STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF VERIZON NEW JERSEY, INC.'S ALLEGED FAILURE TO COMPLY WITH OPPORTUNITY NEW JERSEY COMMITMENTS	DOCKET NO. TO12020155

VERIZON NEW JERSEY INC.'S ANSWER TO ORDER TO SHOW CAUSE

The *Show Cause Order*[1] concerns a 20-year-old commitment by Verizon New Jersey Inc.'s predecessor to accelerate its planned investment to bring advanced services to New Jersey.[2] That commitment was part of a program known as "Opportunity New Jersey" (or "ONJ") that accelerated Verizon's investment and enhanced the State's economic development. Verizon met its commitment, investing more than $13 billion – billions more than was contemplated by ONJ – equipping 100% of its central offices with broadband capability and building out infrastructure that Board Staff acknowledges enables Verizon to offer broadband service to customers in more than 99% of the census blocks in New Jersey. Through Verizon's efforts and investment, New Jersey became the most wired state in the nation, ranking first in broadband connectivity.[3] Indeed, the percentage of New Jersey households connected to higher

[1] *See* Order to Show Cause, Docket No. TO12020155 (Mar. 12, 2012) ("*Show Cause Order*").

[2] Verizon New Jersey Inc. shall be referred to herein as "Verizon."

[3] *See* Atkinson, Robert D., and Andes, Scott, The Information Technology & Innovation Foundation, *The 2010 State New Economy Index: Benchmarking Economic Transformation in the States* (Nov. 2010) ("*ITIF Study*") available at http://www.itif.org/files/2010-state-new-economy-index.pdf.

speed broadband is double the national average, and New Jersey leads the nation in broadband subscribership for fixed connections.[4]

Verizon thus delivered on Opportunity New Jersey's fundamental goal: "to deploy ... advanced technologies as soon as possible to provide the voice, data and video services that [Verizon's] customers will require."[5] This success came at a significant cost that far exceeded what was envisioned in Opportunity New Jersey. As noted above, Verizon has invested over $13 billion in broadband deployment in New Jersey – billions more than the figures the Board cited in adopting Opportunity New Jersey. This massive investment came despite an evolving competitive communications market in which consumers can and increasingly do obtain service from wireless, Voice over Internet Protocol ("VoIP"), cable, satellite and other providers – rather than from Verizon. Verizon has lost more than 50 percent of its access lines in New Jersey since the Board approved Opportunity New Jersey in 1993.[6] These customer losses caused Verizon to lose nearly **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** on its Board-regulated intrastate operations since 2007.

The *Show Cause Order* points to two New Jersey towns where Verizon provides broadband to schools and libraries and surrounding areas, but does not reach every resident with broadband. In doing so, it overlooks Verizon's commitment over the past 20 years to satisfy the ONJ objectives with massive and, in many cases, uneconomic investment to deploy broadband to make New Jersey the leading state in broadband connectivity. Even when the ONJ was first

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[4] *See* Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2010* (Oct. 2011) (available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1011/DOC-310261A1.pdf).

[5] Opportunity New Jersey, Exh. 2, Att. 1 to Application of New Jersey Bell for Approval of a Plan for Alternative Regulation (Mar. 31, 1992), at 10.

[6] *See* Affidavit of Paul B. Vasington on Behalf of Verizon New Jersey Inc. ("Vasington Aff.") (attached hereto as Exhibit A) at ¶ 55.

adopted, the Board and New Jersey Bell were focused on accelerating broadband investment to spur economic development, not on rigid absolutes. Given the long-term nature and scope of the undertaking, Opportunity New Jersey was to be "guided by developments" in "technology, markets and economic conditions."[7] Accordingly, Opportunity New Jersey was framed in terms of certain "expect[ations]," "target[s]" and "projections" – not strict requirements or litmus tests for success. Verizon has met all these terms of ONJ and more by equipping 100% of its central offices with DSL, wiring over 2 million customers with fiber-to-the-home, and offering broadband to customers in more than 99% of census blocks. Indeed, when addressing broadband availability, the Federal Communications Commission's National Broadband Plan considered the buildout of infrastructure to more than 99% of households by 2020 to achieve its goal of universal broadband coverage – with satellite identified as well-suited to fill in coverage gaps in high cost/low density areas.[8]

With New Jersey topping the nation in broadband communications and Verizon having satisfied its commitments, the Board should recognize the success of Opportunity New Jersey and refrain from further pursuing the *Show Cause Order*.

I. VERIZON HAS EXCEEDED ITS OBLIGATIONS UNDER OPPORTUNITY NEW JERSEY TO BRING BROADBAND AVAILABILITY TO THE STATE.

In the face of dramatically changing regulatory, market and economic conditions, Verizon's $13 billion investment to deploy broadband in New Jersey far exceeded its commitments under Opportunity New Jersey and the Board orders implementing it.

A. VERIZON HAS INVESTED BILLIONS OF DOLLARS MORE IN DEPLOYING BROADBAND IN NEW JERSEY THAN WHAT WAS CONTEMPLATED IN ONJ.

[7] Opportunity New Jersey at 10.

[8] *See* Federal Communications Commission, "Connecting America: The National Broadband Plan," http://www.broadband.gov/download-plan (Mar. 16, 2010) at 137, 143, 150.

Opportunity New Jersey represented an "aggressive"[9] "infrastructure improvement program"[10] that required Verizon to expend greater amounts on developing its network in the state than it would under a business as usual ("BAU") approach. ONJ originally estimated that, under a BAU case, Verizon would invest approximately $3.87 billion between 1992 and 1999 on the network development projects that became encompassed by Opportunity New Jersey.[11] ONJ, in turn, called for an additional investment of approximately $1.5 billion from 1992 through 1999 above and "beyond those monies that would have been spent for network improvements as part of the business as usual case ...."[12] As aggressive as the plan was, Verizon has invested much more than these targeted amounts.

From mid-1993 through 1999, Verizon invested more than $5 billion to support the modernization of its network infrastructure to meet its deployment commitments and to open markets to competition.[13] Then, in the following years, Verizon invested an additional $8.3 billion in New Jersey.[14] These investments were in addition to the amounts that Verizon Wireless and other Verizon entities have spent on broadband availability in the state. For example, Verizon Wireless has deployed its 3G network to almost all of New Jersey, and is in the process of deploying 4G in the same areas; the Verizon Wireless 4G LTE network provides broadband at average data rates of 5 to 12 megabits per second on the downlink and 2 to 5

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[9] Opportunity New Jersey at 10.

[10] Order Approving Stipulation, *In the Matter of the Board's Inquiry into Bell Atlantic-New Jersey, Inc.'s Progress and Compliance with Opportunity New Jersey, Its Network Modernization Program*, Dkt. No. TX96100707 (June 10, 1997) ("*Order Approving Stipulation*") at 3.

[11] *See In the Matter of the Application of New Jersey Bell Telephone Company for Approval of Its Plan for an Alternative Form of Regulation*, Docket No. TO92030358, Decision and Order (May 6, 1993) ("*PAR-1 Order*") at 74-75.

[12] *Id.* at 73.

[13] *See* Vasington Aff. at ¶ 6.

[14] *Id.*

megabits on the uplink, speeds up to 10 times faster than the company's 3G network.[15] Over the last decade, Verizon Wireless has invested billions of dollars in New Jersey to bring wireless services – including the most advanced wireless broadband services – to the State.[16]

All told, ***Verizon New Jersey has invested a total of more than $13 billion on network development since the plan was approved*** – many times more than the additional investment originally envisioned by Opportunity New Jersey. This massive investment in New Jersey's broadband infrastructure outstripped anything imagined by Opportunity New Jersey, reflecting the fact that Verizon not only met its Opportunity New Jersey obligations under significantly changed market and economic conditions, but – if anything – exceeded them.

As part of its investment in New Jersey, Verizon, *inter alia*:

- passed 2.1 million premises with the fiber-to-the-home technology on the FiOS network;
- deployed 3.7 million miles of fiber optic cable;
- made DSL available in 100% of Verizon Central Offices;
- equipped more than 750 remote terminals for DSL;
- converted to 100% Digital Switching;
- made high speed switching available statewide via 146 Fast Packet and ATM switches and deployed at hub locations around the state;[17] and
- provided more than $100 million worth of free equipment and service discounts to nearly 2,700 K-12 school and public library locations to connect to the high-speed network made possible under Opportunity New Jersey.[18]

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[15] *See* http://aboutus.verizonwireless.com/bestnetwork/network_facts.html.

[16] *See* Vasington Aff. at ¶ 7.

[17] *See* Infrastructure Deployment Supplemental Report 2010 (Exh. 1 to Vasington Aff.).

[18] *See* Vasington Aff. at ¶ 25.

At every step of the way, Verizon kept the Board advised of its investment and the status of its network development via annual reports to the Board.[19] Those reports, which Verizon submitted every year from 1993 through 2010, specifically addressed service capability and technology deployment levels, critical technology issues and upcoming objectives. Verizon also worked with Board Staff regarding additional reporting requirements and provided additional data requested by Staff beyond what was included in the public reports regarding Verizon's progress under the plan.[20]

The Board, in turn, has overseen Verizon's fulfillment of its ONJ obligations and conducted periodic formal review proceedings to assess the status of the implementation efforts. For example, in 1996, the Board initiated a formal review of Opportunity New Jersey,[21] which led to an order memorializing an agreed-upon stipulation that further enhanced ONJ through the establishment of the Access New Jersey program to provide advanced communications services to schools and libraries.[22] In 2001, the Board concluded a second formal review of ONJ, finding that Verizon "is in compliance with its ONJ and ANJ requirements, as modified and accelerated by the Stipulation approved by the Board on June 10, 1997."[23] Then, in 2003, in approving a second plan for alternative regulation ("PAR-2") for Verizon in New Jersey,[24] the Board stated

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[19] *Id.* at ¶¶ 16, 24.

[20] *Id.* at ¶ 16.

[21] *See In the Matter of the Board's Inquiry into Bell Atlantic-New Jersey, Inc.'s Progress and Compliance with Opportunity New Jersey, Its Network Modernization Program*, Order, Dkt. No. TX96100707 (June 10, 1997).

[22] *See Order Approving Stipulation, supra.*

[23] *See* Order of Approval, *In the Matter of the Board's Inquiry into Bell Atlantic-New Jersey, Inc.'s Progress and Compliance with Opportunity New Jersey, As Accelerated by Order Dated June 10, 1997*, Dkt. No. TX99020050 (Mar. 30, 2001) ("*Order of Approval*") at 10.

[24] *See* Decision and Order, *In the Matter of the Application of Verizon New Jersey Inc. for Approval (i) Of a New Plan for an Alternative Form of Regulation and (ii) To Reclassify Multi-Line Rate Regulated Business Services as Competitive Services, and Compliance Filing*, Docket No. TO01020095 (Aug. 19,

that, with respect to ONJ, "we have found in progress review proceedings that [Verizon] has demonstrated that it is fulfilling its commitments and that the economic development benefits of the program are greater than anticipated."[25]

Indeed, Verizon's investment has gone well beyond what Opportunity New Jersey originally envisioned, which – as the below chart indicates – has provided the State with even more than it bargained for when the Board approved the plan nearly twenty years ago.

OPPORTUNITY NEW JERSEY OBJECTIVES

DEPLOYMENT CATEGORY	STATUS
Advanced Intelligent Network	**Full availability in 1997, one year ahead of schedule.**
Narrowband Digital Services	**Full availability in 1997, one year ahead of schedule.**
Wideband Digital Services	**100% digital switches; 24 ATM and 150 fast-packet switches. Provides statewide availability of Asynchronous Transfer Mode ("ATM") and Switched Multi-megabit Data Service ("SMDS").**
Access New Jersey—Schools and Libraries	**Full compliance by 2001.**
Broadband Digital Services	**100% central offices equipped with DSL, with broadband available to customers in more than 99 percent of census blocks by 2010.**

2003) ("*PAR-2 Order*"). PAR-2 replaced PAR-1, making further enhancements to the ANJ program and other changes. As the Board acknowledges, PAR-2 "did not disturb the existing ONJ broadband commitments made by Verizon." *Show Cause Order* at ¶ 11.

[25] *PAR-2 Order* at 53. Following the *PAR-2 Order*, Verizon continued to fulfill its commitments under Opportunity New Jersey and continued to provide annual reports to the Board detailing its progress. Board Staff continued to periodically seek and receive additional information from Verizon. But the Board did not conduct any further formal review of the program prior to issuing the order initiating this docket.

B. AS A RESULT OF VERIZON'S MASSIVE INVESTMENT, ALL OF ITS CENTRAL OFFICES ARE NOW EQUIPPED WITH BROADBAND CAPABILITY AND BROADBAND AVAILABILITY HAS REACHED MORE THAN 99% OF CENSUS BLOCKS IN NEW JERSEY.

Owing in large part to Verizon's heavy investment, New Jersey now enjoys the best broadband communications in the United States.

As noted above, Verizon has deployed broadband capability in all of its central offices in the state. As Verizon demonstrated in the most recent data it provided to the Board, and as the Board Staff recognized, the result is that Verizon has made broadband available in ***more than 99 percent*** of the census blocks in New Jersey.[26] In particular, Verizon provided the Board with the same data (as of December 31, 2010) that Verizon provided to the New Jersey Office of Information Technology, which is the New Jersey-designated mapping entity responsible for collecting data for inclusion in the National Telecommunications and Information Administration's ("NTIA's") National Broadband Map.[27]

This data shows broadband service availability data by census block for broadband Internet access service offered by Verizon on its FiOS network and for DSL in New Jersey, with the associated maximum advertised upstream and downstream speeds. This data effectively captures the level of availability for wireline broadband services offered by Verizon to consumers in New Jersey. For those census blocks with an area greater than two square miles, Verizon provided a list of all street segments with address ranges in such census blocks (as required by the NTIA's July and August 2009 "Notice of Funds Availability"), with the associated maximum advertised upstream and downstream speeds. Verizon also supplied the Board with the most recent available Form 477 data that it filed with the FCC, which shows

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[26] Vasington Aff. at ¶¶ 8-9 and Exhibit 2.

[27] *See* http://broadbandmap.gov/.

where Verizon is currently serving broadband customers, as of December 31, 2010. The combined mapping of these data sets shows that Verizon has deployed broadband facilities in New Jersey capable of serving customers in more than 99 percent of its census blocks.[28]

Moreover, broadband availability is not only virtually ubiquitous in New Jersey, but broadband is available at the kinds of high speeds that were contemplated by Opportunity New Jersey. The ONJ plan envisioned "Switching Technologies matched with transmission capabilities to support data rates up to 45,000,000 bits per second and higher ('45 megabits')."[29] And Verizon offers a variety of products that meet such a definition, including High-Cap, Frame Relay, ATM, DSL and FiOS, with FiOS capable of meeting and exceeding the 45 megabit broadband data rate.[30]

Given the widespread availability of broadband services at high speeds throughout the state, a recent study by the International Information and Technology Innovation Foundation ranked New Jersey first in the nation in broadband telecommunications.[31] Navigant Economics echoed that finding in its own report showing how New Jersey leads the nation in broadband:

> Recent data show clearly that New Jersey leads the nation in overall high-speed broadband penetration. As shown in Figure Six, New Jersey has more than 0.67 broadband connections per household within the approximate range of the FCC's National Broadband availability target (3 Mbps down and 768 Kbps up) – more than any other state. This trend towards steadily increasing broadband speeds (and a decreasing reliance on dial-up service), is

[28] *See* Vasington Aff. at ¶ 9.

[29] Opportunity New Jersey at 2. *See also PAR-1 Order* at 74.

[30] *See* Vasington Aff. at ¶ 10.

[31] *See ITIF Study*, *supra.*

> indicative of the quality improvements that have marked broadband services.[32]

Indeed, according to the FCC's Broadband Reports, New Jersey leads the nation in broadband subscribership for fixed (as opposed to mobile) connections (*i.e.*, connections/households), and the percentage of New Jersey households connected to higher speed broadband is double the national average.[33] These rankings confirm that Verizon met its commitment to deliver broadband capability under Opportunity New Jersey.

In addition, Verizon's fixed broadband offerings in New Jersey have been supplanted by broadband services not envisioned at the time ONJ was adopted. For example, cable providers now offer broadband to almost the entire state. According to the FCC's High-Speed Services Report, high-speed lines provided via cable modem increased by 59% at the end of 1999 and have seen steady increases ever since. Cable modem service was first made available to New Jersey consumers in 2001, with cable modem lines quickly outnumbering DSL lines.[34] By 2010, cable modem service was available to most residential consumers in the State.[35] In addition, as discussed above, wireless carriers now offer broadband capable services throughout most of New Jersey. Wireless carriers serving New Jersey include the four largest wireless carriers in the country – AT&T, Sprint/Nextel, T-Mobile, and Verizon Wireless – as well as others. As a result, the FCC recently released an interactive map that shows "US Census blocks that lack 3G

[32] Dr. Jeffrey A. Eisenach, Navigant Economics, "Competition in the New Jersey Communications Market: Implications for Reform," March 16, 2011, at 11.

[33] *See* Vasington Affidavit at ¶ 13 (citing Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of December 31, 2010* (Oct. 2011) (available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1011/DOC-310261A1.pdf)).

[34] Federal Communications Commission, *High-Speed Services for Internet Access: Subscribership as of December 31, 2000* (Table 7).

[35] Federal Communications Commission, *Internet Access Services: Status as of June 30, 2010* (Table 24).

or better mobile coverage … according to January 2012 American Roamer data," and for New Jersey, the map shows nearly ubiquitous coverage.[36] In addition, broadband is offered by other companies via satellite to much of the state.

C. VERIZON MET ITS COMMITMENTS DESPITE THE FACT THAT THE COMMUNICATIONS MARKET CHANGED DRAMATICALLY SINCE THE SUBMISSION OF THE OPPORTUNITY NEW JERSEY PLAN.

When New Jersey Bell submitted its Opportunity New Jersey plan in 1992, the market and regulatory environment in New Jersey were very different than they are today. The local exchange portion of the industry largely remained a monopoly, and the prevailing regulatory policy was still largely unchanged from the decades-old public utility framework.[37]

At that point, regulators had just begun to adopt ratemaking policies that were more conducive to market changes, such as price cap incentive regulation plans.[38] Those plans were designed to provide local exchange carriers with better incentives for efficiency, but many regulators were wary of changing to such "alternative" regulation without some sort of protection or counterbalancing considerations.[39] The New Jersey Telecommunications Act of 1992 ("NJ Act") conferred authority on the Board to take such an approach, authorizing the Board to replace traditional utility rate-of-return regulation with an alternative form of regulation under certain criteria.

In 1992, New Jersey Bell filed a petition with the Board seeking alternative regulation.[40] The petition included the Opportunity New Jersey plan, which called for New Jersey Bell to accelerate its investment in the deployment of advanced switching and transmission technologies

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[36] http://tiles.mapbox.com/fcc/map/mobility-fund-phase-1-potentially-eligible-areas-oct-2011-data.

[37] *See* Vasington Aff. at ¶ 27.

[38] *See id.* at ¶ 28.

[39] *Id.*

[40] *See* Application of New Jersey Bell for Approval of a Plan for Alternative Regulation (Mar. 31, 1992).

in New Jersey.[41] On May 6, 1993, the Board issued an order granting a modified plan for alternative regulation ("PAR-1"), including Opportunity New Jersey.[42]

As the Board later described it, the *PAR-1 Order* approving the application "allowed [Verizon] freedom from traditional rate base regulation in exchange for certain rate protections and a commitment to a telecommunications infrastructure improvement program known as Opportunity New Jersey."[43] The Opportunity New Jersey plan was designed to modernize the Verizon network in New Jersey in "an aggressive, yet prudent" manner to allow for support of "virtually any telecommunications service imagined" at the time.[44] ONJ initially addressed four fundamental service capabilities: advanced intelligent network, narrowband digital services, wideband digital services, and broadband digital services.[45] As reflected above, Verizon subsequently fulfilled its obligations under ONJ with respect to the advanced intelligent network, narrowband digital services, and wideband digital services; indeed, the advanced intelligent network and narrowband digital services were fully available a year ahead of the projections contained in ONJ.[46] As to those issues, there is no dispute.

With respect to broadband digital services, deployment was to begin in 1996, to coincide with deployment of broadband digital switching capability.[47] "Full deployment of broadband

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[41] *Id.*

[42] *See PAR-1 Order, supra.*

[43] *Order Approving Stipulation* at 3.

[44] Opportunity New Jersey at 10.

[45] *See PAR-1 Order* at 73. Following a formal review of Opportunity New Jersey in 1996, the Board entered an order memorializing an agreed-upon stipulation that further enhanced the ONJ plan through the establishment of the Access New Jersey (or "ANJ") program to provide advanced communications services to schools and libraries. *See Order Approving Stipulation, supra.*

[46] *See* Vasington Aff. at ¶¶ 15, 23. It is likewise undisputed that Verizon performed all of its obligations with respect to the Access New Jersey program. The *Show Cause Order* only concerns Verizon's provision of broadband digital services under Opportunity New Jersey.

[47] *See* Opportunity New Jersey at 8-9.

digital service capability" was "targeted" for 2010, nearly two decades after the plan's submission.[48] Given the long-term nature of the project, the plan approved by the Board explicitly recognized that:

> The service capability and technology deployments described [in the plan] are based upon assumptions regarding technology, markets and economic conditions over an extended period of time. Accordingly, the evolution of Opportunity New Jersey will be guided by developments in these areas.[49]

In light of this potential evolution, Verizon was required to submit annual reports that would serve as updates to the Board on the status of the accelerated infrastructure deployment.[50] For its part, the Board committed to monitor Verizon's performance under Opportunity New Jersey and the impact of the plan, reviewing Verizon's progress and indicating it would make adjustments if ONJ's "projections" proved "overly optimistic" or "the technology and/or costs of actual deployment become more advantageous than projected."[51]

These provisions proved prescient, as – since 1992 – technology, the marketplace and the relevant regulatory policies have changed dramatically, such that the assumptions reflected in the alternative regulation plan became entirely outdated.

With the passage of the federal Telecommunications Act of 1996, the emergence and popularity of the Internet, and the growth in wireless services, the communications marketplace has been transformed since 1993. While New Jersey Bell used to occupy a dominant position in

[48] *Id.* at 9. *See also id.* at 2 (indicating that "complete deployment [was] expected in 2010").

[49] *Id.* at 10.

[50] *Id. See also Par-1 Order* at 97.

[51] *Par-1 Order* at 97.

the market, consumers now increasingly use and prefer voice communications from a host of other providers – including, in particular, wireless and cable providers.[52]

In many cases, wireless service has become a replacement for home landline phone service. As of June 2011, 31.6 percent of households in the U.S. had only wireless phones, and an additional 16.4 percent of American homes received all or almost all calls on wireless telephones.[53] In other words, in 48 percent of American households, wireless phones are either the exclusive or predominant form of voice communication.

New Jersey has experienced similar trends. The vast majority of New Jersey is served by at least four wireless carriers, providing virtually ubiquitous coverage.[54] New Jersey has a population of approximately 8.8 million people and, as of December 2010, there were approximately 8.6 million wireless subscribers in the state.[55] The number of wireless subscribers now far exceeds the approximately 5.4 million (about 2.9 million ILEC + 2.5 million CLEC/Cable VoIP) wireline access connections in New Jersey.[56] And wireless providers are not the only competition that has emerged for traditional wireline providers like Verizon. Cable providers are now significant competitors for both voice and, as detailed above, high-speed broadband services.

Consumers also now use voice services from other VoIP and satellite providers – as well as email, text messages, instant messaging, social networks (such as Facebook and Twitter), and

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[52] *See* Vasington Aff. at ¶¶ 38-53.

[53] Blumberg SJ, Luke JV, National Center for Health Statistics, *Wireless substitution: Early release of estimates from the National Health Interview Survey*, January-June 2011 (December 2011).

[54] Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifteenth Report*, June 27, 2011, Map D-22.

[55] Vasington Aff. at ¶ 44.

[56] *Id.*

even video game chat services.[57] As a result, there has been a steady and steep decline in "minutes of use" for traditional wireline providers. FCC data indicates that, for large incumbent local exchange carriers ("ILECs"), the number of local calls declined by more than half (56 percent) from 2000 to 2007, and the number of toll calls declined by 34 percent in the same time period.[58] More recently, the number of ILEC interstate switched access minutes of use for Verizon in New Jersey has declined from 12.7 billion in 2006 to 7.6 billion in 2010, a decline of about 40 percent.[59]

This market transformation dictates that Verizon is no longer the dominant telecommunications provider in New Jersey that it was when it operated as New Jersey Bell, let alone the monopoly utility for which the Board approved the PAR-1 plan and ONJ. At the end of 1993, Verizon served **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** access lines.[60] By the end of 2011, the number of Verizon access lines had shrunk to **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** – a decline of nearly **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** access lines, or more than 50 percent.[61]

Meanwhile, Verizon's revenue has declined twice as rapidly as its costs, with operating revenue for Verizon New Jersey "total company" (*i.e.*, intrastate and interstate combined) – adjusted to 2011 dollars – dropping from more than **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** in 1993 to **[BEGIN PROPRIETARY]** [redacted] **[END**

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57 *Id.* at ¶ 41.

58 Federal Communications Commission, *Trends in Telephone Service*, September 2010, Table 10.2

59 Federal Communications Commission, *Universal Service Monitoring Report: 2011 (Data through October 2011)* (rel. Dec. 2011), Supplementary Material.

60 Vasington Aff. at ¶ 55.

61 *Id.*

PROPRIETARY] in 2011.[62] Verizon is now at the point where it has operated for the past several years in New Jersey with significant negative net income for both its intrastate and total company (interstate and intrastate) operations.[63] For example, Verizon New Jersey reported net income of negative **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** for its Board-regulated intrastate operations for the year ended 2007, followed by negative net income of **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** for 2008.[64] That loss ballooned to over **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** for 2009.[65] And, most recently, Verizon reported net income of negative **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** for its Board-regulated intrastate operations for the year ended 2010 and negative **[BEGIN PROPRIETARY]** [redacted] **[END PROPRIETARY]** for the year ended 2011.[66]

As a result of these market and economic changes over an extended period of time, the incentives created by the alternative regulation plan approved by the Board became largely irrelevant – not because of any design flaw in the plan, but because consumers and markets took over. Likewise, in light of these changes, the Board no longer should have the same regulatory concerns that prevailed at the time plan was submitted. Indeed, as explained in more detail below, the fundamental change in conditions is clear simply from looking at the remedies the *PAR-1 Order* contemplated should Verizon fail to comply with ONJ; those remedies reflect the monopoly-focused mindset in place in 1993.

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[62] *Id.* at ¶ 56.

[63] *Id.* at ¶ 57.

[64] *Id.*

[65] *Id.*

[66] *Id.* These losses are not limited to the intrastate jurisdiction. For example, Verizon New Jersey has reported negative operating income for its combined interstate and intrastate operations since 2009.

Moreover, there were other significant changes in markets and prevailing conditions in New Jersey during the extended time period since 1993, including passage of the statewide video franchise law designed to require Verizon to deploy cable television in specific towns. Specifically, the 2006 law mandated that Verizon – and Verizon alone[67] – fully deploy cable television service in seventy of the state's most densely populated towns and county seats within specific time frames.[68] This requirement mandates an enormous undertaking by Verizon and has resulted in a further substantial investment by Verizon in the State, reflecting yet another change in "technology, markets and economic conditions" since ONJ was adopted.

Verizon already has begun offering cable television service on a commercial basis to customers in each of the 70 municipalities subject to the deployment requirements, with the Board approving certifications stating that Verizon now is offering cable television service to more than 60 percent of the households in 55 of those 70 municipalities. This only builds upon the progress the Board noted in a June 2010 report, in which it found that Verizon's entry into the video market under the statewide franchise act "assisted in creating an increasingly robust, competitive landscape unlike anything the state has ever seen in four decades of cable television service in New Jersey."[69] Verizon continues to be on track to fulfill its new, state-imposed cable television commitments.

The ONJ plan itself expressly recognized the possibility for these and other changes over the nearly two decades that the project was estimated to run, noting that the plan was "based on assumptions regarding technology, markets and economic conditions over an extended period of

[67] Indeed, since the build-out commitment applied to companies that, on the date of issuance of their system-wide franchises, provided more than 40% of the local exchange telephone service market in this state, the build-out requirement in the statute clearly applied by its terms only to Verizon.

[68] *See* N.J.S.A § 48:5A-25.2a.

[69] New Jersey Board of Public Utilities' report to the Governor and Legislature on "The Effects of the System-Wide Cable Television Franchise in New Jersey," released June 2010.

time" and, therefore, would be subject to "evolution … guided by the developments in these areas."[70] In the face of these changing conditions and mounting losses in its business, Verizon more than met its commitments by accelerating its investments by much more than was contemplated to make broadband available in New Jersey.

D. VERIZON FULFILLED ITS OPPORTUNITY NEW JERSEY OBLIGATIONS UNDER THE PREVAILING TECHNOLOGICAL, MARKET AND ECONOMIC CONDITIONS.

Despite the widespread availability of high-speed broadband services throughout New Jersey, on March 12, 2012, the Board issued an order directing Verizon to show cause why the Board should not find that Verizon had failed to comply with the broadband component of the *PAR Orders* and Opportunity New Jersey.[71] In the Board meeting at which the order was entered, Board Staff acknowledged that the data available to staff "has indicated that broadband is available to the vast majority of Verizon's network, 99 percent …."[72] However, Board Staff indicated that it construes Opportunity New Jersey as requiring "a hundred percent" broadband availability[73] and – because broadband is not yet available to every household in two towns – Verizon has failed to comply with the Opportunity New Jersey plan.[74] The Board's decision to issue the *Show Cause Order* was based on the mistaken notion that Opportunity New Jersey contained an express requirement that anything less than service to every location would amount to a failure to comply with the plan.

[70] Opportunity New Jersey at 10.

[71] *Show Cause Order* at ¶ 13.

[72] Transcript of March 12, 2012 Meeting of Board of Public Utilities, Board Agenda Item 4B ("Transcript") at 5:1-3.

[73] *Id.* at 5:2-4. *See also id.* at 2:12-13.

[74] *Id.* at 3:25-4:3 and 5:8-10.

However, neither Opportunity New Jersey nor the *PAR-1 Order* ever envisioned such a rigid and inflexible standard. Opportunity New Jersey contemplated that "[f]ull deployment of broadband digital service capability is targeted for 2010"[75] and that "complete deployment is expected in 2010."[76] The Board used similar language in the *PAR-1 Order* approving Opportunity New Jersey, referring to "full broadband capability" under ONJ.[77] And, while neither Opportunity New Jersey nor the *PAR-1 Order* explicitly defined what "full deployment," "complete deployment" or "full broadband capability" entailed, both the Opportunity New Jersey plan and the Board avoided any notion of an absolute and inflexible requirement that every location be served. The wording recognized that any such standard would not be practical, workable or realistic, given the decades' long nature of the project and the near certainty that changes would occur in the telecommunications market.

To the contrary, Opportunity New Jersey explicitly recognized that the project was to be viewed under a much broader and more holistic standard:

> The service capability and technology deployments described [in the plan] are based upon assumptions regarding technology, markets and economic conditions over an extended period of time. Accordingly, the evolution of Opportunity New Jersey will be guided by developments in these areas.[78]

This is why the Opportunity New Jersey plan referred to an "expected" completion date[79] and "targeted" deployment goal,[80] rather than any more rigid requirement. The Board likewise

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75 Opportunity New Jersey at 9.

76 *Id.* at 2.

77 *PAR-1 Order* at 97.

78 Opportunity New Jersey at 10.

79 *Id.* at 2.

80 *Id.* at 9.

viewed the schedules in the Opportunity New Jersey plan as "projections," and specifically recognized the need to examine and adjust the plan as conditions warranted.[81]

In particular, the Board recognized that the "projections" and "schedules" in the plan might prove "overly optimistic" or otherwise might not be met, in which case the Board would "commence a proceeding," "examine key aspects of the plan" anew, and "consider remedies" appropriate for the circumstances.[82] By the same token, the Board recognized the possibility that "the technology and/or costs of actual deployment [might] become more advantageous than projected," in which case the Board also would make the necessary adjustments under Opportunity New Jersey.[83] But, under either scenario, the Board considered Opportunity New Jersey to be an evolving project, subject to changing conditions and market realities.

Accordingly, the plan was focused less on specific, inflexible targets and more concerned with ultimately achieving a broader goal: "to deploy wel[l]-defined advanced technologies as soon as possible to provide the voice, data and video services that [Verizon's] customers will require."[84] This is entirely consistent with the contemporaneous views of the Board, which made clear what – as a bottom line – the parties expected Verizon to accomplish under Opportunity New Jersey. In the 1997 *Order Approving Stipulation*, the Board recognized that "ONJ is intended to spur New Jersey's economy by providing a communications network second to none …."[85] And that is precisely what Verizon has delivered, with a recent study ranking New Jersey first in the nation in broadband telecommunications.[86]

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[81] *PAR-1 Order* at 97.

[82] *Id.*

[83] *Id.*

[84] Opportunity New Jersey at 10.

[85] *Order Approving Stipulation* at 3.

[86] *See ITIF Study, supra.*

It would be patently unreasonable to find that Verizon failed to satisfy its obligations for broadband availability under Opportunity New Jersey when it invested billions more on broadband than contemplated by the plan, equipped 100% of its central offices with broadband capability, made broadband available to more than 99 percent of the census blocks in the state, and helped New Jersey achieve the nation's top ranking for broadband telecommunications. These facts reflect "full deployment," "complete deployment" and "full broadband capability" under any reasonable standard.

Indeed, the FCC's National Broadband Plan recognizes that terrestrial broadband service need not reach every household in every location in order to achieve universal broadband coverage. To satisfy the objective of universal broadband coverage throughout the country, the National Broadband Plan proposed reforms that would "enable the buildout of broadband infrastructure to more than 99% of ... households by 2020."[87] Rather than require that terrestrial-based broadband reach every remaining household, the NBP noted the availability of broadband through other providers and specifically highlighted that satellite was well-suited to fill in coverage gaps for high cost/low density areas.[88] The FCC's view of what constitutes universal broadband coverage should be instructive on what constitutes full broadband deployment in this context – particularly in light of the changed market and economic conditions that have seen a dramatic rise in competition and a dramatic decrease in Verizon's landline customers and ILEC revenue since Opportunity New Jersey was initiated.

In fact, the Opportunity New Jersey plan expressly made allowances for such changed conditions. The Board should not change the rules of the game and hold Verizon to a different standard now. Indeed, the type of evolving market and economic conditions contemplated by the

[87] National Broadband Plan at 143.

[88] *Id.* at 137.

Opportunity New Jersey plan led to the situation with respect to broadband availability in Greenwich Township and Stow Creek.[89]

In the March 12, 2012 meeting at which the Board voted on the *Show Cause Order*, Board Staff indicated that, based on a 2009 report, "the Bridgeton wire center which serves both Greenwich Township and Stow Creek in Cumberland County was only 70 percent complete."[90] Verizon equipped that central office with equipment to provide DSL, and deployed remote terminals to provide broadband to schools and libraries in those two towns, as well as surrounding areas.[91] However, although Verizon continues to explore alternatives to provide broadband to the towns, there are certain unique circumstances associated with these localities that render it difficult to reach every household within them with broadband. For example, the towns' distance from the nearest central office in Bridgeton (roughly 18,000 feet) makes it very difficult to provision high speed Internet access to residents in the towns that are the farthest from the central office.

Both these towns are in predominantly rural locations, with relatively small populations and low population density. Based on the available census data, Stow Creek has a population of only 1,429 people, living in 560 housing units and a population density of just 76 people per square mile, while Greenwich has 847 people in 361 housing units, with a population density of only 43 people per square mile.[92] These unique circumstances have combined to make broadband deployment cost-prohibitive in certain areas of these towns. It is simply too expensive to reach every household, and any such investment is uneconomic, given the low

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[89] *See Show Cause Order* at ¶ 12 ("[b]ased upon information and belief," the residents of two towns in Cumberland County, New Jersey are not being provided broadband capabilities").

[90] Transcript at 3:24-4:3.

[91] *See* Vasington Aff. at ¶ 61.

[92] *Id.* at ¶ 64.

population density. Indeed, for the same reasons, the incumbent cable company in the area never pursued a municipal franchise to offer service in either of these two towns.

The cost of deployment here, combined with the current economic conditions Verizon faces in New Jersey, reflect precisely the sort of market conditions that Opportunity New Jersey anticipated would have to guide evolution of the project. By referring to the prevailing "technology, market[] and economic conditions," Opportunity New Jersey recognized that deployment to each individual household would not and should not have to occur in areas where it was not realistic in the face of such conditions.

Given these circumstances and Verizon's widespread broadband deployment in New Jersey, Verizon has met its ONJ commitments. That a tiny fraction of individual households in the State are not realistically reachable for broadband service does not mean that Verizon failed to fully deploy in the State. To the contrary, the FCC explained in the National Broadband Plan that there is no business case for making broadband available for every single household:

> Because service providers in these areas [with low population density] cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital, there is no business case to offer broadband services in these areas.[93]

Verizon respectfully submits that, based upon its prior orders, the current regulatory status of broadband services, and Constitutional considerations, the Board may not require Verizon to make extremely uneconomic infrastructure investments – in addition to the $13+ billion it already has spent – to ensure that broadband reaches every household now.[94] The

[93] National Broadband Plan at 136.

[94] Indeed, it is well established that an agency cannot subject a party to penalties for failing to comply with requirements – or the agency's interpretations of those requirements – that were not sufficiently clear and unambiguous in advance. *See, e.g.*, *United States v. Chrysler Corp.*, 332 U.S. App. D.C. 444, 158 F.3d 1350, 1354-57 (D.C. Cir. 1998) (holding that agency failed to provide fair notice of specific requirements of compliance testing and government therefore could not seek an automobile recall on the

Board did not contemplate any such mandate as a remedy for lack of performance under Opportunity New Jersey in 1993. Rather, it envisioned "remedies" that would take away the benefits of alternative regulation – benefits that have been irrelevant for some time in the changed communications market.

In particular, the *PAR-1 Order* provided that, "[i]n the event that [Verizon] cannot perform its obligations as set forth in Opportunity New Jersey, the Board shall consider remedies such as [1] altering the depreciation allowances for [Verizon], [2] restructuring [Verizon's] ability to implement indexed price increases, or [3] in the extreme scenario, voiding the [alternative regulation] plan and instituting a traditional base rate proceeding."[95] But the Board would not reasonably consider implementing any of these "remedies" today, as Verizon now operates in a completely different environment. For example, the "extreme" remedy of traditional rate regulation today would certainly produce a shortfall in meeting a revenue requirement for Verizon, which – as discussed above – has been operating well below cost in New Jersey for years. Ironically, the result of such a step would be to produce substantial price increases to produce revenues sufficient to meet the cost of serving customers. Yet, in the competitive market in which it operates, Verizon would not be able to implement a revenue increase formulated under archaic rate-of-return methodologies.

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ground that Chrysler had failed properly to perform the testing); *General Elec. Co. v. EPA*, 311 U.S. App. D.C. 360, 53 F.3d 1324 (D.C. Cir. 1995) (holding that agency could not fine a party for its failure to comply with an interpretation that was "so far from a reasonable person's understanding of the regulations that [the regulations] could not have fairly informed GE of the agency's perspective"); *Rollins Envtl. Svcs. (NJ) Inc. v. EPA*, 290 U.S. App. D.C. 331, 937 F.2d 649, 653 (D.C. Cir. 1991) (rescinding fine assessed by EPA because regulation was ambiguous); *Gates & Fox Co., Inc. v. OSHRC*, 252 U.S. App. D.C. 332, 790 F.2d 154, 156 (D.C. Cir. 1986) (holding that agency failed to give fair notice of its interpretation that breathing equipment was required where the regulation "would reasonably be read" not to require the equipment).

[95] *PAR-1 Order* at 97.

In these circumstances, any extension or expansion of the alternative regulation plan and Opportunity New Jersey would no longer make sense. Just as the Board would not seek to impose "remedies" that lack meaning in the current competitive environment, Verizon should not be required to expend excessive, additional resources that would result in minimal benefit to the State and further serious economic harm to Verizon and its customers in New Jersey.

II. CONCLUSION.

This Answer and the supporting Affidavit of Paul B. Vasington demonstrate that Verizon has complied with Opportunity New Jersey and the *PAR Orders* and, therefore, should resolve the concerns the Board raised in the *Show Cause Order*.[96] The Board should refrain from pursuing the *Show Cause Order*.

However, in the event the Board concludes otherwise and/or determines to move forward with this proceeding, Verizon respectfully submits that the Board must follow certain procedural requirements and satisfy certain evidentiary burdens before taking any action considered adverse to Verizon. Should the Board proceed with this docket, as a matter of law, Verizon must be afforded an opportunity to respond to the Board's allegations in the context of a full and complete evidentiary hearing.[97] In that context, it is well-settled that the burden of proof rests with the Board. *See, e.g., James Construction Co. v. Bd. of Pub. Utilities*, 298 N.J. Super. 355, 362 (App. Div. 1997) (holding that, when the Board issued an order to show cause, "because the burden of proof … lies with the Board," the Board was the party responsible for coming forth

[96] To the extent not otherwise addressed herein, Verizon denies the allegations contained in the numbered paragraphs of the *Show Cause Order* or lacks sufficient basis to affirm or deny those allegations.

[97] The Uniform Administrative Procedure Rules ("UAPR") contemplate that a plenary hearing is mandated by the filing of an Order to Show Cause. Specifically, the UAPR states that "when an agency head commences an action by Order to Show Cause, the agency may, prior to service and filing of the order to show cause, contact the Clerk, who will assign a judge and establish the time, place and date for a hearing on the matter." *N.J.A.C.* 1:1-9.2.

with evidence to support its position). As part of that process, Verizon must be permitted the opportunity to take discovery, assert affirmative defenses, test the Board's arguments and evidence, and submit evidence of its own in a trial-type proceeding.[98] Accordingly, should the Board move forward here despite the success of Opportunity New Jersey described above, the Board must set a pre-hearing conference date in order to set a schedule for discovery, pre-hearing motion practice and hearing dates.

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[98] *N.J.A.C.* 1:1-9.2; *N.J.S.A.* 52:14B-10(a)(c) (providing that, in contested cases, a plenary trial-type hearing must be conducted by the agency or an administrative law judge); *High Horizons Dev. Co. v. Dep't of Transp.*, 120 N.J. 40, 49-50, 53 (1990) (holding that, where administrative action is based on disputed adjudicatory facts, a full, trial-type proceeding is required).