prejudice, its *Global Order* litigation, consistent with the additional requirement pertaining to its appeal of structural separation, as noted, above, by no later than April 20, 2001.<sup>28</sup>

If Verizon chooses not to accept the terms of structural separation set forth in this Opinion and Order, with the attendant conditions stated herein, it shall so notify the Commission by no later than April 20, 2001. In that event, the Commission reserves its right to resume its review, consideration and deliberation of the various structural separation proposals, and issue a subsequent adjudication that resolves this matter; **THEREFORE,**

### **IT IS ORDERED:**

1. That Verizon Pennsylvania Inc., shall, on or before April 20, 2001, notify the Commission in writing whether it shall accept, and be bound by, the structural separation terms and conditions contained in this Opinion and Order and the following ordering paragraphs.

2. That Verizon shall engage in the functional separation of its wholesale and retail units. This will require Verizon to separate its wholesale and retail divisions

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<sup>28</sup> Any appeal or other court challenge by Verizon to this instant Opinion and Order would be inconsistent with its “acceptance” of the form of structural separation with conditions set forth herein.

through the application of a Code of Conduct, in a way which provides for non-discriminatory access to its wholesale division by all CLECs. This plan shall encompass personnel, accounting, record keeping and business practices. The functional separation of Verizon's wholesale and retail units shall be analogous to the functional separation ordered in the electric and gas industries. Precise details regarding the functional separation of specific elements shall be addressed in the re-opened Competitive Safeguards proceeding, Docket No. L-00990141, in accordance with Ordering Paragraph No. 4, below.

3. That Verizon shall create an advanced services affiliate, structurally separate and apart from the retail division of its business, consistent with its FCC obligation in the Bell Atlantic merger with GTE. The structural separation of this advanced services affiliate shall remain in effect until such time as the Commission removes such obligation.

4. That the Competitive Safeguards Rulemaking record shall be re-opened at Docket No. L-00990141 for the purpose of issuing a Second Proposed Rulemaking Order addressing the appropriate generic Code of Conduct to be promulgated pursuant to 66 Pa. C.S. §§3005(b)(g)(2).

5. That the record in the Structural Separation proceeding at Docket No. M-00001353 be incorporated into the Competitive Safeguards Rulemaking proceeding to facilitate the development of a new proposed rulemaking.

6. That the Law Bureau is directed to review the Code of Conduct provisions proposed by the Association for Local Telecommunications Services, Covad Communications Company, ACSI Local Switched Services, Inc. d/b/a e.spire, and Rhythms Links Inc. in this proceeding as to their appropriateness for inclusion in the Competitive Safeguards Rulemaking.

7. That interested parties will have an opportunity, on an expedited basis, to file comments and reply comments on the proposed Code of Conduct attached to the Second Proposed Rulemaking Order after the Order is entered by this Commission to the extent applicable. Until completion of the final rulemaking in the Competitive Safeguards Proceeding, we expect Verizon to fully comply with the interim Code of Conduct set forth in the Global Order.

8. That notwithstanding the creation of affiliates, Verizon shall adhere to its Section 251, 47 U.S.C. § 251, resale/wholesale obligations for DSL/advanced services to CLECs, consistent with the interpretation of those obligations by the FCC and any tribunal of competent jurisdiction.

9. That competitive local exchange carriers shall have access to DSLAM equipment in Verizon's remote terminals consistent with an industry standard. That industry standard should be agreed upon by all parties in the context of technical workshops. Those elements which cannot be agreed upon may be presented to the Commission for resolution.

10. That a technical trial of electronic loop provisioning shall convene within thirty (30) days of the entry date of this Order. The results of that trial shall be filed with the Commission and, following a comment and reply comment period, the Commission will determine the feasibility of electronic loop provisioning.

11. That a collaborative shall convene to address the design and deployment of fiber and Next Generation Digital Line Carrier (NGDLC) and equal access to DSL over fiber. The Commission's Office of Special Assistants, Law Bureau, and the Bureau of Fixed Utility Services shall coordinate to convene the collaborative. We shall take notice and consider the results of the national collaborative that is currently in place to address this issue. The results of our collaborative shall be submitted to the Commission no later than September 30, 2001.

12. That the Parties to this proceeding shall be afforded the availability of monthly meetings, which will be mediated by a Commissioner or a senior staff member, with appropriate waivers, to address operational and performance issues. Informal determinations may be reached as a result of these meetings, to which parties may object by providing formal notice to the Commission.

13. That a collaborative conducted consistent with the collaborative conducted in New York, shall commence to address the issue of line splitting. The Commission's Office of Special Assistants, Law Bureau, and the Bureau of Fixed Utility Services shall coordinate to convene the collaborative. The results of this initiative shall be filed with the Commission, and, following a comment and reply comment period, the Commission will determine the feasibility and parameters of line splitting.

14. That Verizon shall withdraw all state and federal court challenges to the *Global Order*, with the exception of structural separation, and shall provide notice of same to the Commission by no later than April 20, 2001. At such time as this Opinion and Order becomes final and non-appealable, Verizon shall withdraw its appeal of the structural separation portion of the *Global Order* within three (3) business days.

15. That Verizon consent to an increase in the Tier II liquidated damages contained in the *PMO Order* entered December 31, 1999, as follows:

- (a) For violations persisting beyond thirty (30) days, but prior to sixty (60) days, liquidated damages shall be increased an additional \$1,000, or 50%, per metric violated, per CLEC affected by the performance deficiency.
- (b) For violations persisting beyond sixty (60) days, the liquidated damages shall be increased by an additional \$1,000, or 25%,

per metric violated, per CLEC affected by the performance deficiency.

- (c) The increases shall be remitted to the Commission, for the purpose of contracting with an independent consultant to train and to assist Commission staff in the analysis of metric reports. This is intended to ensure Verizon's compliance with the *PMO*.

16. That a proceeding shall be convened to determine whether any further adjustment of performance measures penalties may be necessary. The purpose of the performance metrics penalties is to ensure performance by Verizon. Accordingly, this proceeding shall also consider what level of penalties is necessary to achieve this goal. Among those metrics addressed shall be order flow through, Billing Completion Notices (BCN), and under development (UD) metrics. The proceeding shall result in a report and recommendation to the Commission for decision, no later than September 30, 2001.

17. That within thirty (30) days of the entry date of this Opinion and Order, Verizon shall report to the Commission, on a monthly basis, all unreported (UR) metrics in which an anomaly is discovered in Verizon's raw data. This information shall remain proprietary, pending further Commission review and analysis of the underlying data.

18. That Verizon shall implement a \$0.75 reduction in 2-wire loop rates, in Density Cell 4.

19. That a proceeding shall be convened to determine whether any further adjustment of UNE rates is necessary. This proceeding shall result in a report and recommendation to the Commission for decision, no later than December 31, 2001.

20. That if Verizon Pennsylvania Inc. declines to accept the functional/ structural separation terms and conditions set forth herein by April 20, 2001, the Commis-

sion will promptly resume its review, consideration and deliberation of the various structural separation proposals, and issue a subsequent adjudication that resolves this matter.

21. That the Exceptions and Replies to Exceptions of the Parties to the Recommended Decision are granted in part, and denied, in part, consistent with this Opinion and Order.

**BY THE COMMISSION,**

James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: March 22, 2001

ORDER ENTERED: April 11, 2001