

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

In the Matters of)	
)	
GTE Corporation, Transferor,)	
)	
And)	CC Docket No. 98-184
)	
Bell Atlantic Corporation, Transferee, For Consent)	
to Transfer Control of Domestic and International)	
Sections 214 and 310 Authorizations and 310)	
Authorizations and Application to Transfer)	
Control of a Submarine Cable Landing License)	

ORDER ON RECONSIDERATION

Adopted: November 25, 2003

Released: November 26, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we deny Verizon Communications, Inc.'s ("Verizon") Petition for Reconsideration ("*Petition*") of our Memorandum Opinion and Order ("*Order*")¹ regarding the calculation of certain voluntary payments under the Carrier-to-Carrier Performance Plan in the *Bell Atlantic/GTE Merger Order*.² Specifically, we reject Verizon's claim that it is entitled to calculate its payments in the same manner as SBC Communications, Inc. ("SBC") under its merger performance plan.

¹ *Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 18 FCC Rcd 10481 (Enf.Bur. 2003).

² *Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

II. BACKGROUND

2. In the *Bell Atlantic/GTE Merger Order*, the Commission adopted, with modifications, certain voluntary conditions submitted by Bell Atlantic and GTE intended to mitigate any public interest harms that might otherwise arise from the merger, including poor wholesale service quality to competitive local exchange carriers (“CLECs”).³ These merger conditions include a Carrier-to-Carrier Performance Plan consisting of two parts. First, the merged company, now Verizon, must report to the Commission monthly performance measurement data showing the quality of service elements that it provides to CLECs, computed according to detailed instructions for each service element. Second, if Verizon fails to meet certain performance goals, it must make voluntary, self-executing payments to the U.S. Treasury, again computed according to detailed instructions.⁴

3. The Verizon merger performance plan (“Verizon Merger Plan”) was generally modeled on two performance plans originally developed in collaborative proceedings before the state public utility commissions of New York and California (“State Plans”). These State Plans concerned agreements or terms and conditions for interconnection of incumbent local exchange carriers with CLECs, pursuant to sections 251 and 252 of the Communications Act of 1934, as amended (“the Act”), 47 U.S.C. §§ 251, 252.⁵ The Verizon Merger Plan for the post-merger Bell Atlantic legacy states, *i.e.*, the pre-merger state operating companies of the Bell Atlantic Corporation, was largely based on the New York State Plan, and the Verizon Merger Plan for the post-merger GTE legacy states was similarly based on the California State Plan.⁶

4. In correspondence with the Bureau from April to October, 2002, Verizon and the independent auditor for Verizon’s compliance with the Merger Plan addressed Verizon’s existing practice regarding performance measurements using averages or means (*e.g.*, Trouble Duration Interval, OSS Response Time).⁷ Verizon was imposing a certain cap on one factor in the calculation midway through the process, in addition to other caps explicitly provided by the calculation rules.⁸ Verizon contended on various substantive grounds that the voluntary payment formula for this type of metrics permitted the use of this additional cap. Verizon also argued that the Bureau should allow it to use the cap because the Common Carrier Bureau (“CCB”) had previously approved a similar cap for the merger performance plan

³ *Id.*, 15 FCC Rcd at 14086, para. 96. The merger conditions are contained primarily in Appendix D of the Merger Order.

⁴ *Id.*, 15 FCC Rcd at 14159-62, paras. 279-82; *id.*, Appendix D, 15 FCC Rcd at 15293-94, paras. 16-17; *id.*, Attachs. A-3, A-4, A-5, 15 FCC Rcd at 14406-31. Verizon’s voluntary payment amounts are also subject to specific caps identified in the merger conditions and labeled as such. *See id.*, Appendix D, Attach. A-4, 15 FCC Rcd at 14411-12.

⁵ In both the *Order* and the *Petition*, the Verizon Merger Plan is also referred to as the “federal plan,” reflecting its development before this Commission in the merger proceeding, as distinguished from State Plans developed before the state commissions in the interconnection proceedings. *See, e.g., Order* at paras. 10-12; *Petition* at 5.

⁶ *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14161, para. 281.

⁷ *See, e.g.*, Letter from Joseph DiBella, Regulatory Counsel, Verizon, to David Solomon, Chief, Enforcement Bureau, FCC (October 3, 2002) (“*Verizon October 3, 2002 Letter*”).

⁸ *See Order* at para. 3. *See also* note 15, *infra* (describing the cap methodology).

of SBC mandated by the *SBC/Ameritech Merger Order*.⁹ Verizon noted that the Verizon Merger Plan for the Bell Atlantic legacy states was based in some respects on the SBC merger conditions for the legacy states of the former Southwestern Bell Telephone Company and the former Ameritech Corporation (“SWBT/Ameritech”).¹⁰ In the *Order*, we rejected Verizon’s claims on both the merits of the proposed cap and the alleged parallel with the SBC Merger Plan. Verizon seeks reconsideration of the *Order* on both grounds. As discussed below, we deny Verizon’s *Petition*.

III. DISCUSSION

5. Pursuant to section 1.106 of our rules, parties may petition for reconsideration of final Commission actions.¹¹ Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner’s last opportunity to present such matters.¹² We will deny any petition that merely repeats arguments previously considered and rejected.¹³

6. Verizon’s *Petition* briefly reiterates its arguments for the additional cap on the merits.¹⁴ Because we have already addressed those arguments in the *Order*,¹⁵ we will confine our discussion here

⁹ See *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (“*SBC/Ameritech Merger Order*”).

¹⁰ See *Order* at para. 3. See also *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14868, para. 379. The SBC Merger Plan for the Pacific Telesis Group legacy states was based on the California State Plan. See *id.*, Appendix C, Attach. A, 14 FCC Rcd at 14041, para. 4

¹¹ 47 C.F.R. § 1.106. Section 1.429 of our rules governs reconsideration of Commission actions in notice and comment rulemaking proceedings. 47 C.F.R. § 1.429. See also 47 U.S.C. § 405.

¹² *Applications of WWIZ, Inc. et al.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(b)(2).

¹³ *Applications of Bennett Gilbert Gaines et al.*, Memorandum Opinion and Order, 8 FCC Rcd 3986, 3987 (Rev. Bd. 1993). See, e.g., *Metrocall, Inc. v. Southwestern Bell Tel. Co. et al.*, Order on Reconsideration, 17 FCC Rcd 4781, 4782-83, para. 5 (2002).

¹⁴ *Petition* at 8-10.

¹⁵ See *Order* at paras. 5-9. The original four-step computation in the Verizon Merger Plan, similar to that in the pre-modification SBC Merger Plan, consists of: (1) calculation of the average or mean for the measurement that would yield a minimum acceptable level of service (*i.e.*, that would result in no payment at all); (2) calculation of the difference between the actual average service to CLECs and the calculated average in forgoing step 1; (3) multiplication by the volume or number of occurrences of the service provided to the CLECs; and (4) multiplication by certain fixed dollar amounts for different service components. See *Bell Atlantic/GTE Merger Order* at para. 280; see *id.* at Appendix D, para. 16. The second step clearly does not include an explicit limitation. For performance measurements using averages or means, however, Verizon had begun applying a 100% cap in that step, which it now claims is necessary to ensure that it will not pay for what would amount to more occurrences of poor performance than the number that actually occurred. We concluded in the *Order*, however, that neither the plain language, the structure, nor the policy rationale of the rule supported Verizon’s methodology. See *Order* at paras. 5-9; *Petition* at 8-10.

to the argument based on the asserted analogy with the SBC Merger Plan. We emphasize, however, that our conclusions in the *Order*—that Verizon’s self-imposed cap is inconsistent with both the terms and purpose of the payment rule—substantially inform our discussion of whether a cap is justified under an asserted analogy to the SBC Merger Plan.

7. As noted above, the former Common Carrier Bureau permitted such a cap under the *SBC/Ameritech Merger Order* in a letter dated February 6, 2002, responding to an SBC proposal originating the cap methodology.¹⁶ The Common Carrier Bureau first concluded that the language and logic of the existing payment formula did not support such modification.¹⁷ The Common Carrier Bureau further decided, however, that it would allow the cap for the SWBT/Ameritech legacy states because the Texas commission had previously done so for its own state plan. The letter stated that “administrative efficiency would be served if SBC were permitted to apply this payment calculation in a fashion that mirrors the Texas performance plan,” because parts of the SBC Merger Plan for the SWBT/Ameritech legacy states were expressly modeled after the Texas State Plan.¹⁸

8. The Verizon Merger Plan for the Bell Atlantic legacy states is similar to the SBC Merger Plan for the SWBT/Ameritech legacy states regarding this payment calculation because Verizon explicitly borrowed many features of the SBC Merger Plan. Verizon argues in its *Petition*, as it did in its previous correspondence, that it is similarly situated to SBC in terms of comity and administrative efficiency.¹⁹ Accordingly, Verizon concludes, if the cap is not allowed in the Verizon Merger Plan for all of the Bell Atlantic legacy states in the same way as it is allowed in the SBC Merger Plan for all of the SWBT/Ameritech legacy states (other than Texas itself), then Verizon would be subject to an arbitrary distinction between similarly situated parties.²⁰

9. In the *Order*, we rejected this argument. We noted that the Verizon Merger Plan already provides that changes in “performance measurement plans and procedures” adopted by the New York or California state commissions may, through certain semi-automatic procedures, be extended to the Verizon Merger Plan as it applies to one or the other of the two subsets of legacy states. We also observed that a parallel mechanism applies to state changes in performance measurements for SBC and its subsets of

¹⁶ Letter from Carol Matthey, Deputy Chief, Common Carrier Bureau, FCC to Caryn Moir, Vice President – Federal Regulatory, SBC Telecommunications, Inc. (Feb. 6, 2002) (“*CCB SBC Letter*”).

¹⁷ *Id.*, at 3.

¹⁸ *Id.*, at 3-4. The *CCB SBC Letter* used only the phrase “administrative efficiency,” whereas Verizon added the word “comity” in its correspondence and in the present *Petition*. Compare *CCB SBC Letter* at 3 with *Verizon October 3, 2002 Letter* at 2.

¹⁹ Verizon states that each of the SWBT/Ameritech legacy states other than Texas may have a similar state plan as Texas, a different plan than Texas, or no plan at all, but that all of them still receive the same benefit of the cap as adopted from the modified Texas State Plan into the *SBC Merger Plan* for those legacy states. Verizon then reasons that all of its Bell Atlantic legacy states are in the same position as the SWBT/Ameritech states other than Texas, because: (1) they have the same calculation methodology as the pre-modified Texas State Plan; and (2) they likewise may have a similar state plan to Texas, a different plan than Texas, or no plan at all. *Petition* at 6-7.

²⁰ *Petition* at 7-8.

legacy states.²¹ We then stated:

We are not aware of any modifications allowing an additional cap midway through the payment formula in the New York or California state plans, and Verizon has not argued that these state commissions have made such modifications to their states plans. . . . Accordingly, the considerations of comity and administrative efficiency on which Verizon relies are not in fact applicable to Verizon, and, therefore, SBC and Verizon are not similarly situated in the relevant sense. We note that, to the extent the New York or California state commissions modify the payment formula, Verizon remains free to request comparable treatment at the federal level in accordance with the process that the Commission established in the merger conditions.²²

10. Verizon now petitions for reconsideration on the ground that the *Order* is based on a factual mistake that assumes the merger conditions payment calculations—as opposed to the performance metrics—for the Bell Atlantic legacy states were modeled on the New York State Plan.²³ Verizon claims that in fact it took its payment calculation methodology solely from the Texas State Plan, as part of its wide-ranging adoption of provisions from the SBC/Ameritech merger conditions. Verizon further states that the New York State Plan payment calculation is based on an entirely different approach than the methodology that Verizon borrowed from the SBC/Ameritech Merger conditions.²⁴ In other words, the Verizon Merger Plan for the Bell Atlantic legacy states is a hybrid, according to Verizon, with metrics drawn from the New York State Plan, but with a payment calculation drawn from the Texas State Plan. On this basis, Verizon argues in effect that it could not turn to the New York state commission, as the *Order* assumed, in the same way that SBC turned to the Texas state commission. Accordingly, Verizon concludes, its Bell Atlantic legacy states are in exactly the same situation as the SWBT/Ameritech legacy states other than Texas relative to the Texas commission's cap methodology, and are equally entitled to adopt that methodology.²⁵ Verizon notes that an agency may not make arbitrary distinctions that have the effect of treating similarly situated parties differently, and argues that the Commission is interpreting the same payment provision from the same source in the SBC merger conditions with no basis for differentiation between them.²⁶

²¹ See *Bell Atlantic/GTE Merger Order*, Appendix D, Attach. A, 15 FCC Rcd at 14333, para. 4 (allowing changes in measurements adopted in the New York State Plan or the California State Plan to be imported into the Verizon Merger Plan for the remaining legacy states pursuant to semi-annual meetings with Verizon and Commission staff ; such state changes may be may be imported into the Merger Plan for the states of New York and California themselves automatically upon five days notice); *SBC/Ameritech Merger Order*, Appendix C, Attach. A, 14 FCC Rcd at 15041, para. 4 (similarly allowing importation of state commission measurement changes into the SBC Performance Plan).

²² *Order* at para. 13.

²³ *Petition* at 6-8.

²⁴ *Id.*

²⁵ *Id.* at 6-7. Verizon also states that there is no payment plan at all applicable to GTE in the California State Plan. See *id.* at 5, n. 3; Attachs. C & D (orders from the California commission). Based on our review of these materials, we conclude that there is no cap issue similar to the one here for the Pacific Telesis Group legacy states.

²⁶ *Id.* at 7, citing *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *McElroy Electronics v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993). The *Petition* implies that these decisions relied on the (continued....)

11. Verizon ignores the paramount fact that the SBC Merger Plan and the Verizon Merger Plan, although resembling each other in some ways, involve fundamentally different and independent carriers, transactions, jurisdictions, and proceedings. As a result, Verizon misconstrues how the considerations of comity and administrative efficiency stated or implied in the *CCB SBC Letter* bear on whether Verizon's Bell Atlantic legacy states are similarly situated to SBC's SWBT/Ameritech legacy states. There are two significant differences between SBC and Verizon with respect to the performance metrics and payment computations at issue here.

12. Our review of the New York State Plan indeed confirms Verizon's present claim that its payment provisions, as opposed to its performance measurements, are substantially different than those of the Texas State Plan, and that Verizon might have difficulty in obtaining the specific cap remedy from the New York state commission.²⁷ This means that the practical parallel in payment computations between the Texas State Plan and the SBC Merger Plan in the SWBT/Ameritech legacy states cited by the Common Carrier Bureau is virtually non-existent between the New York State Plan and the Verizon Merger Plan in the Bell Atlantic legacy states. The Common Carrier Bureau decision gave SBC administrative efficiency because SBC was using the same calculation and the same cap at the state level, *i.e.*, it only had to make one calculation for federal and state payments. In contrast, Verizon uses a different calculation that does not cap at the state level and thus could not receive any administrative efficiency from a federal cap. Moreover, the comity in SBC's case concerned only the relationship between the Texas Commission and this Commission. Such comity is entirely absent here because Verizon has no jurisdictional relationship with Texas whatsoever, despite any claimed parallels in the content of the plans.

13. Both of these differences show that Verizon is not, in fact, similarly situated to SBC in the relevant sense of the *CCB SBC Letter*. If the difference between SBC and Verizon regarding the payment calculation is so great that there is no practical analogue to the Texas cap remedy for Verizon available from the New York state commission, that is the risk inherent in Verizon's voluntary decision to tie its methodology to a completely foreign state commission.

14. In view of all the considerations discussed above, we deny Verizon's *Petition*.

IV. ORDERING CLAUSES

15. For the reasons stated above, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 405, and Section (Continued from previous page) _____
"similarly situated" principle. Neither case does so. Rather, both cases merely restate—in connection with arguments not reached by the court—the general principle that an agency must treat similarly situated parties alike or provide an adequate justification for disparate treatment.

²⁷ Even if the payment calculation in the *Bell Atlantic/GTE Merger Order* originated with the Texas State Plan, rather than the New York State Plan, this does not change our ultimate conclusion reached in the *Order*. The New York methodology calls for payments to CLECs (rather than to the U.S. Treasury), with total possible payments "at risk," in amounts exceeding \$300 million for failure to maintain quality in major subgroups of service. *See* *Petition* filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, New York Public Service Commission, NYPSA Cases 97-C-0217, 99-C-0940 (November 3, 1999) (included by the *Verizon Petition* at Attach. B). There are, however, other mechanisms in the New York payment plan that apply proportionately greater payments to greater deficiencies in service, in a manner broadly analogous to the problem the cap in the Texas State Plan is designed to resolve. *See* Bell Atlantic Compliance Filing NYPSA Cases 97-C-0217, 99-C-0940 (April 17, 2000), at Appendix A.

1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of Verizon Communications, Inc. IS DENIED. IT IS FURTHER ORDERED that a copy of this Order shall be sent by Certified Mail/Return Receipt Requested to Verizon Communications, Inc., Joseph DiBella, Regulatory Counsel, 1515 North Courthouse Road, Suit 500, Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau