

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held August 30, 2001

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick

Further Pricing of Verizon Pennsylvania Inc.'s Unbundled Network Elements R-00005261; R-00005261C0001

Petition of Covad Communications Company For an Arbitration Award Against Bell Atlantic-Pennsylvania, Inc. Implementing the Line Sharing Unbundled Network Element A-310696F0002

Petition of Rhythms Links, Inc. for an Expedited Arbitration Award Implementing Line Sharing A-310698F0002

Joint Petition of Nextlink Pennsylvania, Inc.; Senator Vincent J. Fumo; Senator Roger Madigan; Senator Mary Jo White; the City of Philadelphia; The Pennsylvania Cable & Telecommunications Association; RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion Telecommunications, Inc.; ATX Telecommunications; CTSI, Inc.; MCI WorldCom; and AT&T Communications of Pennsylvania, Inc. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues P-00991648

Joint Petition of Bell Atlantic-Pennsylvania, Inc; Connectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings P-00991649

Pennsylvania Public Utility Commission v. Bell
Atlantic-Pennsylvania, Inc.

R-00005314

Covad Communications Company, MCIWorldCom,
Inc., and Rhythms Links, Inc.

R-00005350C0001

v.

Bell Atlantic-Pennsylvania, Inc.

OPINION AND ORDER

BY THE COMMISSION

Before this Commission for disposition are the respective Petitions for Reconsideration filed by Verizon Pennsylvania Inc. (Verizon) on June 25, 2001 (Verizon Petition), and Covad Communications Company (Covad) on June 25, 2001 (Covad Petition), relative to our Opinion and Order entered on June 8, 2001 (*Interim UNE Order*), in the above-captioned proceeding. Verizon's Petition also included a request for stay of the *Interim UNE Order*. By way of the *Interim UNE Order*, we addressed the Recommended Decision of Administrative Law Judge (ALJ) Louis G. Cocheres issued on March 26, 2001, and Exceptions filed with respect thereto.

History of the Proceedings¹

On November 30, 1999, Verizon filed tariff revisions to Tariff No. 216 in order to establish rates for certain unbundled network elements (UNEs) in accordance

¹ A comprehensive History of the Proceedings is contained in our *Interim UNE Order* entered on June 8, 2001, and will not be repeated here.

with the determinations directed in our *Global Order*.² By Order entered April 27, 2000, at Docket No. R-00005261, this Commission instituted an expedited proceeding to “establish prices for Verizon’s Tariff 216 rate elements” in accordance with the *Global Order*.³

On November 5, 1999, the Federal Communications Commission (FCC) issued its *UNE Remand Order*.⁴ On April 28, 2000, Verizon filed further revisions to Tariff No. 216 at Docket No. R-00005314, pursuant to the FCC’s *UNE Remand Order*. By Order entered June 8, 2000, at Docket No. R-00005314, we allowed further revisions to Tariff No. 216 to become effective subject to refund and evidentiary investigation “to determine whether [Verizon’s] revisions comply” with the FCC’s *UNE Remand Order*.⁵

² *Joint Petition of Nextlink, et al. and Joint Petition of Bell Atlantic, et al.*, Docket Nos. P-00991648 and P-00991649 (Order entered September 30, 1999), Ordering ¶6; *affirmed Bell Atlantic-PA, Inc. v. Pa. PUC*, 763 A.2d 440 (Pa. Cmwlth. 2000). The *Global Order* required that Verizon develop UNEs in accordance with the determinations stated therein and in *Application of MFS Intelenet of Pennsylvania, Inc.*, Docket No. A-310203F0002 (Order entered August 7, 1998) (hereafter *MFS III*).

³ *See, Order Instituting Proceeding Price Unbundled Network Elements*, R-00005261, Order entered, April 27, 2000, ordering ¶1. The Commission found that Verizon’s revisions to Tariff No. 216 were in compliance with the *Global Order* with exclusion of the following issues raised on exception: (1) Operator Services/Directory Services (“OS/DS”); (2) Expanded Extended Loops (“EELs”); (3) Digital Loops; and (4) UNE-P. (*See*, Order entered June 8, 2000, Docket Nos. P-00991648, P-00991649, R-00005261, p. 3).

⁴ *See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238. The *UNE Remand Order* was entered in response to the direction of the United States Supreme Court in *AT&T v. FCC*, 525 U.S. 366 (1999).

⁵ *Pa. Public Utility Commission v. Bell Atlantic- Pennsylvania, Inc.*, Docket No. R-00005314, Order entered June 8, 2000, Ordering ¶¶1, 3.

Further, the investigation at Docket No. R-00005314 was consolidated with and the expedited UNE proceeding at Docket No. R-00005261.⁶

By Order entered June 22, 2000, we expanded the scope of this consolidated and expedited UNE proceeding to include: (1) Line Sharing Cost Issues;⁷ (2) Collocation in Remote Terminals;⁸ (3) Dark Fiber; and (4) Sub-loops.

The following entities are the active parties in this case:

AT&T Communications of Pennsylvania, Inc. (AT&T);
ATX Telecommunications Services, Ltd. (ATX);
Central Atlantic Payphone Association (CAPA);
Connectiv Communications, Inc. (Conectiv);
CoreComm Limited (CoreComm);
Covad Communications Company (Covad);
CTSI, Inc. (CTSI);
e.spire Communications, Inc. (e.spire);
Intermedia Communications, Inc.(Intermedia);
MCI WorldCom, Inc. (MCIW);
MGC Communications, Inc., d/b/a Mpower Communications Corp. (MGC);
NEXTLINK Pennsylvania, Inc. n/k/a XO Communications, Inc. (XO);
Office of Consumer Advocate (OCA);
RCN Telecom Services, Inc. (RCN);
Rhythms Links, Inc. (Rhythms);

⁶ *Id.* at Ordering ¶2. *See also*, Order entered June 22, 2000, Docket Nos. R-00005350C0001, A-310696F0002, A-310698F0002, and Docket No. R-00005261 at Ordering ¶¶4, 5.

⁷ *See*, Order entered June 8, 2000 at Docket Nos. R-00005350C0001, A-310696F0002, A-310698F0002 and R-00005261 at n.4. Covad Communications Inc. (“Covad”) and Rhythms Links, Inc. (“Rhythms”) petitioned to include the following cost issues associated with line sharing: (1) splitter installation; (2a) Verizon relay rack for splitters per shelf; (2b) splitter land & building per shelf; and (3) Maintenance of splitter equipment per ninety-six line shelf.

⁸ On May 17, 2000, Verizon filed Tariff 218 containing revisions to its collocation tariff and introducing “remote terminal equipment enclosures”. On June 14, 2000, Covad, MCI WorldCom, Inc. (“MCIW”) and Rhythms filed a complaint challenging Verizon’s proposed rates, terms and conditions governing collocation in Remote Terminals Equipment Enclosure (RTEEs) *Id.*, p. 4.

Rural Telephone Company Coalition (RTCC);
Sprint Communications Company, L.P. (Sprint);
Telecommunications Resellers Association (TRA);
The United Telephone Company of Pennsylvania (United);
Verizon Pennsylvania, Inc. (Verizon); and
Z-Tel Communications, Inc. (Z-Tel)

Inactive participants are as follows:

FairPoint Communications Solutions Corp.
Network Access Solutions Corp.

The Recommended Decision of ALJ Cocheres was issued March 26, 2001. Exceptions were filed by Verizon, MCIW, and AT&T. Replies to Exceptions were filed by Verizon, AT&T, XO, MCIW, CAPA, Sprint, and Covad/Rhythms. In its *Interim UNE Order*, the Commission modified the ALJ's Recommended Decision, granting in part and denying in part the Exceptions of the Parties.

On June 25, 2001, Verizon and Covad filed their respective Petitions. On July 5, 2001, Verizon filed its Answer to Covad's Petition. (Verizon's Answer). On the same date, AT&T (AT&T's Answer), MCIW (MCIW's Answer), and Sprint (Sprint's Answer), filed their respective Answers to Verizon's Petition. CAPA filed a letter stating it was not filing an Answer to Verizon's Petition based on representations of Verizon's counsel that Verizon was not seeking reconsideration of the Commission's ruling on payphone providers in the *Interim UNE Order*.

Discussion

A. Standard of Review

The standard for granting reconsideration or clarification of a prior Commission order is articulated in *Duick v. PG&W*, 56 Pa. P.U.C. 553 (1982). (*Duick*). In *Duick*, we said:

A petition for reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the Pennsylvania Railroad case, wherein it was said that “[p]arties...cannot be permitted by a second motion to review or reconsider, to raise the same questions which were specifically considered and decided against them.” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

(*Duick*, p. 59).

B. Verizon Petition

1. Escort Services at the Remote Terminal

Verizon urges the Commission to reconsider our decision to reject Verizon’s requirement that CLECs pay for escort services anytime CLEC personnel enter a Remote Terminal. Specifically, Verizon argues that the CLECs agreed, in the Settlement Agreement in the Collocation Proceeding at R-00994697 et al., to pay for escorted

access to perform needed work outside of physically secured collocation sites, and that the Settlement Agreement supports escorted access to remote terminals. Second, Verizon disagrees with the Commission's conclusion that Verizon's policy of requiring CLECs to pay for escort services at Remote Terminals is contrary to the FCC's requirements that CLECs have 24-hour access to their collocation arrangements and facilities. Referencing the FCC's *Advanced Services Order*,⁹ Verizon explains that the FCC recognized the need for Verizon to secure its network and recover costs of doing so. Verizon adds that because Remote Terminals are not visited on a frequent basis (as are central offices) and are fully exposed to the public, escorted access is the only adequate and cost effective means to secure equipment at the thousands of remote terminals sites in Pennsylvania.

In its Answer, Sprint notes that the settlement agreement provision cited by Verizon allows the ILEC to escort CLECs to unsecured areas of the central office where there is physical collocation. Sprint comments that there are very few remote terminals having enough space for physical collocation, and as such, the escort requirement was never intended to apply to remote terminals. According to Sprint, even if situations where physical collocation is possible within a remote terminal, Verizon's escorted access proposal is unwarranted given the availability of less restrictive alternatives. For example, Verizon could implement a security policy requiring CLECs to notify its call center whenever the CLEC intends to access a specific remote terminal. Adoption of Verizon's position for authority to insist upon an escort for every CLEC seeking access to a physical collocation arrangement at or adjacent to a Verizon remote terminal would, Sprint contends, hinder competition and cause CLECs to incur unnecessary costs. Sprint questions Verizon's motives for its request for reconsideration and urges the Commission to deny Verizon's petition on this issue. (Sprint's Answer, pp. 2-4).

⁹ *In the Matters of Deployment of Wireline Services offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 98-48, First Report and Order (March 31, 1999).

Upon consideration of the arguments, we find that Verizon has not presented any new or novel arguments not previously raised or considered in the decision below. Indeed, Verizon has not made a persuasive case that we erred in ruling that Verizon's policy of requiring CLECs to pay for escort services at the Remote Terminals is contrary to the FCC's requirement that CLECs have access to their collocation arrangements twenty-four hours a day, seven days a week. As such, we find that grant of reconsideration is inappropriate on this issue.

2. Dark Fiber

In its Petition, Verizon seeks reconsideration of the Commission's dark fiber policy. According to Verizon, the Commission's ruling to adopt the Massachusetts policy¹⁰ to restrict Verizon's fiber reserve policy to 5% would also unreasonably limit Verizon's maintenance spares requirements to no more than 5% of its fiber optics strands per cable. The Commission's 5% policy, in Verizon's view, is inadequate and could result in longer service outages undermining the reliability of the telecommunications network. As such, Verizon believes that the Commission should permit Verizon to continue its long-standing maintenance spare policies.

¹⁰ See, the dark fiber policy established by the Massachusetts Department of Telecommunications and Energy (Mass. D.T.E.) in its December 13, 1999 decision at Docket Nos. D.P.U./D.T.E. 96-73/74, 96-80/81, 96-83, 96-94-Phase 4-N, (*Phase 4 Order*)

Generally, the CLECs¹¹ oppose Verizon's reconsideration of the Commission's dark fiber ruling.

As an initial matter, XO views Verizon's request for reconsideration and stay of the *Interim UNE Order* as a collateral attack on the Commission's favorable Section 271 Consultative Report¹² to the FCC regarding Verizon's application for in-region interLATA entry. Specifically, XO comments that the *Interim UNE Order*, which Verizon now seeks to have reconsidered and stayed, was included as a foundation upon which the Commission based its favorable Section 271 recommendation. On this basis, XO contends that the Commission should summarily deny Verizon's request for reconsideration and stay. (XO's Answer, pp. 5-6).

In response to Verizon's claims, XO notes that under the FCC Merger Order,¹³ Verizon is required to offer the terms and conditions for dark fiber availability and provisioning for CLECs operating offered by Verizon-Massachusetts to all CLECs operating in the Verizon footprint. XO continues that because the Verizon Massachusetts dark fiber policy provides better terms and conditions for dark fiber availability, CLECs operating in the service areas of Verizon Communications Corp. subsidiary ILECS outside Massachusetts, such as Verizon Pennsylvania, are entitled to the same treatment.

¹¹ While MCIW objects to Verizon's Petition for Reconsideration in its entirety, it filed specific objections to Verizon's request for reconsideration of the Commission's ruling on UNE-P and OS/DA. (MCIW's Answer, p. 2). AT&T states that the fact it does not offer specific objections to all of the issues raised mentioned in Verizon's Petition should not be construed as AT&T's concurrence with Verizon on these issues. (AT&T's Answer, pp. 1-2). Sprint does not offer specific objections to all issues in Verizon's Petition, but urges the Commission to deny the Petition in its entirety for failure to satisfy the *Duick* standard. (Sprint's Answer, p. 2).

¹² *In re Application of Verizon Pennsylvania, Inc., et al. for Authorization Under section 271 of the Communication Act to Provide In-Region, InterLATA Service in the Commonwealth of Pennsylvania*, CC Docket No. 01-138, Consultative Report of the Pennsylvania Public Utility Commission, June 25, 2001.

¹³ *In re GTE Corporation & Bell Atlantic Corporation*, CC Docket No. 98-184 (June 16, 2000).

Notwithstanding Verizon's reluctance to adopt the Massachusetts dark fiber policy in Pennsylvania, the ILEC, according to XO, has demonstrated its willingness to adopt the terms and conditions of interconnections reached between Verizon ILECs and CLECs in other jurisdictions in accordance with the FCC Merger Order. (XO's Answer, pp. 6-9).

XO points out that Verizon has failed in this proceeding as well as in its Petition to rebut the notion that the mandates of the FCC Merger Order apply to this issue and that Verizon is required to offer Pennsylvania CLECs the same treatment offered to Massachusetts CLECs. XO maintains that Verizon's arguments regarding spare dark fiber are neither new nor novel and as such, the Commission should deny Verizon's Petition on this issue. (XO's Answer, pp. 3-4).

Sprint shares XO's position, arguing that Verizon has offered no new arguments not previously considered by the ALJ or the Commission on this issue. In response to Verizon's assertion that its fiber maintenance policy is not a reservation policy, Sprint argues that application of Verizon's policy results in a reservation of spare fiber that is held by Verizon and is not in active use. (Sprint's Answer, p. 4). In support of its contention, Sprint cites an example, which it purports, demonstrates that under Verizon's policy, the ILEC is able to reserve a significant number of fiber spares while curtailing any for CLEC use. (Sprint's Answer, pp. 4-5). In Sprint's view, the Commission's 5% policy is appropriate and the Commission should not reconsider its ruling on this issue.

Verizon suggests that in adopting the Massachusetts policy, the Commission inadvertently overlooked the maintenance spare policy established by the Mass. D.T.E., in that decision. This is untrue. In reaching our decision to adopt the Mass. D.T.E. dark fiber policy, the Commission was mindful of the Mass. D.T.E.'s maintenance spares policy. In its *Phase 4 Order*, the Mass. D.T.E. adopted guidelines which stated as a general rule, that five percent of fibers in a sheath could be reserved for

maintenance; that with smaller cables of 12-24 fibers, a minimum of two fibers could be reserved; and that for extremely larger fiber cables, no more than twelve fibers could be reserved for maintenance. Under the Mass. D.T.E. dark fiber maintenance spare policy, the ILEC would have to offer a formal explanation to a requesting CLEC if it wished to reserve more fibers in any of the given circumstances. Similarly, under the Mass. D.T.E. maintenance spare policy, if the ILEC is relying on reservation of fibers for maintenance in excess of that permitted under the policy, the ILEC must give the affected CLEC notification of this reliance and its reasons for doing so.

On the issue of network reliability, we note that this issue was previously raised in this proceeding. In addition, we agree with XO that the Massachusetts dark fiber policy contains the necessary flexibility to address such concerns. (XO's Answer, pp. 8-9).

In our *Interim UNE Order*, we accepted the ALJ's recommendation to adopt the Mass. D.T.E. policy. At this juncture, we are not persuaded by Verizon's argument to alter our previous ruling on dark fiber. For purposes of clarification, we also adopt the conditions established by the Mass. D.T.E. in its maintenance spare policy. Likewise, if experience with the maintenance spare policy proves to be unsuccessful or unsatisfactory after a twelve month period, Verizon may petition the Commission, with appropriate documentation, for suggested revisions to the maintenance spare policy.

3. UNE-P Total Billed Revenue (TBR)

On this issue, Verizon argues that the Commission's conclusion that the \$80,000 Total Billed Revenue (TBR) is determined by location is inconsistent with the *Global Order* and the FCC's *UNE Remand Order*. Verizon repeats its earlier request that the Commission adopt the FCC's 4-line benchmark for determining whether Verizon is required to provide UNE-P to a particular business customer.

The CLECs object to Verizon's request and urge the Commission to deny it. Specifically, AT&T opposes Verizon's request, arguing that the Commission's ruling is neither contrary to the *Global Order* or the FCC's *UNE Remand Order*. Verizon's proposed business customer definition, AT&T notes, would undermine the intent of the *Global Order* to increase the availability of the UNE-P. AT&T also disputes Verizon's claim that the Commission's ruling violates the FCC's necessary and impair standard. On this issue, AT&T comments the Commonwealth Court expressly rejected Verizon's argument that the *Global Order* violated the necessary and impair standard of Section 251 of the Telecommunications Act of 1996 (TA-96)¹⁴ and found that the Commission's actions with respect to the availability of unbundled switching was in accordance with federal and state law. AT&T also argues that the Commission's decision which promotes competition is consistent with the FCC's four-line rule, and should be upheld. The Commission, in AT&T's view, properly rejected Verizon's restrictive business customer definition as a determinant of the TBR threshold.

MCIW takes a similar position arguing that in the *Interim UNE Order*, the Commission simply determined whether Verizon's tariff complied with the *Global Order*. Contrary to Verizon's assertion, the Commission's ruling on UNE-P in the *Interim UNE Order* did not establish new requirements but rather enforced existing requirements established in the *Global Order*. MCIW also observes that Verizon's argument that the TBR requirement violates the Act and the FCC *UNE Remand Order* is untimely since Verizon did not challenge the issue in its response to the *Global Order*. After considering all arguments of the Parties, which includes the same arguments raised by Verizon in the instant Petition, the Commission, in MCI's view, properly concluded that Verizon's proposal was anti-competitive and contrary to the directives of the *Global*

¹⁴ 47 U.S.C. §251

Order. For these reasons, MCIW contends, the Commission should deny Verizon's request. (MCIW's Answer, pp. 3-6).

We note that Verizon advances the same positions it previously argued in the decision below. In addition, we continue to believe that Verizon's proposed business customer definition would hinder competition. In our *Interim UNE Order*, we clarified that our *Global Order* requirements regarding UNE-P are in force and should be interpreted as pre-existing supplements to the minimum federal requirements. We find that Verizon fails to offer any new or novel arguments not addressed in our previous decision. As such, we continue to hold that the TBR threshold established in our *Global Order* should be based on a locational definition. Verizon has not presented new convincing arguments, which would warrant a reconsideration or modification of our ruling.

4. Operator Services/Directory Assistance (OS/DA)

Verizon urges the Commission to reconsider its rejection of the ALJ's recommended finding that because Verizon offers customized routing in Pennsylvania, it is not required under the FCC's ruling to offer OS/DA as an UNE. As an alternative, Verizon proposes that if the Commission is not inclined to reconsider its ruling, the Commission should find that Verizon is entitled to recover from MCIW the costs associated with developing a technical solution to the CLEC's Feature Group D incompatibility problem. These types of costs, *i.e.*, provisioning of OS/DA via a Feature Group D protocol, according to Verizon, are recoverable under the Act and the FCC rules.

MCIW argues that the Commission should reject Verizon's request on two grounds. First, MCIW notes that Verizon advances the same arguments previously raised and considered in this proceeding. Second, MCIW observes that in its

Consultative Report to the FCC, the Commission relied upon its ruling in its *Interim UNE Order* when it stated that Verizon had met the checklist item on this issue. (MCIW's Answer, pp. 6-8).

As an initial matter, we emphatically disagree with Verizon's assertion that the Commission overlooked the applicable law when rejecting the ALJ's recommendation on this issue. To the contrary, in our *Interim UNE Order*, we thoughtfully addressed and considered the applicable FCC regulations and rulings on this issue. Citing the relevant FCC regulation, 47 C.F.R. §51.319(f) and the FCC's *UNE Remand Order*, we concluded that the FCC requires an ILEC to offer OS/DA as an UNE where the ILEC does not provide a requesting CLEC with customized routing or a compatible signaling protocol. Based on the pertinent facts presented in this proceeding, (*i.e.*, Verizon offers customized routing through MOSS, which is not a compatible signaling protocol for all CLECs offering telecommunication services in Pennsylvania), we concluded that Verizon's proposal to exclude OS/DA as an UNE was inconsistent with FCC requirements.

Again, Verizon has failed to present any new or novel arguments not previously raised and addressed. We previously rejected Verizon's contention that a ruling on this matter is premature because under a current interconnection agreement, MCIW is able to receive OS/DA from Verizon at UNE rates. (*Interim UNE Order*, p. 83).

With regard to Verizon's alternate proposal to permit it to recover costs associated with developing a technical solution to resolve the signaling protocol incompatibility, we find no support for allowing recovery of costs to develop technology for services which Verizon is required by law to provide.

5. Switch Port Costs

Verizon concedes the propriety of the Commission's conclusion that Verizon's switch port tariff did not comply with the Commission's previous directive to offer CLECs two different UNE-P port options. (See *Global Order*). However, Verizon urges the Commission to reconsider the directive that Verizon issue refunds to CLECs that ordered UNE-P from Verizon during the relevant period.

In response, AT&T believes that the Commission properly directed Verizon to refund the difference between the Option A and Option B rates. According to AT&T, the Commission's decision is reasonable and provides meaningful relief to CLECs who were adversely affected by Verizon's non-compliance with the *Global Order*. AT&T comments that Verizon's claims are mere recitations of arguments previously presented and considered in this proceeding and, as such, should be rejected. (AT&T's Answer, pp. 9-13).

Similarly, MCIW urges the Commission to deny Verizon's request for reconsideration. MCIW also disagrees with Verizon's claim that its compliance with the Commission's ruling in the *Interim UNE Order* on this issue would require the ILEC to "slam" a CLEC to a lower priced port. (MCIW's Answer, pp. 8-10).

Upon consideration, we find no basis to reconsider our ruling on this issue. In our view, Verizon has not presented any new or novel arguments not previously considered by the Commission. Despite Verizon's repeated efforts to avoid the requirements established in the *Global Order* with regard to switch port rates, the facts

remain that Verizon has failed, since October 31, 1999, to offer CLECs two rate options for switch ports in violation of the *Global Order*.¹⁵

Indeed, in our *Global Order*, we intended that every CLEC in Pennsylvania have the benefit of choosing between two switch port rates. Verizon's failure to comply with our directive precluded CLECs from having that choice. Contrary to Verizon's contention, we clarify that our *Interim UNE Order* does not require Verizon to unlawfully switch any CLEC to another Option. In fact, our *Interim UNE Order* does not preclude any CLEC from now choosing either option. Given that Verizon has now revised its tariff and offers both Option A and Option B for switch port rates, CLECs should now be able to select the option of its choice. We emphasize that Verizon's own disregard of a Commission directive for almost two years makes it difficult to determine which CLECs ordered the Option A Port because they actually wanted the higher priced option or because it was the only available switch port rate option. For this reason, as we explained in our *Interim UNE Order*, Verizon should issue refunds to every CLEC who ordered UNE-P arrangements after October 30, 1999. To alleviate any possible uncertainty as to the exact period Verizon is obligated to offer this refund, we clarify that the refund should be offered from October 30, 1999, until such time that the Commission determines that Verizon has filed a tariff which offers an Option A and Option B for switch port rates, consistent with our *Global Order* and the *Interim UNE Order*.

With respect to Verizon's assertion that our ruling is improper because no CLEC filed a complaint to Verizon's switch port rate offerings, we remind the

¹⁵ We remind the Parties that the Commission is empowered to impose civil penalties in an amount not to exceed \$1,000 daily on any public utility that fails to adhere or comply with a Commission directive. We note that the issue of switch port rates was not included in Verizon's appeal of the *Global Order*.

Parties that the Commission may, on our own initiative, take all necessary measures and actions to ensure that directives are followed and implemented. Having failed to meet the threshold standard of review for reconsideration, Verizon's request for reconsideration of this issue is denied.

Finally, on page 9 of its Answer,¹⁶ MCIW states that while Verizon now offers two tariffed options for its switch port rates, CLECs are still required to order the higher priced port and seek the appropriate billing credits. We are concerned that Verizon has failed to implement systems, which would enable CLECs to order the lower priced port. We stress that if a CLEC is still unable to access systems which enable it to order the lower priced port, the mere tariffing of the lower priced port does not, in and of itself, constitute compliance with the *Interim UNE Order* and *Global Order*. Verizon's inaction or actions, as the case may be, are contrary to the intent of our *Global Order*. Therefore, we direct Verizon to file with this Commission, within ten days of the entry date of this Opinion and Order, a report indicating whether the systems problems which prevent CLECs from ordering the lower priced port have been corrected and if not, what proactive measures Verizon is taking to address this problem.

¹⁶ In footnote 18, MCIW represents that:

It is important to note that even though Verizon has tariffed the lower priced port now, the systems have still not been established to permit CLECs to order the lower priced port and therefore CLECs are still being required to go through the onerous process of ordering the higher priced port and hoping that Verizon credits the CLEC correctly, which is less than certain given all of Verizon's billing problems. In addition, given the manner in which Verizon applies the credits, it is virtually impossible to audit whether the credits have been applied properly.

C. Verizon Request for Stay

Verizon requests a stay of portions of the Interim UNE Order which addresses dark fiber maintenance spares, UNE-P TBR definition and switch port charge refunds pending Commission resolution of this petition.

The Pennsylvania Supreme Court, in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group (Process Gas)*, 502 Pa. 545, 467 A.2d 805 (1983), requires a petitioning party to make a strong showing under the *Virginia Jobbers*¹⁷ criteria in order to justify the issuance of a stay, as modified by the case of *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir.1977), which provided that a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.

Applying the criteria of *Process Gas* to the facts of this proceeding, we conclude that Verizon is not entitled to relief in the nature of a stay or supersedeas of our prior Order. Verizon has not convinced this Commission that it has a substantial case on the merits. Further, we find that, on balance, the alleged harm will inure to the detriment of Verizon does not outweigh the policy considerations or harm to other parties to this proceeding or the public.

¹⁷ *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). The standards are: (1) the petitioner makes a strong showing that he is likely to prevail on the merits; (2) the petitioner has shown that without the requested relief he is likely to suffer irreparable injury; (3) the issuance of a stay will not substantially harm other interested parties to the proceeding; and (4) the issuance of a stay will not adversely affect the public interest. (*Process Gas*, 467 A.2d, p. 554).

Based on the foregoing, Verizon's request for a stay will be denied. We shall, however, consistent with the discussion herein, grant Verizon an extension of time nunc pro tunc in which to file various tariff clarifications consistent with this Order.

D. Covad Petition

1. Cooperative Testing

In its Petition, Covad remarks that the Commission's ruling to allow Verizon to impose a cooperative testing charge will essentially permit the ILEC to charge CLECs to determine whether the provisioned loop is working, *i.e.*, connected all the way to the customer's premises. Covad noted that Verizon already charges CLECs to make a loop a complete circuit during the provisioning process. As such, Covad adds, if Verizon delivered working loops, as it is required to do, then CLECs would not need to engage in cooperative testing. In light of this, Covad urges the Commission to suspend the cooperative testing charge until Verizon is able to demonstrate that it provides working loops in the vast majority of cases. As an alternative position, Covad proposes that Verizon waive the cooperative testing charge (1) for all loops in a month where more than 5% of the loops are determined to be non-working during the cooperative testing process; or (2) where Verizon does not offer cooperative testing on at least 98% of loops ordered in the month.

Verizon answers that Covad's request is flawed for three reasons:

(1) Section 251(d)(1) of the TA-96 permits ILECs to recover the costs of providing interconnection or network elements, but placing a condition, such as that proposed by Covad, on an ILEC's recovery of such costs is in conflict with the Act; (2) Verizon tests its loop as a matter of course and additional testing at the CLEC's request is an optional task, the costs of which should be incurred by the requesting CLEC; and (3) requiring Verizon to waive the costs of cooperative testing is not an appropriate means of ensuring

service quality - instead performance incentives implemented by the Commission are designed to achieve that objective and result. For these reasons, Verizon contends the Commission should deny Covad's request for reconsideration on this issue. (Verizon's Answer, pp. 3-5).

Upon consideration, we deny reconsideration of this issue. Covad has not presented any new arguments or concerns not considered or addressed in our June 8, 2001 *Collocation Order*. We concluded in our previous decision that this charge was reasonable and did not provide a disincentive for Verizon to provide quality service. Covad does not offer any new or novel argument to persuade us that our initial ruling on this issue was improper. With respect to Covad's alternative proposal that the Commission direct Verizon to waive its cooperative testing charge under circumstances proposed by Covad, we continue to believe, as we did in our initial ruling, that there are adequate Performance Assurance Plan¹⁸ sanctions as well as competitive safeguards considerations which may be used to address any findings of Verizon's inadequate service to the CLECs.

2. Collocation Splitter Equipment Support Costs

On this issue, Covad asks the Commission to modify its ruling which permits Verizon to apply the Collocation Splitter Equipment Support Costs (CSESC) to a primary CLEC (first CLEC to collocate on the relay rack), who in turn should recover pro rata contributions from other CLECs using that relay rack. Covad notes that a CLEC's

¹⁸ Pursuant to ordering paragraph 16 of our *Functional/Structural Separations* order at Docket No. M-00001353 and the terms of the June 6, 2001 Secretarial Letter regarding Verizon's Section 271 application, the Commission initiated a new proceeding, at Docket No. M-00011468, to address (1) whether to conform the Pennsylvania metrics to the New York metrics, as proposed by Verizon, including an appropriate transition plan, and (2) whether to adopt features of the New York remedies plan for the PA Performance Assurance Plan, with a "rebuttable presumption" that New York remedies features tailored to Pennsylvania should be adopted.

collocation on Verizon's relay racks are virtual arrangements and, as such, CLECs do not have physical access to the splitter shelves. Like Verizon, Covad comments, it is physically impossible for a primary CLEC to pro rate the charge among responsible CLECs on a monthly basis as new lines are added or subtracted, because the primary CLEC would be unable to determine what CLECs are located in the same rack. This uncertainty, according to Covad, could be minimized if Verizon is required to pro rate by dividing the CSESC charge among all CLECs that have a splitter shelf on a particular relay rack. Under this approach, Verizon would not be required to pro rate based on the number of lines or the number of shelves. Covad asserts that because the ILEC has physical access to the relay racks in which splitter shelves sit, Verizon would be in the best position to pro rate the charges and bill the responsible CLECs.

In its Answer, Verizon notes that Covad's request is based on a mis-interpretation of the Commission's ruling which allows Verizon to bill one primary CLEC for each shelf. Verizon seeks clarification that it is authorized to bill CLECs on a per-shelf basis and that the primary CLEC has the responsibility of obtaining the requisite pro-rated reimbursement from other CLECs only when one CLEC chooses to sub-lease a portion of its own shelf to another CLEC. Verizon explains that because CLECs are free to allow other CLECs to share shelf space, the primary CLEC should remain responsible for billing other CLECs with whom it shares its shelf.

In reviewing our *Interim UNE Order*, Covad's Petition, and Verizon's response, it is clear that confusion exists regarding terminology. The terms relay "rack" and the splitter "shelf" are not interchangeable. The rack is a structure that holds several splitter shelves. Covad seems to misunderstand the *Interim UNE Order* to allow Verizon to charge one CLEC for the entire rack supporting multiple splitter shelves for multiple CLECs. This is not the case. The Commission did not intend or authorize Verizon to charge the cost of the entire rack to one CLEC. Therefore our *Interim UNE Order* only allows Verizon to charge a CLEC for the CLEC's shelf.

Both Verizon and Covad agree, that CLECs own the splitter shelves. Therefore, the decision whether to allow other CLECs to share a particular shelf rests with the CLEC that owns that shelf, not with Verizon. CLECs are free to allow other CLECs to share shelf space. The primary CLEC is responsible for billing other CLECs with whom it shares its shelf.

3. Line and Station Transfers (LST)

Covad urges the Commission to reconsider its decision to allow Verizon its proposed line and station transfer charge rate on an interim basis pending a re-run of its cost study. In support of its request, Covad argues that the parties did not have an opportunity to address Verizon's proposed LST rate in testimony.

Initially, Verizon points out that the LST rate element is the result of its recent arbitration with Covad and Rhythms Links, Inc. Verizon explains that the Parties reached an agreement in which Verizon agreed to provide this service on the condition that the CLECs reimburse Verizon for its costs. Because the agreement was reached after Verizon submitted its direct testimony, Verizon filed its LST rates in its rebuttal testimony.

Verizon also disputes Covad's claim that the parties had no opportunity to challenge Verizon's proposed LST rate charge. Specifically, Verizon notes that Covad had an opportunity during the evidentiary stages to cross examine Verizon's witness, present its own LST rates or move to strike Verizon's rebuttal testimony on this issue. Given Covad's failure to challenge Verizon's proposed LST rates and testimony before or during the hearings, Verizon argues that the Commission should not allow Covad to retract its promise to reimburse Verizon for these costs.

We decline reconsideration of this issue. As noted, the LST rate is an interim rate. The Parties will have full opportunity to file comments to Verizon's proposed rate in the revised cost study. At that the time, the Commission will review Verizon's revised cost study as well as consider and address all comments and objections filed by the Parties. Having failed to meet the threshold standard for a review on reconsideration, Covad's request for reconsideration on this issue is denied;

THEREFORE,

IT IS ORDERED:

1. That the Petition for Reconsideration and Stay of the Commission's June 8, 2001 Interim UNE Order filed by Verizon Pennsylvania, Inc. on June 25, 2001, is granted in part, and denied, in part.

2. That the Petition for Reconsideration filed by Covad Communications Company on June 25, 2001 is granted, in part and denied in part, consistent with this Opinion and Order.

3. That within ten (10) days of the date of entry of this Opinion and Order, Verizon Pennsylvania, Inc. file with this Commission a report indicating whether

the systems problems which prevent CLECs from ordering the lower priced port have been corrected, or the proactive measures which Verizon is taking to address this problem.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: August 30, 2001

ORDER ENTERED: September 4, 2001