Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
WorldCom, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-02-MD-017
	)	
Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprises Solutions), and Verizon Global Networks, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 22, 2002 **Released: July 23, 2002**

By the Commission: Chairman Powell issuing a statement; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. In this Order, we deny a formal complaint that WorldCom, Inc. ("WorldCom") filed against Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprises Solutions), and Verizon Global Networks, Inc. (collectively "Verizon") pursuant to sections 208 and 271(d)(6) of the Communications Act of 1934, as amended ("Act" or "Communications Act").[1] WorldCom alleges that Verizon ceased to meet one of the conditions of the Commission's approval of Verizon's application to provide interLATA service in Massachusetts.[2] In particular, WorldCom alleges that, after January 28, 2002, Verizon's switching rates in

[1] 47 U.S.C. §§ 208, 271(d)(6).

[2] Formal Complaint, File No. EB-02-MD-017 (filed Apr. 24, 2002) ("Complaint") at 1-2. *See Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprises Solutions), and Verizon Global Networks, Inc., For Authorization to Provide In-Region InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8996-9006 (2001) (*Massachusetts 271 Order*) at ¶¶ 16-36.

Massachusetts ceased to comply with section 271(c)(2)(B)(ii) of the Act, because those rates no longer mirrored the switching rates[3] in New York, the state to which Verizon's switching rates in Massachusetts were "benchmarked" in the *Massachusetts 271 Order*.[4]

2. We deny WorldCom's complaint, because WorldCom failed to meet its burden of proving that, during the six month, interim period between the issuance of the unbundled network element ("UNE") rate order in New York on January 28, 2002 and the setting of new UNE rates by the Massachusetts Department of Telecommunications and Energy ("DTE") effective August 5, 2002, Verizon ceased to meet a condition of its approval to provide interLATA service in Massachusetts.[5] In particular, the record in this proceeding demonstrates that, under the specific circumstances present, including steps Verizon took to ensure that competitors had access to cost-based rates during the interim period and the shortness of the interim period in question, Verizon remained in compliance with section 271. Our denial of this complaint, however, is without prejudice to whatever rights that WorldCom may have to challenge the *Massachusetts UNE Rate Order*.

II. BACKGROUND

A. The Parties

3. WorldCom provides long distance and local telephone services in the Commonwealth of Massachusetts.[6] The Verizon defendants include the incumbent local exchange carrier providing local service in the Commonwealth of Massachusetts, as well as affiliates that provide long-distance telecommunications service to residential and business customers in Massachusetts.[7]

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[3] The parties generally agree that switching includes the following elements: switching usage, port, transport, and signaling. *See* Supplemental Joint Statement of WorldCom and Verizon, File No. EB-02-MD-017 (filed May 13, 2002) ("Supp. Joint Statement") at 14 and 17. This order refers to the individual rates for these elements collectively and generally as "switching rates."

[4] Complaint at ¶¶ 26, 144. WorldCom intends to seek damages and other relief in a supplemental complaint proceeding. Complaint, ¶ 34. *See* 47 C.F.R. §§ 1.722(d) and (e).

[5] *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, Order, D.T.E. 01-20 (rel. July 11, 2002) (*Massachusetts UNE Rate Order*). Although the DTE issued its order on July 11, 2002, the new rates will not be established until after Verizon makes a compliance filing in accordance with the DTE's rulings on August 5, 2002.

[6] Supp. Joint Statement at 2, ¶ 2.

[7] *Id.* at 2, ¶ 3.

B. Verizon's Authority to Provide InterLATA Services In Massachusetts

4. The Act prohibits a Bell Operating Company ("BOC") from offering in-region interLATA services without first obtaining authorization to do so from the Commission.[8] To obtain this authorization, a BOC must demonstrate that it satisfies the "competitive checklist" set forth in section 271(c)(2)(B).[9] As part of this showing, a BOC must demonstrate that the state in question has properly set non-discriminatory and cost-based rates for UNEs, including switches, that the BOC must provide to competitors.[10] The Commission has established rules governing how states should set such rates.[11] These rules specify that UNE rates shall be set in accordance with a total element long run incremental cost ("TELRIC") methodology.[12]

5. On January 16, 2001, pursuant to section 271, Verizon submitted its application ("Massachusetts 271 Application") to provide interLATA services in Massachusetts.[13] Verizon's Massachusetts 271 Application relied upon voluntarily adopted rates that were equivalent to those in place at the time in New York that the Commission previously had found were TELRIC-compliant and satisfied section 252(d)(1) of the Act.[14] Verizon argued *inter alia*

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[8] 47 U.S.C. § 271. *See Massachusetts 271 Order*, 16 FCC Rcd at 8993-94, ¶¶ 10-11; *Joint Application by SBC for Provision of In-Region InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, at ¶¶ 7-10 (2001) ("*Kansas/Oklahoma 271 Order*"), *aff'd in part and remanded in part, Sprint Communications Co. v. FCC,* 274 F.3d 549 (D.C. Cir. 2001); *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*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3958, 3961-63, at ¶¶ 8, 17-20 (1999) (*New York 271 Order*), *aff'd*, *AT&T Corp. v. FCC,* 220 F.3d 607, 616-18. For our purposes here, Verizon is a "BOC" within the meaning of section 153(4) of the Act. 47 U.S.C. § 153(4).

[9] 47 U.S.C. § 271(c)(2)(B).

[10] 47 U.S.C. § 271(c)(2)(B)(ii). *Massachusetts 271 Order*, 16 FCC Rcd at 8996-7, ¶¶ 16-17; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6259-61, ¶¶ 47-48; *New York 271 Order*, 15 FCC Rcd at 3977-79, ¶¶ 63-66. Checklist item 2 of section 271(c)(2)(B) states that the BOC must provide access to network elements in accordance with section 252(d)(1) of the Act. 47 U.S.C. § 271(c)(2)(B)(ii). Section 252(d)(1) provides that the state shall set rates that are non-discriminatory and based on costs and that may include a reasonable profit. 47 U.S.C. § 252(d)(1).

[11] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15812-929 at ¶¶ 618-862 (1996) (*Local Competition First Report and Order*), *aff'd in part and vacated in part sub nom*., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand*, *Iowa Utils Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part, Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646 (2002).

[12] *See Local Competition First Report and Order*, 11 FCC Rcd at 15844-869, ¶¶ 672-732; *see also* 47 C.F.R. §§ 51.501-51.515. The Supreme Court recently upheld these rules. *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646 (2002).

[13] Supp. Joint Statement at 3, ¶ 8. *See Massachusetts 271 Order*, 16 FCC Rcd at 8989, ¶ 1.

[14] *Massachusetts 271 Order*, 16 FCC Rcd at 8999-9000, ¶ 21. *See also* Supp. Joint Statement at 3, ¶ 10; Complaint at ¶ 17. The Massachusetts DTE originally had set interim switching rates in December 1996 that it (continued….)

that "benchmarking" its Massachusetts switching rates to the existing New York switching rates demonstrated that it was TELRIC-compliant in Massachusetts because the switching costs in Massachusetts are the same or higher than Verizon's switching costs in New York.[15]

6. In evaluating Verizon's Massachusetts 271 Application, the Commission found that New York's UNE rates, including switching rates, could properly "be used as the benchmark for measuring whether Verizon's UNE rates are TELRIC-based in Massachusetts."[16] The Commission explained that a comparison of Massachusetts and New York rates and costs was appropriate because: (1) the same BOC serves both states; (2) the states are adjoining; and (3) the states have similar rate structures.[17] Further, the Commission noted that it had already found that "the New York rates are within a zone that is consistent with TELRIC based on current information in the record."[18] The Commission had declared that, in these circumstances, a state that fully adopted another state's TELRIC-compliant rates "would be entitled to a presumption of compliance with TELRIC if it … could demonstrate that its costs were at or above the costs in that state whose rates it adopted."[19]

7. The Commission found that Verizon's switching costs in Massachusetts were the same as or slightly higher than its switching costs in New York.[20] Thus, the Commission concluded that the Massachusetts switching rates, like their New York counterparts, "are at present within the range that a reasonable application of TELRIC principles would produce," and granted Verizon's application to provide interLATA services in Massachusetts.[21]

8. In the *Massachusetts 271 Order*, the Commission acknowledged that the New York Public Service Commission ("NYPSC") was actively investigating UNE rates and might

(Continued from previous page)

made "permanent" in March 1999. *Massachusetts 271 Order*, 16 FCC Rcd at 8997-98, ¶ 18. On July 24, 2000, the Massachusetts DTE subsequently lowered these "permanent" switching rates by approving lower "promotional" switching rates as part of an interconnection agreement that Verizon made available to similarly situated carriers. *Id.* These promotional switching rates were in effect when Verizon filed its first section 271 application for Massachusetts. While this first application was pending, Verizon further voluntarily lowered its Massachusetts switching rates in October 2000 to the same level as the switching rates that were then in effect in New York. *Id.* Although Verizon subsequently withdrew this first application, its Massachusetts switching rates remained equivalent to the New York switching rates when it filed its second Massachusetts application in January 2001. *Id.* at 8991-92, 8997-9000, ¶¶ 7, 18, 21.

15 *Id.* at 9001-02, ¶ 26.

16 *Massachusetts 271 Order*, 16 FCC Rcd at 9002, ¶ 28.

17 *See id.* at 8999-9002, ¶¶ 21, 28 & n. 56.

18 *Id.* at 9002, ¶ 28.

19 *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6276-77, ¶ 82 & n.244.

20 *Massachusetts 271 Order*, 16 FCC Rcd at 9001-02, ¶¶ 26-27.

21 *Id.* at 9002, ¶ 27. The Commission determined, of course, that Verizon had complied in Massachusetts with all of the other requirements of section 271 as well. *Id.* at 8989-90, 8996-9117 ¶¶ 1, 15-231.

ultimately modify the switching rates as a result of that investigation.[22] Nevertheless, the prospect of future rate reductions in New York did not dissuade this Commission from using the existing New York rates as a TELRIC benchmark. The Commission pointed out that it had found those rates to be TELRIC-compliant in December 1999 notwithstanding the pendency of the NYPSC's rate investigation,[23] and the Court of Appeals upheld the Commission's conclusion.[24] In addition, the Commission noted that there had been no intervening "determination that those rates are not TELRIC-compliant" that precluded Verizon from relying on the New York rates merely because they were under "challenge or review" in that State.[25] The Commission stated, however, that a future decision by the NYPSC to revise New York switching rates "may undermine Verizon's reliance on those rates in Massachusetts and its compliance with the requirements of section 271, depending on the New York Commission's conclusions."[26] Nevertheless, the Commission did not adopt a suggestion from some commenters, including WorldCom, that the approval of Verizon's application be conditioned on Verizon's agreement to immediately and completely mirror in Massachusetts any subsequent rate reductions in New York.

9. The Commission also acknowledged in the *Massachusetts 271 Order* that the Massachusetts DTE was in the process of reviewing Verizon's UNE rates ("DTE Rate Proceeding"), having begun a scheduled, five-year review of those rates in January of 2001.[27] Although commenters questioned whether the DTE would adopt TELRIC-compliant rates on a going-forward basis, the Commission expressed confidence that the DTE would set UNE rates in compliance with the Act and the Commission's implementing rules.[28] The Commission noted that there had been significant guidance on what constitutes TELRIC-based rates since the DTE first set UNE rates in 1996, including proceedings in other states that specifically addressed changes in technologies and cost information.[29] The Commission presumed that the DTE, like

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22 *Id.* at 9002, ¶ 29. The NYPSC cost proceeding was initiated to address, *inter alia*, issues relating to changes in technologies and switching costs in New York, including a switch discount issue that was raised late in the NYPSC's prior rate proceeding. *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case Nos. 98-C-1357, 95-0657, 94-C-0095, 91-C-1174, Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding at 10-12 (N.Y.P.S.C. Sept. 30, 1998). Because of the uncertainty regarding newly adduced evidence in its prior rate proceeding, the NYPSC deemed the switching rates to be temporary, subject to possible refund or reparation. *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-C-1357, Order on Unbundled Network Element Rates at 42 (N.Y.P.S.C. Jan. 28, 2002) (*NY UNE Order*).

23 *New York 271 Order*, 15 FCC Rcd at 4083-86, ¶¶ 242-247.

24 *AT&T v. FCC*, 220 F.3d 607, 616-18 (D.C. Cir. 2000).

25 *Massachusetts 271 Order*, 16 FCC Rcd at 9003, ¶ 31.

26 *Massachusetts 271 Order*, 16 FCC Rcd at 9003-04, ¶ 30.

27 *Id.* at 9004-06, ¶¶ 33-36.

28 *Id.* at 9005, ¶ 35.

29 *Id.* at 9005, ¶ 35.

other state commissions, would examine the issues relevant to costs during the course of its ongoing rate case and set rates within the range that a reasonable application of TELRIC principles would produce.[30] The Commission expressly contemplated that the DTE would take into account any rate changes implemented in New York and the basis for those changes.[31]

C. Developments in New York and Massachusetts After the *Massachusetts 271 Order*

10. On January 28, 2002, the NYPSC issued an order concluding its UNE rate investigation and setting new UNE rates.[32] The *NY UNE Order* substantially reduced switching rates from the temporary rates previously established.[33] A subsequent order of the NYPSC made the new rates effective March 1, 2002.[34]

11. After the new rates became effective in New York, WorldCom requested that Verizon immediately reduce its Massachusetts switching rates to match the new, lower switching rates adopted in the *NY UNE Order*.[35] Verizon declined.[36] On April 10, 2002, however, Verizon filed a tariff (*Verizon Interim Tariff*) with the Massachusetts DTE to reduce its switching rates on an interim basis until the DTE issued its final rate order.[37] The rates Verizon proposed were lower than its current rates (*i.e.*, the rates benchmarked to the "old" New York rates), but higher than the new New York rates set forth in the *NY UNE Order*.[38] Verizon proposed that these rates become immediately effective on April 10, 2002, rather than after the normal 30-day waiting period under Massachusetts law.[39] Verizon also proposed that these rates be subject to a true-up

30 *Id.* at 9005, ¶ 34.

31 *Id.* at 9005-06, ¶¶ 35-36.

32 *NY UNE Order*; Joint Statement at 3, ¶ 7.

33 *See* Complaint at ¶ 25. The rates were reduced by approximately 40-45%. *See* Supp. Joint Statement at 19 and Exhibit C. In its order, the NYPSC did not state whether it had erred in setting the previous switching rates, but encouraged the parties to negotiate the issue of whether refunds were warranted. *NY UNE Order* at 42-47.

34 *Proceeding on Motion of the Commission to Consider Cost Recovery by Verizon and to Investigate the Future Regulatory Framework*, Order Instituting Verizon Incentive Plan, Case Nos. 00-C-1945, 98-C-1357 (N.Y.P.S.C. Feb. 27, 2002).

35 Complaint at ¶ 27; Answer, File No. EB-02-MD-017 (filed May 1, 2002) ("Answer") at ¶ 27.

36 Complaint at ¶ 28; Answer at ¶ 28.

37 Letter to Mary Cottrell, Secretary, Department of Telecommunications and Energy, from Region President-Massachusetts/Rhode Island for Verizon (Apr. 10, 2002) (*Verizon Interim Tariff Letter*).

38 Complaint at ¶ 80.

39 *Verizon Interim Tariff Letter* at 2. The Massachusetts DTE had granted a similar request from Verizon in adopting the lower UNE rates in October 2000 upon which the Commission's grant of Verizon's section 271 authorization in Massachusetts was based. *See Massachusetts 271 Order*, 16 FCC Rcd at 8998, ¶ 18.

against the permanent rates eventually established by the DTE.[40]

12. On May 9, 2002, the Massachusetts DTE suspended *Verizon's Interim Tariff*.[41] The DTE pointed out that "the Department very rarely" has allowed "interim rates to take effect on the very verge of issuing a dispositive final order on the very same matter."[42] The DTE found that its pending "adjudicatory process for establishing new UNE rates should be allowed to run its course, particularly (but not only) where [the DTE is] very close to a final decision, and should not be preempted by activities driven by federal litigation."[43] The DTE further stated that "[a]llowing a rate to take effect is an implicit statement that the rate is just and reasonable … [and] TELRIC-compliant" and that the DTE was not prepared at the time to make that judgment about *Verizon's Interim Tariff* particularly because "the setting of such rates is what its extensive effort now near the verge of completion" in its rate proceeding "has been all about."[44] In the meantime, the DTE stated that the current Massachusetts' UNE rates, "including switching and transport rates," "are TELRIC-compliant."[45]

13. Within days of the *DTE Interim Tariff Decision*, Verizon offered amendments to its interconnection agreements with WorldCom and other CLECs in Massachusetts that would have trued-up the Massachusetts switching rates then in effect to the rates that the DTE ultimately established in its rate order, retroactive to March 1, 2002.[46] Thus, Verizon offered to agree that the switching rates that the DTE ultimately set in its UNE rate order would be effective retroactively to the effective date of the new New York rates.[47] Although WorldCom declined this offer, at least two other CLECs accepted Verizon's offer before the DTE issued its

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[40] *Id.* at 2. The true-up that Verizon proposed would have made the rates set by the DTE in the DTE Rate Proceeding effective retroactively to April 10. Thus, if the DTE's new rates were lower than the rates proposed in *Verizon's Interim Tariff*, then Verizon would have refunded the difference between the amounts CLECs paid for affected UNEs during the period between April 10 and the DTE's final rate order, and the amount they would have paid if the new rates had been charged during that period. *Verizon Interim Tariff Letter* at 2; *DTE Interim Tariff Decision* at 2.

[41] *DTE Interim Tariff Decision* at 4.

[42] *Id.* at 6.

[43] *Id.* Although we respect the DTE's decision to suspend *Verizon's Interim Tariff*, we would ordinarily expect state commissions to accept interim lower rates that are subject to a true-up once the state's permanent rates are set.

[44] *Id.*

[45] *Id.* at 4.

[46] Opening Brief of Verizon, File No. EB-02-MD-017 (filed May 29, 2002) at 10; Supp. Joint Statement at 26-30.

[47] *See* Letter from Catherine K. Ronis, Counsel for Verizon, to Ms. Marlene Dortch, Secretary, FCC, File No. EB-02-MD-017 (filed June 3, 2002) (*Verizon Supplemental Submission*).

UNE rate order.[48]

14. On July 11, 2002, the DTE issued the *Massachusetts UNE Rate Order*.[49] The *Order* was the culmination of a comprehensive eighteen month investigation that was pending at the time the Commission granted the Massachusetts 271 Application. The "primary objective" of the proceeding was to assess "whether Verizon ha[d] substantiated the reasonableness of its many UNE and interconnection cost components."[50] The proceeding involved eighteen days of evidentiary hearings and extensive briefing by numerous parties, including WorldCom and Verizon.[51] The DTE examined "a myriad of cost issues bearing on the development of recurring and non-recurring rates for UNEs and interconnection, including UNE loops, switching, inter-office transport, collocation, and Operation Support Systems."[52] The DTE's *Order* thoroughly analyzes the competing cost arguments made by Verizon and the CLECs, including WorldCom, and the DTE appears to have credited and adopted many of WorldCom's arguments concerning switching rates.[53] Indeed, according to WorldCom, the Massachusetts DTE "rejected Verizon's position on virtually every significant switching input" and "has issued an order that appears to contemplate switching rates roughly equivalent to those adopted in New York."[54]

D. WorldCom's Complaint

15. On April 24, 2002, WorldCom filed the present complaint against Verizon.[55] WorldCom alleges that as of January 29, 2002, Verizon's Massachusetts switching rates ceased to comply with section 271(c)(2)(B)(ii) of the Act, because those rates no longer mirrored the switching rates in New York, the state to which Verizon's switching rates in Massachusetts were "benchmarked" in the *Massachusetts 271 Order*.[56] WorldCom asks us to determine whether Verizon remained in compliance with section 271 from January 29, 2002 to August 5, 2002, and intends to pursue relief in a supplemental complaint after the liability phase of this proceeding is

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[48] Motion to Supplement the Record, File No. EB-02-MD-017 (filed July 10, 2002). The offer expired once the DTE issued the *Massachusetts UNE Rate Order*. *See Verizon Supplemental Submission* at 2.

[49] *See Massachusetts UNE Rate Order.*

[50] *See Massachusetts UNE Rate Order* at 4.

[51] *See Massachusetts UNE Rate Order* at 4-10.

[52] *See Massachusetts UNE Rate Order* at Executive Summary.

[53] *See Massachusetts UNE Rate Order* at 276-316.

[54] Letter from Lisa B. Smith, Counsel for WorldCom, Inc., to Alexander P. Starr, Chief, Market Disputes Resolution Division, FCC, File No. EB-02-MD-017 (filed July 19, 2002) at 2.

[55] *See* Complaint.

[56] *Id.* at ¶¶ 26, 144.

completed.[57]

III. DISCUSSION

A. WorldCom Has Failed to Prove That Verizon Ceased to Comply With Section 271 During the Limited, Interim Period Between the New York and Massachusetts UNE Rate Orders.

16. This is the first opportunity the Commission has had to address how "benchmarking" that is used to gain section 271 authority affects a section 271(d)(6) complaint proceeding after the "benchmark" state alters its rates.[58] According to WorldCom, because (1) Verizon and the Commission based the lawfulness of Verizon's switching rates in Massachusetts solely on a "benchmark" to Verizon's switching rates in New York, and (2) Verizon's switching rates in New York have since substantially diminished with no immediate matching reduction in Massachusetts, we now have no choice but to rule that Verizon was out of compliance with section 271 from the date of the *NY UNE Order* to the date new rates are set in accordance with the *Massachusetts UNE Rate Order*.[59] WorldCom contends that Verizon should have made available the new New York switching rates immediately in Massachusetts, and that Verizon's offer to true-up rates set in the *Massachusetts UNE Rate Order* retroactively to the effective date of the new New York rates was insufficient to remain in compliance with section 271. For the following reasons, we disagree and conclude that Verizon implemented reasonable interim measures to remain in compliance with section 271 pending the setting of new rates as ordered in the *Massachusetts UNE Rate Order*.[60]

1. The *Massachusetts 271 Order* Did Not Require Verizon Immediately to Mirror the New Switching Rates in New York.

17. We disagree with WorldCom that the Commission required in the *Massachusetts 271 Order* an immediate rate reduction in Massachusetts once New York altered its rates.[61] The Commission stated that it would watch New York closely to observe whether it reduced UNE

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[57] Complaint at ¶¶ 34, 144. *See* 47 C.F.R. §§ 1.722(d) and (e). *See also* Reply Brief of WorldCom, Inc., File No. EB-02-MD-017 (filed June 6, 2002) ("WorldCom Reply Brief") at 17.

[58] WorldCom Reply Brief at 14.

[59] Complaint at ¶¶ 21-22, 25-26; Opening Brief of WorldCom, Inc., File No. EB-02-MD-017 (filed May 29, 2002) ("WorldCom Opening Brief") at 25-30.

[60] WorldCom filed a Motion to Strike one of Verizon's affirmative defenses and related portions of Verizon's briefs, arguing that Verizon improperly modified its affirmative defenses subsequent to filing its answer. Motion to Strike, File No. EB-02-MD-017 (filed June 6, 2002). Verizon filed an opposition to WorldCom's motion. Opposition to Motion to Strike, File No. EB-02-MD-017 (filed June 7, 2002). We deny this motion as moot, because our decision does not depend or rely upon the challenged affirmative defenses.

[61] Complaint at ¶ 22.

rates and the basis for any such reductions.[62] The Commission also stated that a decision by the NYPSC to revise New York switching rates "*may* undermine Verizon's reliance on those rates in Massachusetts and its compliance with the requirements of section 271, depending on the New York Commission's conclusions."[63] The Commission noted that it would work "*in concert* with the Massachusetts [DTE], . . . to monitor closely Verizon's post-approval compliance for Massachusetts to ensure that Verizon does not 'cease[] to meet any of the conditions required for [section 271] approval'"[64] (emphasis added). The Commission did not mandate that Verizon immediately reduce its Massachusetts rates to the level of any new rates set in the New York cost proceeding.[65] In fact, the Commission did not adopt that proposed condition, and refused to prejudge any decision by the NYPSC to modify its UNE rates or interfere with the pending DTE proceeding.[66]

18. Nevertheless, the Commission contemplated that if the NYPSC reduced its rates before the DTE had concluded its rate proceeding, some action would likely be required on an interim basis in Massachusetts to protect local competitors until the DTE concluded its rate proceeding.[67] As Verizon points out, the Commission spoke favorably in the *Massachusetts 271 Order* of a true-up mechanism that would protect CLECs until the DTE concluded its rate proceeding: "implementation of a true-up mechanism pending the outcome of the DTE's current UNE cost-proceeding could help to ensure that competitive LECs pay cost-based rates."[68] Notably, the Commission did not require Verizon to implement such a true-up mechanism in order to obtain section 271 authority.[69]

19. Verizon argues that its offer to true-up the rates set by the DTE in the *Massachusetts UNE Rate Order* retroactively to March 1, 2002 was precisely the kind of reasonable interim measure that the Commission contemplated in the *Massachusetts 271 Order*.[70] WorldCom argues, on the other hand, that Verizon's true-up offer was flawed, because the true-up was without regard to whether the rates set in the *Massachusetts UNE Rate Order*

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62 *Massachusetts 271 Order*, 16 FCC Rcd at 9002-03, ¶¶ 30-31.

63 *Id.* at 9003-04, ¶ 30 (emphasis added).

64 *Id.* at 9125, ¶ 250; 47 U.S.C. § 271(d)(6)(A).

65 *See* Answer at ¶¶ 21-23.

66 *See Massachusetts 271 Order*, 16 FCC Rcd at 9002-03, ¶ 30-31; Answer at 15-16.

67 *See Massachusetts 271 Order*, 16 FCC Rcd at ¶ 34.

68 Answer at 17; *Massachusetts 271 Order*, 16 FCC Rcd at 9005, ¶ 34.

69 *Massachusetts 271 Order*, 16 FCC Rcd at 9005, ¶ 34.

70 Verizon also argues that its true-up proposal comports with what Chairman Powell envisioned in his separate statement. Reply Brief of Verizon, File No. EB-02-MD-017 (filed June 6, 2002) ("Verizon Reply Brief") at 25-26.

were later found to be unlawful.[71] Thus, WorldCom complains that Verizon did not contractually commit to re-true-up rates back to March 1, 2002, if the DTE-set rates were challenged, found to be unlawfully high, and then reduced. Verizon points out, however, that its true-up offer did not prevent CLECs who accepted the offer from challenging the DTE-set rates and arguing that they are entitled to refunds retroactive to March 1, 2002 or earlier, if the rates are subsequently declared unlawful.[72] In particular, Verizon makes clear that nothing in its true-up proposal prevented any CLEC from asserting "any claim that Verizon is obligated to true-up to March 1, 2002, or earlier the existing Massachusetts switching rates to whatever rates a court, the FCC, or the DTE (on remand from a court of the FCC) ultimately sets in Massachusetts."[73] Accordingly, because Verizon's true-up proposal allowed CLECs to make claims seeking a true-up to March 1, 2002, or earlier to rates ultimately deemed lawful by a court or commission, we do not find unreasonable Verizon's decision not to contractually bind itself to such a re-true-up.

20. Further, Verizon also assumed risks with its true-up proposal. Specifically, under Verizon's true-up proposal, it relinquished any ability to seek an upward true-up for switching usage rates.[74] Moreover, Verizon's true-up proposal reasonably limited the administrative problems associated with potential future multiple true-ups.[75] Accordingly, we disagree with WorldCom's criticisms of Verizon's true-up offer and conclude that we should consider that offer in determining whether Verizon violated section 271 pending the setting of new rates in

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[71] WorldCom Reply Brief at 13-17.

[72] *See Verizon Supplemental Submission* at 3; Verizon Reply Brief at 24.

[73] *See Verizon Supplemental Submission* at 2-3 and attached draft Agreement and Release at ¶ 2(a); Verizon Reply Brief at 24-25. Although WorldCom complains that Verizon conditioned the true-up offer on agreement by the CLEC not to challenge the rates in effect during the interim period as unlawful under section 271, that restriction seems reasonable. Verizon was simply asking the CLECs who accepted the proposal to refrain from filing a complaint challenging the existing rates during this interim period before the DTE issued its rate order. *See, e.g.* Verizon Reply Brief at 25 (explaining that a CLEC "is eligible for Verizon's true-up offer, as long as it agrees not to accept that offer while *at the same time* arguing that Verizon's existing Massachusetts rates cause Verizon, *at this time*, to be in violation of section 271 of the Act.") (emphasis added). Verizon's proposal did not prevent CLECs, once the Massachusetts DTE order issued, from filing challenges to that order and arguing that any rates set as a result of a successful challenge be retroactive to March 1st or earlier. *See, e.g.* Verizon Reply Brief at 24 ("nothing in the proposed interconnection agreement amendment would prohibit WorldCom or any other CLEC from raising arguments before a court or the DTE that any new rate set subsequent to the DTE's decision *should* be applied retroactively to March.")

[74] Verizon's proposal stated that "if the average rate per minute of use by the CLEC during the true-up period for an individual usage element, using the rates applicable absent any true-up, is lower than the average rate per minute of use by the CLEC during the true-up period for the same usage element using the [DTE set] Rate, then the [DTE set] Rate for that usage element will not apply retroactively." *Verizon Supplemental Submission* at 2. In addition, Verizon assumed the risk that if the DTE sets rates that were, in Verizon's view, too low, the true-up offer obligated Verizon to charge those low rates until it successfully challenged those rates on appeal. *Id.* at 1.

[75] *Verizon Supplemental Submission* at 2. By agreeing to true-up without regard to whether the rates were challenged, Verizon reduced the likelihood of having to calculate true-ups multiple times.

accordance with the *Massachusetts UNE Rate Order*.[76]

[76] *See* Verizon Reply Brief at 23-26; Answer at 15; Opening Brief of Verizon, File No. EB-02-MD-017 (filed May 29, 2002) ("Verizon Opening Brief") at 11-15. .

2. Verizon's Interim Measures After the *NY UNE Order* and Before the *Massachusetts UNE Rate Order* Satisfied its Obligations Under Section 271.

21. As set forth below, Verizon's interim measures and the particular circumstances of this case lead us to conclude that Verizon did not violate section 271 of the Act for the limited period of time in question. The critical facts supporting this conclusion are: (1) Verizon proposed to agree that the DTE-set rates would be retroactive to the effective date of rates set by the *NY UNE Order*;[77] (2) the rates set by the DTE are entitled to a TELRIC presumption in the first instance; and (3) the interim period in question was of short duration.[78] Thus, we conclude that Verizon's actions helped ensure that the local market remained open to competition during the short, interim period between the effective date of the new rates in New York and Massachusetts.

22. Our conclusion that Verizon did not violate section 271 during this interim period is supported by Commission orders that have found interim rates to be satisfactory, based on the particular facts presented in a 271 application. In these cases, for example, the Commission has cited with approval instances where the state commissions were showing progress in issuing final rates, the interim period in question was expected to be short in duration, and where refunds or true-ups would be available once the final rates are issued.[79] In the instant case, the record in

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[77] *See Verizon Supplemental Submission* at 1–2.

[78] *Massachusetts 271 Order*, 16 FCC Rcd at 8999, 9006, ¶¶ 20, 37. The Commission has previously held that it will not conduct a *de novo* review of a state's pricing determinations and will reject a 271 application only if "basic TELRIC applications are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." *Massachusetts 271 Order* at ¶ 20. The initial deference due the states in setting UNE rates derives from the statutory framework, pursuant to which states establish rates in the first instance. *See, e.g.,* 47 U.S.C. § 252(d)(1). WorldCom implicitly concedes that the rates set by the DTE are presumed lawful in the first instance. This concession is reflected in the fact that WorldCom proposed to Verizon that it charge the new New York switching rates effective January 29, 2002, but with a true-up to the rates set by the DTE if no party challenged those rates. WorldCom Reply Brief at 16 and Tab A. Thus, WorldCom acknowledges that the DTE's rates are lawful unless and until a party successfully challenges those rates.

[79] *See Kansas/Oklahoma Order*, 16 FCC Rcd at 6359-61, ¶¶ 238, 240 (the Kansas and Oklahoma Commissions had pending cost proceedings to set permanent rates, and the commissions had ordered the interim rates be subject to true-up); *Joint 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 Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20750, ¶ 64 (2001) (Missouri Commission had scheduled hearings for the month following the 271 authorization grant to conclude the setting of permanent rates, and made provision for refund or true-up once permanent rates were set); *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 Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18395-96, ¶ 90 (2000) (Texas Commission had set up a schedule to set permanent rates, with a hearing scheduled for the same month as 271 authorization grant, and had indicated to parties that the interim rates were subject to refund or true- (continued….)

the Massachusetts DTE rate proceeding had closed and the DTE had repeatedly declared its intention to issue its final rate order imminently, which it did on July 11, 2002.[80] Further, Verizon offered CLECs a means to obtain true-ups to the switching rates ultimately set by the DTE, retroactive to March 1, 2002. Thus, the short-term, interim measures implemented here resemble measures the Commission has approved in section 271 application proceedings.

23. Further, our finding that WorldCom failed to prove that Verizon ceased to comply with section 271 during this limited period reflects an acknowledgement of the flexibility built into the rate-setting process under our TELRIC rules. The Commission has approved rates under section 271, even while recognizing that "the costs of inputs [may] have changed" since the date those rates were initially approved by the state acting pursuant to section 252.[81] The Commission also has previously concluded that neither the Act nor its implementing rules impose an obligation on a BOC to update cost data in one state each time it files a newer cost study in another state.[82] The United States Court of Appeals for the District of Columbia Circuit similarly has recognized that, while rates may often need adjustment to reflect newly discovered information, such new information is not necessarily a basis to reject an existing UNE rate as non-TELRIC.[83] Moreover, the Supreme Court has found that "TELRIC rates in practice" routinely experience "lags in price adjustments" because the UNE rates adopted by state commissions typically remain effective for several years.[84]

24. WorldCom appears to acknowledge the inherent flexibility in the rate-setting process, because WorldCom made its own true-up proposal to Verizon to account for the lag between the *NY UNE Order* and the *Massachusetts UNE Rate Order*. In particular, WorldCom proposed to withdraw this complaint if Verizon charged the new New York rates effective January 29, 2002, with a true-up to whatever rates the DTE set in its UNE rate order, if those rates were not challenged or were deemed lawful after a challenge.[85] Thus, Worldcom concedes that it was appropriate, within the TELRIC rate-setting framework, for Verizon to offer to charge "placeholder" switching rates for the interim period in question, until the DTE issued its rate

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up); *New York 271 Order*, 15 FCC Rcd at 4090, ¶ 256 (NYPSC had an accelerated rate proceeding underway to set permanent XDSL rates, subject to refund).

80 *See DTE Letter Submission* at 2; *DTE Interim Tariff Decision* at 5-6 & n 7.

81 *Georgia/Louisiana 271 Order*, 2002 WL 992213 at ¶ 96.

82 *Vermont 271 Order*, 2002 WL 598046, ¶ 22.

83 *AT&T v. FCC*, 220 F.3d at 617-18. Indeed, as the D.C. Circuit noted in affirming the *New York 271 Order*, "[n]ot only are state-agency-approved rates always subject to refinement, but we suspect that rates may often need adjustment to reflect newly discovered information, like that about Bell Atlantic's future discounts"; the court specifically noted that such "new information" does not make the existing rates non-TELRIC and subject to rejection under section 271. *Id.* at 617.

84 *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1669 (2001).

85 WorldCom Reply at 16 & Tab A.

order. WorldCom contends, however, that Verizon could select *only* the new New York switching rates as the placeholder rates for the interim period in question to remain in compliance with section 271. For the reasons explained above, we disagree that Verizon was so constrained.

25. Finally, we are not persuaded that Verizon ceased to comply with section 271 because its offer to true-up was effective only to March 1, 2002, and not to January 28, 2002, the release date of the *NY UNE Order*. March 1, 2002 is the effective date of the new rates in New York and Verizon was therefore reasonable in selecting that date for its true-up offer. Accordingly, we conclude that WorldCom has failed to prove that Verizon ceased to comply with section 271 for the interim period in question.

26. We wish to reiterate, however, that our conclusion here hinges largely on the short duration of the interim period. We would be less inclined to approve of interim measures, such as Verizon's true-up proposal, if the interim period in question were of longer or indefinite duration. In addition, although the facts in this case do not reflect evidence of gamesmanship by Verizon to avoid offering cost-based UNE rates to its competitors during the interim period, we note that in future similar proceedings, we will not credit a BOC's behavior where we are presented with persuasive evidence of gamesmanship by the BOC, including delays in taking steps to ensure that competitors have access to interim cost-based UNE rates pending the imminent adoption of permanent cost-based rates by a state commission. We will continue to assess the adequacy of interim measures in the context of 271(d)(6) complaints on a case-by-case basis in the future. Finally, although we are denying the instant complaint, this is without prejudice to whatever rights WorldCom may have to challenge the *Massachusetts UNE Rate Order* itself.

IV. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), 201(b), 208, and 271(d)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, and 271(d)(6), that the formal complaint filed by WorldCom against Verizon is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: WorldCom, Inc., v. Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., File No. EB-02-MD-017

The Order we issue today, in my view, sensibly denies WorldCom's request that we find Verizon out of compliance with section 271 in Massachusetts solely because the Massachusetts DTE did not immediately reduce its UNE rates to match the rates established by another state commission. At bottom, our denial of WorldCom's request reflects our firm belief that we should allow states to develop and update UNE rates without unwarranted intervention or pre-emptive actions by this Commission where none are necessary to prevent harm to competition or consumers. This decision also reflects the appropriate flexibility of the TELRIC rate-setting process that the Supreme Court recently acknowledged in affirming our TELRIC rules.[86]

Were I at all concerned that either Verizon or the Massachusetts DTE had failed to act promptly and in the interest of competition, I would not hesitate to find Verizon in violation and impose an appropriate remedy, including suspension or revocation of its section 271 authority. This is simply not that case. The Massachusetts DTE, after a thorough 18 month proceeding, has adopted a 500+ page pricing order that directs Verizon to file rates that WorldCom believes will be roughly equivalent to the current New York rates,[87] and in any event, are presumed to comply with TELRIC absent challenge.[88] The DTE did not conclude its rate proceeding until late March, and yet it was able to generate a thorough, voluminous final order less than four months later. All of this has occurred within a few months of New York's action that raised the question of whether the rates that we approved in the *Massachusetts 271 Order* continued to fall within a range of what a reasonable application of TELRIC principles would produce.[89]

I would add that WorldCom's request here amounts to a collateral attack on the sound conclusion that Congress granted to the states the authority to set UNE rates. The Commission granted Verizon's 271 application to provide long distance services in Massachusetts by relying, in part, on UNE rates that were benchmarked to rates then in effect in New York.[90]

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86 *See Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1660-61, 1669-70 (2002).

87 Letter from Lisa B. Smith, counsel for WorldCom, Inc., to Alexander P. Starr, Chief, Market Dispute Resolution Division, FCC, File No. EB-02-MD-017 (filed July 19, 2002) at 2.

88 The initial deference due the states in setting UNE rates derives from the statutory framework, pursuant to which states establish rates in the first instance. *See, e.g.*, 47 U.S.C. § 252(d)(1). In the *Massachusetts 271 Order*, we stated "as always, we presume that the Massachusetts Department, like other state Commissions, will . . . set rates within the range of what a reasonable application of TELRIC principles would produce." *Massachusetts 271 Order*, 16 FCC Rcd at 9005-9006, ¶ 35.

89 *See Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-C-1357, Order on Unbundled Network Element Rates at 42 (N.Y.P.S.C. Jan. 28, 2002).

90 In doing so, the Commission acknowledged the existence of pending rate proceedings in both New York and Massachusetts that would result in new UNE rates. *See Application of Verizon New England Inc., Bell* (continued….)

Nevertheless, I did not support a requirement that Verizon match immediately any New York rate reductions in Massachusetts as a condition of its 271 authorization, because such a "mirroring" requirement would unduly federalize rate-setting and impermissibly subject the Massachusetts DTE to the regulatory actions of another state.[91] The Commission properly declined to impose such a requirement.

In the Massachusetts 271 proceeding, I stated that, if the New York rates went down before the Massachusetts DTE had concluded its rate proceeding, Verizon would likely need to take some action that would have the practical effect of charging cost-based switching rates for a short period until the DTE established new rates. As the Massachusetts DTE worked to conclude its process of updating its rates to reflect changes in technology and economic assumptions pursuant to the Commission's TELRIC pricing methodology, Verizon took several affirmative steps to ensure continued compliance with the Act, including its proposed tariff and its offer to true-up the old rates to those ultimately established by the Massachusetts DTE. Indeed, it appears that if WorldCom had accepted Verizon's true-up offer, as other CLECs did, WorldCom would have obtained essentially all of the relief it sought in its complaint: the benefit of paying rates that WorldCom believes will now be equivalent to the new New York rates, retroactive to March 1, 2002. In light of Verizon's actions and the laudable efforts of the Massachusetts DTE, I believe the company did not act unreasonably and I find no cause for criticizing my state colleagues here. I want to express my deep appreciation for the enormous dedication and acumen demonstrated by the Massachusetts DTE in this matter and for issuing its decision before the statutory deadline in this proceeding.

Finally, I want to emphasize that our Order expressly relies on the specific circumstances presented here, including the shortness of the interim period in question, Verizon's efforts to remain in compliance with section 271 during the interim period, and the DTE's swift action to conclude its rate proceeding and establish new rates. Just as the Commission took swift, substantial action when problems with Verizon's OSS in New York were identified,[92] we will

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Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprises Solutions), and Verizon Global Networks, Inc., For Authorization to Provide In-Region InterLATA Services in Massachusetts, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8996-9006 (2001) (*Massachusetts 271 Order*) at ¶¶ 16-36. The Commission also acknowledged that there might be a time lag between the setting of new rates in New York and in Massachusetts. *Id.*

[91] *Massachusetts 271 Order*, Separate Statement of Chairman Powell.

[92] *See 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,* Order, 15 FCC Rcd 5413 (2000).

take similarly swift and substantial action if, in the future, BOCs or states do not act quickly to ensure continued compliance with the market-opening requirements of section 271. We will remain vigilant in exercising our 271(d)(6) enforcement authority in future cases to ensure that competitors are not denied access to cost-based rates.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
DISSENTING

Re: WorldCom, Inc., v. Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc.

In the Telecommunications Act of 1996, Congress sought to promote competition in all telecommunications markets. One of the central tools that Congress created to achieve this objective is section 271 of the Act. Pursuant to this section, a Bell company may enter the long-distance market, but only after it opens its local markets to competition. Congress recognized, however, that the grant of a section 271 application is not the end of the road. It therefore required Bell companies to maintain the openness of their local markets and established a 90-day period to adjudicate complaints that a Bell company has ceased to meet any of the requirements in section 271.

Congress directed the Commission to establish a process to adjudicate such complaints under section 271(d)(6). The Commission, in its 271 orders, has continually stated that it would not hesitate to use its authority under section 271(d)(6) to ensure continued compliance with the Act. Today's decision is the first time that the Commission is setting in place such a process. Notwithstanding the significant efforts by the Massachusetts Department of Telecommunications and Energy (DTE) to open its local markets to competition, I dissent from today's decision because it puts in place a framework that I fear will preclude the Commission from effectively adjudicating pricing complaints in the future.

In the *Massachusetts Order*, the Commission approved rates based on a comparison to rates in neighboring New York. The Commission was aware that rates in New York were under review, but approved the application recognizing that "a decision by the New York Commission to modify these UNE rates may undermine Verizon's reliance on those rates in Massachusetts and its compliance with the requirements of section 271, depending on the conclusions of the New York Commission."[93] Since that time, the New York Commission not only modified its rates, but this Commission has also concluded that it is "inappropriate" to evaluate compliance with the section 271 pricing requirements "based on a benchmark comparison to superseded New York rates."[94] The majority makes much of the fact that the Commission did not require Verizon to reduce immediately its rates in Massachusetts and that a Bell company need not update its cost studies in one state merely because it updates its cost studies in another state. But

[93] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988, 9002-03 (2001) (*Massachusetts 271 Order).*

[94] *Application by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region InterLATA Services in Rhode Island*, Memorandum Opinion and Order, 17 FCC Rcd 3300, 3324 (2002).

these statements miss the point entirely. The issue is not whether Verizon would need to update rates in Massachusetts just because its rates in other states were updated. The issue is whether the rates in Massachusetts comply with TELRIC, as Congress required in section 271.

It is clear that the only basis under which the Commission approved rates in Massachusetts was the comparison to superseded New York rates, and that the Commission has since stated that Bell companies may no longer rely on those rates.[95] The majority does not dispute that the rates in effect in Massachusetts did not comply with TELRIC on the date the complaint was filed. The majority further does not dispute that the rates in effect today also do not comply with TELRIC. Although the Massachusetts DTE issued an order in its cost proceeding on July 11, the rates will not be set – or even known – until Verizon submits a compliance filing on August 5. Indeed, we do not even know if the rates that will be adopted following the compliance filing will comply with TELRIC

Because the majority is unable to conclude that the current rates comply with section 271, the majority must rely on Verizon's offer of a true-up to find that there was no violation. Although the Commission has approved section 271 applications in which rates are interim subject to a true-up, the true -up here does not meet the conditions that the Commission has relied on in the past. As the majority points out, in previous section 271 applications, the relevant state commissions had pending cost proceedings to set permanent rates and had ordered that the interim rates would be subject to a true-up for all carriers. In those instances, the state commission set interim rates and retained control of the true-up process. In contrast, the rates in effect on day 1 and on day 90 of this complaint are permanent rates that the Massachusetts DTE has not subjected to a true-up. It is only the carrier that has offered a true-up, but with substantial limitations. The true-up was only offered to the rates adopted by the Massachusetts DTE even if those rates were later deemed not to comply with TELRIC. The true-up was only available to those carriers that agreed to forego the ability to challenge the current rates. And the true-up was not available to any carrier that had not accepted it prior to the decision of the Massachusetts DTE. The Commission has never accepted a true-up offered by a carrier with the conditions that Verizon placed on it here.

Given that Verizon does not have TELRIC-compliant rates in effect, I find that Verizon failed to comply with a critical provision of section 271. I do not conclude that the true-up saves Verizon, because it is of limited scope, is no longer available, and was offered only to those carriers that agreed not to challenge the rates. I cannot support the decision of the majority that there is no violation. Additionally, I fear that such a decision provides the ability for game-playing in the future. Under the majority's test, a Bell company may avoid a finding of violating section 271 by offering a limited true-up only to those carriers that agree not to challenge the rates under section 271(d)(6). By this reasoning, would the Commission grant a section 271 application if a Bell company offered a true-up only to those carriers that agreed not to contest the rates in the application?

[95] *Id.* at 3321-24.

Although I would have found that Verizon ceased to comply with a provision of section 271, the Act provides several remedies including suspension of long-distance authority, revocation of such authority, or an order to correct the deficiency. In this instance, I would neither have revoked nor suspended Verizon's authority. I would instead have ordered Verizon to correct the deficiency – something the Massachusetts DTE is now attempting to do. Verizon had sought to reduce its rates – albeit not to the New York rates – but was denied by the Massachusetts DTE because it was close to completing its cost proceeding. The Massachusetts DTE has now completed its extensive review, and, as even WorldCom admits, appears to set rates roughly comparable to those now in effect in New York. I commend the Massachusetts DTE for its on-going efforts to open the local market to competition.

By finding a violation, and ordering Verizon to correct the deficiency, the Commission could have resolved this complaint and maintained the integrity of its enforcement process. I fear that the majority's resolution here may substantially undermine our enforcement ability in future complaints.