STATE OF MAINE
PUBLIC UTILITIES COMMISSION

VERIZON MAINE
Petition for Consolidated Arbitration

Docket No. 2004-135

May 6, 2004

EXAMINER'S REPORT

NOTE: This Examiner's Report is written in the form of an Order; however, it is the Advisors' recommendation only and does not constitute formal Commission action. Parties may file exceptions to this Report by close of business on May 20, 2004. We anticipate that the Commission will consider this case at its deliberative session on May 24, 2004.

I. SUMMARY

In this Order, we grant the Motions of the CLEC Coalition, the Competitive Carrier Coalition, and Sprint, to dismiss Verizon's Petition for Arbitration, without prejudice. We also determine that Verizon must perform routine network modifications for CLECs in accordance with federal rules without requiring the CLECs to sign an amended interconnection agreement.

II. BACKGROUND

On February 20, 2004, Verizon Maine (Verizon) filed with the Commission a Petition for Consolidated Arbitration (Petition). (A copy of the Petition can be found on the Commission's website in the virtual case file for this proceeding, http://mpuc.informe.org/) The Petition requested that the Commission arbitrate disputes between Verizon and competitive local exchange carriers (CLECs) and Commercial Mobile Radio Service (CMRS) carriers relating to Verizon's October 2, 2003, proposed amendment to all interconnection agreements to implement the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)*. On March 2,

2004, the D.C. Circuit Court of Appeals released its decision in the *United States Telecom Ass'n v. FCC* case (*USTA II),*[1] which upheld, vacated, and remanded various portions of the *TRO.*

Since that time, the parties to this proceeding have made numerous filings, including Motions to Dismiss and multiple replies to those Motions.[2] Due to time constraints, we will not take the time to summarize each filing in this Order. Instead, reference should be made to the Summary of Motions to Dismiss found in Attachment A as well as the filings themselves (available on our website in the virtual case file for this proceeding).

III. ISSUES RAISED IN MOTIONS TO DISMISS

A. Procedural Infirmities

The CLEC Coalition (Mid-Maine Communications, Oxford Networks, Revolution Networks and Pine Tree Networks), the Competitive Carrier Coalition (Adelphia Business Solutions Operations, Inc. d/b/a Telcove, CTC Communications Corp, DSLnet Communications, LLC, ICG Telecom Group, Inc., Level 3 Communications, LLC and Lightship Telecom, LLC), Sprint, and Conversent all request that the Commission dismiss the Petition because Verizon failed to comply with the procedural requirements of section 252 of the Telecommunications Act of 1996 (TelAct).

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[1] *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II).*

[2] On May 4, 2004, Verizon filed a Motion for Abeyance with the Commission requesting that this proceeding be stayed pending commercial negotiations. Because our decision today results in this matter being dismissed, we believe that the guidance we provide in this Order as well as the ruling on routine modifications will avoid additional disputes in the future. Thus, we deny Verizon's Motion for Abeyance.

These parties make two points. First, they argue that section 252 does not apply to Verizon's attempt to amend their interconnection agreements because the interconnection agreements contain change of law provisions which are not governed by section 252. They specifically question the authority of the FCC to effectively override the TelAct by declaring in paragraph 703 of the *TRO* that the effective date of the *TRO* will be considered the date on which all carriers requested modification of their interconnection agreements. Second, they claim that Verizon's failure to provide notice of its intention to file for arbitration, its failure to serve all parties on the day the Commission was served, and its failure to include with its Petition a list of the unresolved issues and the positions of the parties on each issue, requires dismissal. The CLECs argue that Verizon's failures have made it difficult, if not impossible, to identify and resolve all of the issues before July 2, 2004 – the deadline set by both the *TRO* and section 252.

Verizon points to paragraph 704 of the *TRO* and argues that that the section 252 timetable applies even in situations where the interconnection agreement contains a change of law provision. However, Verizon also argues that while the section 252 timetable applies, the section 252 procedural requirements do not. Thus, according to Verizon, it did not need to follow section 252's filing requirements. Further, even if it was required to follow them, Verizon believes that it has complied, at least in spirit, with the requirements. Verizon argues that this is a unique situation and that it would be very difficult to list all the parties' positions on each issue. Finally, Verizon argues that dismissal is too drastic a measure under these circumstances.

We find that Verizon failed to comply with the procedural requirements of section 252 by failing to provide notice of its intention to file for arbitration, failing to serve all parties on the day the Commission was served, and failing to include with its Petition a list of the unresolved issues and the positions of the parties on each issue. We find the last failure the most egregious. As the Competitive Carrier Coalition pointed out in its Motion, the procedural requirements of section 252 serve an important purpose – without a detailed listing of the issues and the parties' positions, it would be difficult for a state commission to resolve the issues within the statutory deadline. Verizon did not even attempt to meet this requirement. The responsibility for developing such a list clearly lies with the party seeking arbitration, and we will not take on that burden, nor force it upon the CLECs.

We note, however, that it is unclear whether a section 252 arbitration is the correct procedural vehicle for this dispute between Verizon and the CLECs. First, Verizon is correct that paragraph 704 of the *TRO* states that contract negotiations pursuant to change of law provisions should follow the section 252 timetable and be resolved within nine months. However, paragraph 704 also distinguishes between negotiations pursuant to change of law provisions and an arbitration pursuant to section 252, both in terms of the procedural requirements and the potential role (or lack thereof) of the state commission. Because of the result we reach below, we do not have to resolve this issue today but we direct Verizon and the CLECs to consider this issue before filing another petition for arbitration.

B. Failure to Negotiate in Good Faith

The CLEC Coalition, the Competitive Carrier Coalition, GWI, and Sprint all claim that Verizon failed to negotiate in good faith after Verizon issued its October 2nd Industry Letter. The CLEC Coalition and GWI contend that the October 2nd Industry Letter was not sufficient notice under either section 252 or the change of law provisions in their interconnection agreements. They also contend, along with the Competitive Carrier Coalition and Sprint, that Verizon's Petition should be dismissed because of Verizon's lack of good faith negotiations as required by section 252. In support of their contention, Sprint and GWI provided specific information concerning their attempts to negotiate with Verizon and the lack of response by Verizon.

Verizon contends that its October 2nd Industry Letter was sufficient to begin negotiations and that it was the CLECs' burden to initiate further discussions. Verizon states that members of the CLEC Coalition did not initiate any further discussions and argues that its lack of responsiveness to Sprint's proposal does not amount to bad faith – Verizon merely rejected Sprint's proposals.

The documentation Sprint attached to its Motion reveals that Verizon did not reciprocate Sprint's attempts to negotiate in good faith. Sprint sent Verizon a marked-up version of the *TRO* Amendment on October 29th – less than a month after Verizon issued its Industry Letter. Verizon has yet to specifically respond to that counteroffer, despite several phone calls and repeated e-mail from Sprint requesting a specific response. GWI's pleading details how Verizon repeatedly changed the personnel responsible for negotiating with GWI and how progress on issues unrelated to the *TRO* have been stalled by Verizon since November.

Section 252 of the TelAct requires parties to negotiate in good faith. There is a reason for this requirement: it ensures that ILECs, like Verizon, who have the upper hand in negotiations (i.e., they have the network elements that the CLECs need to access), fairly and fully participate in negotiations. It also ensures that substantive discussions and a narrowing of the issues occur before the matter is brought to the state commission. One does not have to look any further than the face of Verizon's Petition to know that good faith negotiations have not taken place. Add to that the experiences of Sprint and GWI, and it is clear that Verizon has not met the good faith negotiation requirement of section 252.

If Verizon chooses to re-file its Petition in the future, we remind Verizon, and all CLECs, of the requirements of section 252. We expect that both sides will participate in meaningful discussions and make strenuous efforts to reach agreement before bringing issues to the Commission for resolution. Repeated failure to engage in good faith negotiations may result in dismissal of future requests to arbitrate and/or other administrative penalties.

C. Overlap of Arbitration Issues With Existing Cases

The CLEC Coalition and the Competitive Carrier Coalition both argue that many of the issues raised in Verizon's proposed *TRO* Amendment are already being considered in the Commission's Wholesale Tariff (Docket No. 2002-682) and Dark Fiber (Docket No. 2002-243) proceedings. The CLECs argue that the Commission should focus on the existing cases first, which will establish generally available terms and conditions for all of Verizon's section 251 unbundling obligations and thereby eliminate

the need for arbitrating many of the issues presented by Verizon's Petition.[3] Verizon contends that the issues raised in its Petition are distinct from the Wholesale Tariff and should be treated separately. Specifically, Verizon contends that the parties have a statutory duty to conduct their business dealings by contract and that the pending Wholesale Tariff proceeding does not obviate the need for arbitration.

A review of the issues associated with the Petition and with the Wholesale Tariff case reveals a significant overlap. The Petition (both the original and revised version) requests arbitration of Verizon's proposed *TRO* Amendment, which attempts to capture the changes in law caused by the *TRO* and *USTA II*. Specifically, Verizon seeks to amend its interconnection agreements so that they reflect *only* Verizon's unbundling obligations pursuant to section 251 and section 252 of the TelAct; Verizon's proposed amendment does *not* address any obligations it has under section 271 of the TelAct or state law. Similarly, Verizon's proposed Wholesale Tariff addresses Verizon's section 251/252 obligations and not its section 271 or state law obligations.[4]

We conditioned our support of Verizon's 271 application upon the filing of a wholesale tariff because we wanted to avoid multiple arbitration proceedings and to provide a single forum for all CLECs to litigate their disagreements with Verizon concerning the provisioning of UNEs. We have been working on that proceeding since November 2002 and were about to enter the hearing stage of the proceeding when the *TRO* was released, which led to changes in positions, and the need to resolve some

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[3]Some of the same CLECs have argued in the Wholesale Tariff proceeding that the wholesale tariff should also cover Verizon's section 271 obligations.

[4]Verizon has argued in the Wholesale Tariff proceeding that the Commission has no authority to require Verizon to tariff its section 271 obligations.

preliminary legal issues. Once we resolve the legal issues, we should be able to move directly to the prefiled testimony, discovery, and hearing phases and resolve all outstanding issues, including those involving Verizon's section 271 obligations. A final order in the Wholesale Tariff would likely eliminate most, if not all, of the issues associated with the Petition.

While in the perfect world, we might be able to litigate both the Wholesale Tariff case and this Arbitration case at the same time, we do not have the resources to do so at this time. The events of the past eight months have caused a marked increase in complaints from CLECs which have resulted in additional Rapid Response Complaints as well as a Commission investigation into Verizon's wholesale practices – Docket No. 2004-53. The *TRO* contains numerous ambiguities, which lead to disagreements in interpretation between Verizon and the CLECs, which eventually require a detailed legal analysis and decision by the Commission – all of which takes a considerable amount of our time and resources.

In addition, we are endeavoring to complete the Dark Fiber proceeding which has been fully litigated for quite some time but stalled because of the *TRO* and *USTA II* decisions. We also just recently issued a decision in the Skowhegan Online proceeding (2002-704) which took much longer than expected because of the legal disagreements and confusion caused by the *TRO* and *USTA II.* In short, the *TRO* and *USTA II* have caused, and continue to cause, a significant drain on our resources, forcing us to make strategic decisions concerning our docket and the use of our resources.

Finally, we acknowledge that events at the federal level and the possibility that CLECs and Verizon will reach commercially negotiated agreements may eliminate (or at least lessen) the need for state commission arbitrations. While it remains very unclear whether such negotiations will be fruitful, we believe allowing additional time for negotiations may be helpful. (Verizon itself requested additional time in its Motion for Abeyance.)

Thus, we find it prudent at this time to dismiss Verizon's Petition for Arbitration, both for administrative reasons and for the procedural failures discussed above. If, after we have issued decisions in our Dark Fiber and Wholesale Tariff proceedings, there remain issues to be arbitrated, the parties can bring a new petition for arbitration, one that complies with all the requirements of section 252. We recognize that our decision today will not make some parties happy. Those parties are free to pursue arbitration at the FCC pursuant to section 252(e)(5) which allows the FCC to step into the state commission's shoes and conduct the arbitration if the state refuses to act. Parties are also free to arbitrate their issues in other states which are conducting an active arbitration and/or to participate in the commercial negotiations going on at the national level.

D. Applicability of Bell Atlantic/GTE Merger Conditions

The CLECs have argued extensively that the *TRO* does not trigger change of law provisions in their interconnection agreements because the Bell-Atlantic/GTE merger conditions require Verizon to continue to make all UNEs available until a final, unappealable decision is released. They further contend that the *TRO* and *USTA II* orders do not constitute such decisions because they were the continuation of

litigation in the FCC's *UNE Remand* and *LineSharing* proceedings. Finally, they point to decisions by the FCC's Enforcement Bureau as support for their interpretation of the merger conditions.

Verizon argues that the merger conditions do not apply because: (1) they have sunset; and/or (2) *USTA I*[5] was a final unappealable decision. Thus, according to Verizon, they have no continuing obligation to provide at TELRIC prices those UNEs which were eliminated by the *TRO.*

Because of our decision above to dismiss the Petition, it is unnecessary to reach a determination on this issue in this Order. We expect, however, that similar arguments will be raised in the Wholesale Tariff proceeding, with CLECs arguing that Verizon should be required to tariff all of its wholesale obligations – both its 252 and 271 obligations, as well as its merger and state law requirements. Thus, we will provide some additional guidance on this issue.

The CLECs correctly note that the *TRO* is captioned as a Report and Order "on Remand" and lists as dockets both the *UNE Remand* and *Line Sharing* proceedings – this would certainly seem to rebut Verizon's arguments concerning the finality of *USTA I*. With regard to the FCC Enforcement Bureau's decisions, while they appear to support a finding that merger conditions continue to apply, they do not address the specific question before us today concerning Verizon's merger conditions.

We believe the best course of action at this time is for the parties to seek guidance directly from the FCC regarding what it intended concerning the continued enforceability of the conditions. We will take any such guidance into consideration if it is

[5] *U.S. Telcomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)(*USTA I*).

issued before we are forced to make a final decision on this issue in the Wholesale Tariff or Dark Fiber cases.

E. Routine Network Modifications

In paragraphs 630 –641 of the *TRO*, the FCC discusses the obligations of ILECs to perform routine network modifications to ensure non-discriminatory access to UNEs by CLECs. In *USTA II*, the D.C. Circuit upheld the FCC's routine modifications requirements. The CLECs now argue that the *TRO* and *USTA II* confirm that ILECs have always had an obligation to perform routine modifications and that there is no need to modify their interconnection agreements to implement existing law. Verizon argues that the *TRO* decision was a change of law, that the FCC established new rules, and that CLECs must modify their interconnection agreements before Verizon will perform routine network modifications.

The *TRO* language on this subject is not clear. Whether the routine network modification rules are new law or codification of existing requirements requires examination of both the historical record and the language of the *TRO*. Historically, until the summer of 2000, Verizon performed routine network modifications, such as installing new line cards, when it was necessary to meet a CLEC's request for facilities.[6] We can conclude from Verizon's earlier behavior that it believed it had an obligation to perform those routine network modifications at that time. In 2000, Verizon established a new policy of refusing to perform routine network modifications based upon its belief that any such activities constituted new construction that ILECs were not obligated to

[6] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Order at pp 36-42.

perform.[7] This change in policy appears to reflect a decision to attempt to shift and limit its obligations to provision certain UNEs.

During our 271 proceeding, we heard testimony and argument from CLECs regarding the discriminatory nature of Verizon's policies. At that time, we said that while we agreed that Verizon's policies prevented CLECs from making use of Verizon's facilities, we would not resolve the issue in the context of the 271 proceeding.[8] We specifically noted that the issue was before the FCC and that we would await their guidance – which they now have issued in the form of the *TRO.*

Turning to the language of the *TRO*, we find that it could provide support for both positions. In paragraph 632, the FCC refers to the requirement "we adopt today" – indicating that the routine modification requirement is new. Yet, in the very next paragraph, the language indicates that the FCC was resolving an existing dispute regarding the line that must be drawn between requiring an ILEC to modify its network to provide CLEC access to the full functionality of the UNE and requiring an ILEC to provide superior quality access – a dispute based upon existing requirements of section 251 of the TelAct.

We find that, on balance, that the *TRO* did not establish new law but instead clarified existing obligations. Section 251(c)(3) has always required that Verizon provide access to its UNEs on a non-discriminatory basis. The FCC's new rules merely clarify what is required under that existing obligation. Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules.

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[7] *Id*. at 42.

[8] *Id.* at 46.

Verizon may not require the CLEC to first sign an interconnection agreement amendment before performing the modifications.

With regard to the pricing issues associated with the routine modifications, we do not reach a specific decision today. Instead, we find that our existing TELRIC rates should be used until we approve any additional rates in the Wholesale Tariff case or future TELRIC proceeding. Our decision is consistent with the direction given by the FCC in the *TRO.* Specifically, in paragraph 640, the FCC noted that ILEC costs for routine modifications are often already recovered in non-recurring and recurring costs associated with the UNE. In addition, the FCC noted that state commissions have the discretion to determine how any costs that are not already recovered should be recovered. Thus, to the extent that Verizon believes its existing rates do not recover the costs associated with routine modifications, it may amend its cost filings in the Wholesale Tariff case and propose additional rates. If it chooses to do so, it must provide support for the new rates and, in particular, show in detail how the new costs are not already recovered in existing rates.

F. Instability of Law

Both the CLEC Coalition and the Competitive Carrier Coalition argued that that the instability of the law regarding UNEs warrants a decision by the Commission to refrain from further action on Verizon's Petition at this time. Verizon and AT&T, MCI, and Conversent argue that some provisions of *TRO* which were not appealed should be implemented as quickly as possible. Currently, the FCC has obtained an extension of the stay of the *USTA II* decision until June 15, 2004, in order to allow parties to conduct commercial negotiations.

We agree that the state of the law is very much in flux and that additional changes may occur in the near future. However, this has been the case in the telecommunications arena since the TelAct was first passed in 1996. There has been continuous litigation and ever-changing standards and requirements. If we stopped each time there was a possibility that a legal standard could be overturned, we would never reach a decision on any issue. Thus, we find that the best course of action is to proceed with litigating the Wholesale Tariff and Dark Fiber cases with the full knowledge that the standards used to reach our decisions may be changed at some point in the future.

G. Verizon's Revised Petition

AT&T contends that the revision of the *TRO* Amendment that Verizon submitted after the release of *USTA II* should be dismissed because *USTA II* is not in force yet and, even when in force, the BA/GTE merger conditions delay any change in Verizon's obligations until there is a final decision in the *TRO* appeals. Verizon contends that the revision is necessary to properly reflect existing law.

Because of the decision we reached earlier, this issue is now moot. If, at some future date, Verizon re-submits its Petition, it should contain all of the issues to be arbitrated based on the law existing at the time of filing.

Respectfully submitted,

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Trina M. Bragdon
Hearing Examiner
on behalf of the Advisory Staff