STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-750

December 5, 2003

VERIZON NEW ENGLAND, INC.
D/B/A VERIZON MAINE
InterLATA Entry Amendment to the
Implementation Plan for the Introduction
of IntraLATA Presubscription (ILP)

ORDER DENYING
REQUEST FOR
RECONSIDERATION

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny Verizon Maine's Request for Reconsideration of our October 3, 2003 Order in this matter. [1]

II. BACKGROUND

On December 5, 2002, Verizon filed a Request to Amend the Commission's May 30, 1997 Order Approving Stipulation in Docket No. 1997-204, *Verizon Maine (formerly known as New England Telephone Company d/b/a NYNEX), Implementation Plan for the Introduction of IntraLATA Presubscription (ILP)*. The purpose of the requested amendment was to eliminate the prohibition in the Stipulation against the marketing of intraLATA toll services by Verizon on customer-initiated calls to its call centers for the purpose of establishing basic exchange service or establishing or changing the customer's presubscribed interexchange carrier. On October 3, 2003, we issued an Order Denying Waiver Request (Chairman Welch, dissenting), in which we found that the restrictions in the 1997 Stipulation retain their relevance and necessity, and we rejected the Verizon's request. We also found that the recorded message that Verizon plays to customers when they call Verizon's call center constitutes marketing activity that is in violation of the provisions of the Docket No. 97-204 Stipulation. We ordered Verizon to cease its use of the recording and, if it chooses to revise its recorded message, to obtain approval for any revised replacement language from the Director of the Consumer Assistance Division.

On October 23, 2003, Verizon filed a Petition for Reconsideration of the Commission's October 3rd Order. A Procedural Order issued on October 28, 2003, invited "parties to this proceeding" to file comments on the Petition by November 7, 2003. Two parties, the Office of the Public Advocate (OPA) and AT&T, filed comments. In addition, the Commission received 12 letters in support of Verizon's Petition from

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[1] Chairman Welch dissented in part and concurred in part. See separate statement attached to this Order.

individuals or on behalf of organizations that are not parties to this proceeding. It is possible that Verizon may have encouraged these persons to file the letters with the Commission. We will discuss the propriety of these letters in Section V(C) below.

III. VERIZON'S PETITION FOR RECONSIDERATION

In its Petition for Reconsideration, Verizon asserts that, as articulated in the Dissenting Opinion, the majority fundamentally misperceived the nature of Verizon's request, as well as the Commission's rationale in 1997 in adopting the ILP Stipulation. Verizon asserts that no valid regulatory purpose is served by continuing "a restriction that infringes on Verizon's constitutional right to provide truthful commercial information to its customers." Verizon claims that the issue is not whether cross-marketing of toll service to a subscriber of local exchange service constitutes a competitive advantage, but rather, whether allowing Verizon to market its toll services in the same manner as all other toll providers harms toll competition.

In its Petition for Reconsideration, Verizon argues that its market share for local exchange service, even if it were found to be "significant, dominant or the residual effect of decades of government protected monopoly status" (as stated in our October 3 Order), is entirely irrelevant to the marketing restriction on Verizon toll service. Verizon claims that the Stipulation, in general, and the restriction on Verizon's marketing, in particular, were intended to accelerate competition for presubscribed toll service, and the restriction has succeeded. The marketing restriction was not intended to restrict Verizon's opportunity to sell toll service in order to promote local service competition. Yet, Verizon claims that is the standard ascribed to the provision by the majority decision.

Verizon asserts that the original provision was agreed to at a point when, unlike now, there was no local competition, and that the Commission should not confuse a competitor's claimed interest in fairness in the toll market with the public's legitimate interest in competition. Verizon also states that if the Commission regulates only Verizon's ability to market its services, the public receives less, not more, competition. Verizon also asserts that other carriers are free to provide local service in Maine and acquire the same advantages from vertical integration.

Verizon also claims that our Order creates an irrational standard for future elimination of the restriction, because it requires that the restriction remain in place until Verizon can show that competition in the local market is sufficiently developed. According to Verizon, in the event that Verizon's share of the intraLATA toll market was reduced to zero, but it maintained its dominance in the local exchange market, it still would not be able to obtain relief from the marketing prohibition. Verizon also argues that its share of the toll market has fallen dramatically, and the percentages quoted in the Order overstate Verizon's actual market share.

IV. COMMENTS OF PARTIES

A. OPA

The OPA argues that Verizon's petition should be denied because it simply restates arguments made prior to the Commission's October 3 Order. The OPA also asserts that there is no record evidence to support Verizon's assertion that its share of the instate toll market has decreased as much as Verizon claims. The OPA argues that lifting the restrictions would give Verizon a marketing advantage that is not available to other in-state toll providers. The OPA also asserts that the purpose of the Stipulation provisions at issue was to prevent Verizon from using its dominant position in the local market to enhance its ability to market its in-state toll services. The OPA states that, contrary to Verizon's assertion, the local exchange market is not an open and fully competitive market, and Verizon retains a substantial share of the local market, which gives it an advantage over other in-state toll providers in terms of contact opportunities. The OPA argues that the Commission should not permit Verizon to leverage its still-near-monopoly advantage in the local market in order to increase its share of the in-state toll market. The OPA asserts that the in-state toll market is far from perfectly competitive, and it will only become less competitive if the Commission lifts the marketing restrictions at this time. The OPA also urges the Commission to reiterate its finding that the recorded announcement used by Verizon is in violation of the 1997 Stipulation, and Verizon must cease its use as soon as reasonably possible.

Finally, the OPA asserts that the twelve letters received by the Commission in support of Verizon's Petition, constitute prohibited *ex parte* communications under Chapter 110 § 760-A of the Commission's Rules of Practice and Procedure. The OPA urges the Commission to refer the prohibited communications to the Administrative Director for action and to give no consideration to the letters in reaching its decision on the reconsideration request.

B. AT&T

AT&T argues that Verizon has offered no new information or reason for the Commission to reverse its original decision, and that the Commission should deny Verizon's petition. AT&T asserts that Verizon occupies a unique position as the dominant local telephone service provider in Maine and should not be permitted to use this advantage to enhance its position in the in-state toll market. Lifting the restriction, AT&T asserts, would harm competition in the in-state toll market.

V. DECISION

A. Stipulation

We find that Verizon has presented no reason for us to reverse our original decision, and we deny Verizon's Request for Reconsideration. In the 1997 Stipulation, Verizon agreed to abide by the marketing restriction on calls from customers

to its call centers in order to promote competition in the in-state toll market. The original restriction was implemented because of Verizon's dominance in the local exchange market and was designed to restrain Verizon's ability to leverage that dominance into an unfair advantage in the in-state toll market. While competition exists today in the intraLATA toll market,[2] Verizon's dominance in the local exchange market, while somewhat diminished from the level that existed in 1997, is still very substantial. We believe that the competition exhibited in the in-state toll market is evidence that the marketing restriction imposed on Verizon may act as a brake on Verizon's ability to exploit its lock on the local market.

The simple fact is that a person moving into most areas of Maine must call Verizon to establish residential, local telephone service. It was determined in 1997 that it would be unfair to allow Verizon to use that gatekeeper role to market its presubscribed, in-state toll service. That competitors have made inroads into the in-state toll market does not alter that basic determination, nor does it warrant reversing regulatory policies that may well have helped that competition to develop.

The marketing restriction was not and is not intended to be a permanent mechanism, but rather, one that will become unnecessary once a sufficient level of competition develops in the local exchange market. Indeed, we might currently be willing to lift the restriction for business customers, assuming it can be shown that local competition is sufficiently robust in that market segment.

Finally, we note that the restriction does not limit Verizon's ability to market through outbound direct calls to customers nor does it prohibit Verizon from discussing its service when the customer raises the issue of Verizon's in-state toll plans. Indeed, our decision today does not require a customer to initiate a separate call to seek information from Verizon about its in-state toll services; all the customer need do is ask Verizon for information on its calling plans. Thus, the concerns expressed by some of the letter writers regarding consumer access to information regarding Verizon calling plans are both misplaced and not directly impacted by our decision today.

B. Recorded Message

We also reaffirm our original finding that the recorded message which Verizon plays to customers who call its call centers constitutes prohibited marketing under the terms of the original Stipulation. While Verizon argues that the message

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[2] The extent of that competition should not be overstated. Although the exact market shares for carriers in the presubscribed, intraLATA toll market are unknown, Verizon represented in its reply brief that "more than a third of Verizon's [residential] customers have presubscribed to a carrier other than Verizon." Since Verizon has no incentive to overstate its market share, we can safely assume that it retains significantly more than half of its local service residential customers as presubscribed, intraLATA toll customers. Furthermore, residential customers constitute the group for whom we believe the restriction is most important.

refers to its interLATA long distance service, for which joint marketing is explicitly permitted by the FCC, we find that a reasonable consumer likely would not make that distinction, but rather, would assume the message refers to all toll services (both interLATA and intraLATA). To the great majority of customers "long distance service" means all toll calls, both in-state and out-of-state. We cannot restrict Verizon's marketing of its out-of-state toll service, but we can, and will continue to, enforce the prohibition on marketing of in-state toll services that was included in the 1997 ILP Stipulation.

C. Letters From Non-Parties

Section 760-A of Chapter 110 of our Rules of Practice and procedure, specifically prohibits direct or indirect communication to any commissioner, presiding officer, or other advisory staff member in connection with any potential or proposed decision in the proceeding except for the filing by a party of a response or exceptions to the report of the presiding officer or as permitted by the Commission. This prohibition continues until after final action by the Commission on any motion for reconsideration or clarification. This Rule was promulgated in response to a situation in which a party, specifically Verizon's predecessor New England Telephone and Telegraph Company, d/b/a NYNEX, encouraged non-parties to contact the Commission concerning two pending Examiner's Reports. *Rulemaking: Chapter 110, Rules of Practice and Procedure; Proposed Amendments to Ex Parte Provisions*, Docket No. 95-390, Order Adopting Rule Amendments, (Feb. 1, 1996) at 3.

In its Order Adopting Rule Amendments, the Commission determined that the prohibition against *ex parte* communication applied to both communications *from* Commissioners and Staff to outside persons as well as communications *to* Commissioners and Staff from outside person. *Id*. at 11. In doing so, the Commission reiterated the importance of ensuring that participation in Commission matters occurs at a time and in a manner that is fair to all parties and does not interfere with the adjudicatory process. *Id.* at 3,15. The Commission found that "the activities of NYNEX in the NYNEX cases, of soliciting or encouraging its selected 'stakeholders' to send communications to the commissioners expressing opinions about the Examiners' Reports, were wholly inappropriate." *Id.* at 17. The Commission further stated that "we intend that this provision should prevent an organized campaign by a party to influence our decision-making following the ample opportunities that are provided under the Administrative Procedures Act, Title 35-A, and our Rules of Practice and Procedure." *Id.* at 19.

In this case, non-parties sent us 12 letters, many making very similar arguments, urging us to grant the petition to reconsider. Whether those communications were the result of an organized effort by Verizon cannot be definitively determined without an investigation. Rather than proceed down that potentially time-consuming path, we think the public interest is served by our emphasizing that parties to a Commission proceeding must refrain from encouraging impermissible *ex parte* communications. If it happened in this case, it should not happen again.

Accordingly, Verizon's petition that we reconsider our Order of October 3, 2003, in this docket is

D E N I E D

Dated at Augusta, Maine, this 5th day of December, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Diamond
Reishus

Welch: Dissenting in part and concurring in part. See separate statement.

Separate Statement of Chairman Welch, dissenting in part and concurring in part:

I dissent from the decision not to reconsider, and grant, Verizon's request, for the reasons outlined in my dissent to our initial order. I join in Section V.C. of this opinion (dealing with the letters we received from non-parties concerning our decision).