

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

Public Meeting held July 8, 2004

Commissioners Present:

Terrance J. Fitzpatrick, Chairman  
Robert K. Bloom, Vice Chairman  
Glen R. Thomas  
Kim Pizzingrilli  
Wendell F. Holland

Covad Communications Company,  
Complainant,

R-00038871C0001

v.

Verizon Pennsylvania Inc.,  
Respondent

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before this Commission for consideration is the Petition of Verizon Pennsylvania Inc. (Verizon PA) for Interlocutory Commission Review and Answer to a Material Question and a Stay of Proceedings (Petition and Stay) filed on February 25, 2004, in the above-captioned proceeding. *See* 52 Pa. Code § 5.302. The Petition and Stay have been filed in response to a February 13, 2004 Interim Order of Administrative Law Judge (ALJ) John H. Corbett, Jr. (assigned as Motions Judge January 20, 2004). In the Interim Order, ALJ Corbett denied a Verizon PA Motion to Dismiss a Formal Complaint of Covad Communications, Inc. (Covad), which was filed

against certain tariff revisions to Verizon PA's Tariff No. 216 (pertaining to Unbundled Network Elements (UNEs)) which are designed to remove and revise terms and conditions for, among other services, line sharing.<sup>1</sup>

By its Petition and Stay, Verizon PA requests interlocutory review of the following two material questions:

- (1) Whether this Commission is preempted by federal law from requiring Verizon to provide "line-sharing" under state tariff under terms, conditions and prices differing from those that the FCC has determined are appropriate under the federal Telecommunications Act ("Act"); and
- (2) Whether this Commission lacks independent authority under Section 271 of the Act or state law to impose any line-sharing requirement.

Briefs in opposition to Verizon PA's Petition and Stay were filed by the Office of Consumer Advocate (OCA) and Covad. Verizon PA filed a Brief in support of its Petition and Stay.<sup>2</sup> We, thereafter, elected to waive the 30-day period for consideration of the Petition and Stay as set forth in 52 Pa. Code § 5.303. *See* Secretarial Letter of March 18, 2004 citing 52 Pa. Code § 1.2(c); also *C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993).

Before we evaluate the interlocutory matter before us, we make the following procedural observations. As noted, this proceeding involves tariff revisions filed by Verizon PA to its Services for Other Telephone Companies Tariff – Pa. PUC No. 216, to remove certain UNEs and to revise terms and conditions for line sharing. We

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<sup>1</sup> *See* Tariff PA PUC 216, Section 3A, Revised Sheet 5.

<sup>2</sup> The Parties were permitted to increase the page length of the briefs to twenty-five pages and also granted an extension of time until March 8, 2004, in which to file.

observe that pursuant to the requirements of Section 1308(b) of the Public Utility Code, 66 Pa. C.S. § 1308(b), this Commission may, at any time before they become effective, suspend the operation of such rates for a statutorily prescribed period, pending decision by the Commission. By Order entered herein on December 4, 2003, the Commission suspended the proposed revisions to Tariff No. 216. However, the period of time for the suspension of the proposed tariff revisions has expired and we are advised that Verizon PA intends to place said tariff revisions in effect. Notwithstanding, there are substantial questions raised by the proposed revisions and we shall continue this Commission's investigation into the lawfulness of said tariff revisions. Final adjudication of the lawfulness of said revisions may require changes to Tariff No. 216.

## Background

In the Federal Communications Commission (FCC) *Line Sharing Order*,<sup>3</sup> FCC rules implementing the unbundling requirements of the federal Telecommunications Act of 1996 (Act or TA96) were amended to require incumbent local exchange carriers (LECs) to provide unbundled access to the high frequency portion of the local loop (HFPL).<sup>4</sup> This was mandated to enable competitive LECs to compete with incumbent LECs to provide xDSL-based services through telephone lines that the competitive LECs could “share” with incumbent LECs. Line sharing, therefore, is the process by which a requesting LEC provides DSL service over the same copper loop that the incumbent LEC uses to provide voice service, with the incumbent LEC using the low frequency portion of the loop and the requesting LEC using the HFPL.

The *Line Sharing Order* was vacated and remanded. *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied* 538 U.S. 940 (2003). After the D.C. Circuit Court’s vacation and remand of the FCC’s original line sharing rules, line sharing was again considered in the recently issued FCC *Triennial Review Order* (TRO).<sup>5</sup> Pursuant to the TRO, FCC unbundling rules were further revised and as a result of the TRO, line

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<sup>3</sup> See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order; CC Docket No. 96-98, 14 FCC Rcd 20912 (1999).

<sup>4</sup> The HFPL is defined as “. . . the frequency range on the copper loop above the range that carries analog circuit-switched voice transmissions.” 47 C.F.R. § 51.319(a)(1)(i). See 47 U.S. C. § 251(c) and 252(d).

<sup>5</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); corrected by Errata, 18 FCC Rcd 19020 (2003); *vacated, in part, United States Telecom Ass’n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases).

sharing is no longer classified as a UNE subject to the unbundling requirements of Section 251 of the Act, 47 U.S.C. § 251. *See* TRO para. 255. Except as directed by the FCC on a “grandfathered” basis, and subject to a three-year transition mechanism, paras. 264-266, line sharing is no longer considered by the FCC to be a UNE, the lack of which would “impair” the ability of competitive LECs seeking access to provide the services that they seek to offer to the public. *See* 47 U.S.C. § 251(d)(2)(B).

Most of the self-implementing revisions to FCC rules mandated by the TRO became effective October 2, 2003, after publication in the Federal Register. On October 2, 2003, Verizon PA made the filing at issue here, seeking to revise its tariffs so as to remove line sharing based on its interpretation of the TRO. The TRO was appealed by several Parties.<sup>6</sup> On March 2, 2004, while the Verizon PA Petition and Stay of the Interim Order of ALJ Corbett was pending our consideration, the United States Court of Appeals for the District of Columbia Circuit issued a decision which vacated the TRO, in part. *See USTA v. FCC*, No. 00-1012, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2004) 2004 U.S. App. LEXIS 3960. However, the D.C. Circuit affirmed the FCC rules pertaining to line sharing.

In the case before us, the two material questions presented by Verizon PA, arise from the following procedural history (reprinted from the Initial Decision):

On October 2, 2003, Verizon Pennsylvania Inc. (“Verizon”) filed tariff revisions to its Services for Other Telephone Companies Tariff-Pa. PUC No. 216, to remove certain Unbundled Network Elements (“UNEs”) and to revise terms and conditions for line sharing. . .

Verizon proposes to make the following revisions to its Tariff 216:

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<sup>6</sup> This Commission was an active petitioner in those appeals.

- (1) Eliminate OC3 (Optical Carrier level-3) and OC12 (Optical Carrier level-12) interoffice transport from the list of available UNEs.
- (2) Eliminate STS-1 (Synchronous Transport Signal-1) interoffice transport from the list of available UNEs.
- (3) Discontinue provisioning IOF (Inter-Office Facility) Dark Fiber between a TC (Telephone Company) Collocation arrangement in a Telephone Company Central Office and the TC's central office (Dark Fiber Channel Termination).
- (4) Discontinue provisioning new Line Sharing arrangements over copper loops or sub-loops.

On October 28, 2003, Covad Communications Company ("Covad") filed a complaint challenging Verizon's tariff filing. In its complaint, Covad alleges Verizon's proposed Tariff 216 violates the Telecommunications Act of 1996 (the "Act") and the Public Utility Code (the "Code"). Tariff 216 does not correctly implement the FCC's *TRO*. First, Verizon incorrectly interprets the FCC's grandfathering rule for existing line sharing arrangements and unilaterally imposes additional limitations on CLECs not contained in the *TRO*. Second, Verizon cannot cease offering line sharing. Verizon must detail its line sharing obligations in its tariff to include: (1) its obligations under the *TRO*'s § 251 transition plan; and (2) unbundled access to line sharing under § 271 of the Act and under Pennsylvania law. The Act preserves independent state authority, which the *TRO* does not preempt.

For relief, Covad seeks, *inter alia*, a Commission ruling to require Verizon to continue line sharing pursuant to § 271 of the Act. Covad suggests the Commission can determine this threshold question without evidentiary hearings by ruling on the pleadings. 52 Pa. Code §5.102. In addition, it notes in Verizon's pending Network Modernization Plan proceeding, Covad has raised the applicability of §271 to the issue of hybrid copper-fiber loop availability to Verizon's competitors. Thus, Covad suggests the Commission should investigate Verizon's proposed Tariff 216, set the remaining

issues for hearing and disposition, and consolidate Covad's complaint with that proceeding.

On November 7, 2003, Verizon answered the complaint and filed a motion to dismiss it. Verizon declares it filed its Tariff 216 revisions to conform the tariff to the self-executing provisions of the *TRO*. The FCC's *TRO* eliminated "line sharing" as an UNE and phased out its availability. "Line sharing" refers to a requirement to unbundle the high frequency portion of the loop ("HFPL"), so "a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end-user, with the incumbent LEC using the low frequency portion of the loop and the competing carrier using the HFPL." In the *TRO*, the FCC held ILECs will no longer be required to provide line sharing as a UNE, because competitors are not "impaired" without unbundled access to the HFPL. Under new FCC rules set forth in the *TRO*, the high frequency portion of a copper loop is not a UNE under §251, even on a transitional basis.

. . . Verizon argues any Commission attempt to impose additional line sharing requirements is preempted by federal law. Its tariff proposals, Verizon claims, are fully consistent with the plain language of the *TRO*. Thus, it contends Covad's complaint is baseless and fails to state a claim on its face.

By Order entered December 4, 2003, the Commission, *inter alia*, suspended the tariff filing for a period not to exceed six months or until June 4, 2004 pursuant to 66 Pa. C.S. § 1308(b). In Ordering Paragraph Four of this Order, the Commission also assigned this tariff filing "in conjunction with [Covad's] complaint" to the Office of Administrative Law Judge "for such proceedings as shall be deemed necessary and the issuance of a Recommended Decision." I received the assignment as Motions Judge on January 20, 2004.

(Interim Order, pp. 1-4) (Note omitted).

## Discussion

### **1. Positions of the Parties**

The Interim Order provides a succinct summary of the positions of the Parties. We rely on that summary as supplemented by our review of the Briefs filed in support of and in opposition to interlocutory review.

Verizon PA takes the position that this Commission, as a result of the suspension and investigation of its tariff revisions “conforming” its Tariff 216 to the TRO’s line sharing requirements, has placed itself in direct conflict with federal law and the FCC’s policy articulated in the TRO, to eliminate line sharing as a UNE. (VZ Brief at 3). Verizon PA, repeating the arguments made in its Motion to Dismiss, argues that any attempt to require line sharing beyond what is set forth in the TRO is preempted by federal law. Also, Verizon PA asserts this Commission lacks independent authority to require line sharing under either state law or Section 271 of TA96, 47 U.S.C. § 271. (Brief at 5).<sup>7</sup>

With regard to unbundling under Section 251 of TA96, Verizon PA also takes the position that, notwithstanding any retention by the state commissions of general unbundling authority in areas where the FCC did not specifically adopt a national rule, because the FCC has reached a determination that unbundling the HFPL would be contrary to the goals and requirements of the Act. Consequently, the states may not reverse such a conclusion. (Brief at 7). The FCC, relying on long-standing federal preemption principles, concluded that states may not enact or maintain a regulation or

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<sup>7</sup> Verizon PA states that this Commission has never imposed a state law line-sharing requirement. It explains that the Commission set prices and other details for line sharing under the FCC’s prior line sharing rules. Based on the foregoing, Verizon PA argues the Commission lacks state law authority to now establish a line sharing requirement. (VZ Brief at 6; also I.D. at 6).

law pursuant to state authority that thwarts or frustrates the federal regime adopted in the TRO. (Brief at 8). Verizon PA additionally notes that the FCC rules which previously gave states the discretion to create additional unbundled network elements were eliminated. *See* Brief at 8, n. 12 citing 47 C.F.R. § 51.317. Thus, state authority expressly preserved by 47 U.S.C. § 251(d)(3) is narrow and limited to action that is consistent with the requirement of Section 251 and does not substantially prevent the implementation of the federal regulatory scheme. *Id.* referencing TRO, para. 194.

Verizon PA's position regarding independent authority under Section 271 of the Act is as follows. The FCC alone is authorized to approve or deny a former Bell Regional Operating Company (RBOC) application for in-region intraLATA authority. The role of the state commission is limited to providing "consultation" to the FCC in this regard. Therefore, the state commission does not have any authority concerning line sharing based on Section 271 of TA96. (Brief at 13). Also, Verizon PA argues that after Section 271 authority is granted it is, again, the FCC which has the enforcement authority under the Act to determine, after notice and hearing, whether an RBOC has "ceased to meet" any of its Section 271 conditions. Should such a deficiency be found, the FCC must issue an order correcting the deficiency. (Brief at 15-16).

Verizon PA, thereafter, attacks Covad's basis for asserting that line sharing is a cognizable requirement under Section 271, Checklist item # 4. Verizon PA asserts that Covad is wrong in implying that line sharing is a Section 271 requirement. (Brief at 17). It argues that the plain language of the statute requires it to provide only a loop, and does not encompass some portion or capacity of the loop. *Id.* Verizon PA bolsters its position regarding whether Checklist item # 4 could be read to include line sharing, by making a distinction between the "limited" and "specific" language of Section 271 with the more expansive language of Section 251(c)(3), which requires LECs to provide unbundled access to network elements. And, "network elements" are defined to include their features, functions, and capabilities. *Id.*

Verizon PA discounts the FCC's discussion of line sharing in past Section 271 decisions by observing that the FCC and the courts have recognized that each checklist item draws its content from the evolving nature of the FCC's local competition rule at any given time. (Brief, p. 18). Because Checklist item # 2 requires an RBOC to provide nondiscriminatory access to network elements in accordance with Sections 251(c)(3) and 252(d)(1) of TA96, the FCC, in prior decisions was obligated to consider line sharing because the law prior to TRO was that line sharing was required under Section 251. Now that there is no longer a requirement for line sharing under Section 251, Verizon PA reasons that the elimination from the Checklist #2 item should also result for Checklist item # 4, which requires an RBOC to provide a loop unbundled from switching. (Brief at 18-19).

Verizon PA makes two concluding points. They are: (1) the FCC concluded that Total Element Long Run Incremental Cost (TELRIC) pricing does not apply to elements unbundled pursuant to the authority of Section 271 of TA96; and (2) line sharing was neither established or discussed in the Commission's *Global Order*. Rather, specific findings were made regarding line sharing as a result of the arbitration of interconnection agreements, and not as a state law requirement. (Brief at 20-22).

The essence of Covad's Complaint against Verizon PA's proposed tariff revisions is based on the independent authority of Section 271 of TA96. Covad maintains that Verizon PA must provide line sharing "at the current rates, terms, and conditions set forth in Tariff 216." (Covad Brief at 3). Covad primarily relies on Section 271 of the Act for its position that this section provides an independent source of authority by which a state commission could require unbundled access to the HFPL, notwithstanding a contrary conclusion of the FCC regarding the unbundling of this element pursuant to Section 251 of the Act. (Brief at 4). Covad observes that should the state commission acknowledge this independent authority, this would obviate the need to

consider the preemptive effect of the TRO on state commission unbundling determinations and would render questions on this issue moot. *Id.*; 7.

Covad also relies, although to a lesser degree, on its view that there is independent state law authority through Chapter 30 of the Public Utility Code (sunset December 31, 2003), to mandate a line sharing requirement. Covad argues: (1) the FCC TRO has established the independence of Section 271 requirements from any analysis pursuant to Section 251; and (2) the HFPL comes within the definition of unbundling of local loop transmission which is a checklist item (Checklist item # 4) Verizon PA had to satisfy in order to receive authorization for intraLATA authority. This obligation continues. (Brief at 8-9). Covad points out that in the *PA Section 271 Order*, the FCC relied upon access to the HFPL through line sharing and line splitting when it found that Verizon PA had complied with Checklist item # 4. *See* Brief at 9 citing *PA Section 271 Order*, paras. 76; 78.

Covad further observes that since the advent of line sharing, each time the FCC has reviewed an application of a former RBOC's entry into long distance, the FCC has "insisted" on the applicant's demonstration of non-discriminatory access to the HFPL in order to comply with Checklist item # 4. (Brief at 10). To this end, Covad cites a recent FCC decision which required compliance with Checklist item # 4 and line sharing after the TRO was issued. *Id.*, n. 15. Covad, therefore, suggests that the Section 271 proceedings require Verizon PA to provide non-discriminatory access to the HFPL and that these obligations are enforceable in Pennsylvania. (Brief at 10).

Covad additionally points to decisions in the jurisdictions of North Carolina and Georgia and argues that the commissions in these states have adopted decisions which Covad asserts, stand for the proposition that RBOCs have an independent obligation under Section 271 to provide unbundled access to loop transmission, which, necessarily includes line sharing. (Brief at 13) Regarding the rates for line sharing, Covad

continues to press for the maintenance of Tariff 216 for line sharing at the rates, terms, and conditions presently contained therein. (Brief at 11).

Covad then criticizes the TRO as an invalid exercise of congressional authority to the extent the TRO purports to preempt states from establishing additional UNEs. (Brief at 17). Covad suggests that the deference given to a federal agency's interpretation of an act which it administers under the doctrine of *Chevron*,<sup>8</sup> has been forfeited as a result of the many D.C. Circuit Court rulings which have vacated various portions of the FCC rules. *Id.*

Although Covad asserts, in the primary sense, that should this Commission find independent authority pursuant to Section 271 of the Act and independent state law authority for the maintenance of a line sharing requirement, there would be no need to engage in a preemption analysis, it also addresses the preemptive effective of the TRO. Covad makes the argument that preservation of line sharing would not frustrate the intent of the FCC TRO, but would complement the goals of Section 251. Covad holds that “unbundling of the HFPL is clearly consistent with the intent of Section 251, which authorizes states to implement additional requirements fostering interconnection and competition.” (Brief at 18). The proper preemption analysis, according to Covad, should be that outlined by the United States Court of Appeals for the Sixth Circuit in *Michigan Bell v. MCI Metro*, 323 F. 3d 348 (6<sup>th</sup> Cir. 2003). *Michigan Bell* is cited for the proposition that the focus of conflict preemption is frustration of purpose. Therefore, state law regulations may be enforced, even where the terms differ from the Act or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services. (Brief at 20).

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<sup>8</sup> *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The OCA adopts the arguments set forth by Covad in its Complaint and Motion. The OCA agrees that Section 271 and state law provide an independent source of authority to require line sharing. The OCA, however, does not elect to address pricing issues at this juncture. It emphasizes that the question of Verizon PA eliminating its present line sharing tariff should be considered separately from the question of what pricing should be applied. (*See* OCA Brief at 6)

As noted, ALJ Corbett denied both the Verizon PA Motion to Dismiss and the Covad Motion for Judgment on the Pleadings.<sup>9</sup> Consequently, both Parties filed pleadings indicating a view that there are no genuine issues of material fact to be resolved and that they are each entitled to a favorable determination on their respective positions as a matter of law and without the necessity for a hearing.<sup>10</sup> ALJ Corbett disagreed and found that the Commission has jurisdiction to address the threshold jurisdictional question of preemption in this case. (I.D. at 21). However, in order to do so would require the development of a record in light of the ambiguity of material facts essential to a reasoned decision. (I.D. at 22). ALJ Corbett was further persuaded that the Commission had jurisdiction to make a threshold determination of the propriety of removing line sharing from its tariff in light of the fact that access to the HFPL was integral to the FCC's determination to grant it authority to provide long-distance service in the *Pennsylvania Section 271 Order*.<sup>11</sup>

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<sup>9</sup> Covad does not seek interlocutory review of the denial of its motion for judgment on the pleadings.

<sup>10</sup> By e-mail communications attached to the Covad Brief as Appendix A, the Office of ALJ has indicated that the question of whether the independent access to the loop requirement of Section 271 approval requires access to the whole loop or access to a select portion of the loop was amenable to resolution by explanation of counsel. (Brief at 3).

<sup>11</sup> *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*; 16 FCC Rcd 17419, 2001 FCC LEXIS 5009 (September 19, 2001).

### 3. Disposition

On consideration of the positions of the Parties, and the Petition and Stay, we shall grant interlocutory review, consistent with the discussion below. The standards for interlocutory review of a material question sought by a participant are set forth at 52 Pa. Code § 5.302(a). The Regulation requires that the petitioning party “state ... the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” Therefore, the principal concern in our determination of whether interlocutory review is appropriate, is whether the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process. *See Joint Application of Bell Atlantic Corporation and GTE Corporation*; Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. P.U.C. v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. P.U.C. v. C.S. Water and Sewer Associates*, 74 Pa. PUC 716 (1991); *Re Knights Limousine Service, Inc.*, 59 Pa. PUC 538 (1985).

Verizon PA raises substantial jurisdictional questions which go the very heart of this Commission’s ability to suspend and investigate its proposed tariff revisions for line sharing. We, therefore, conclude that interlocutory review is appropriate. Resolution of the material questions raised by Verizon PA at this stage of the proceeding will remove uncertainty regarding the effect of Commission action on the lawfulness of Verizon PA’s revisions to its line sharing rules, will prevent substantial prejudice, and expedite the conduct of the proceeding as it relates to all participants.

On consideration of the first material question, we shall decline to answer it. The TRO’s potential to preempt state law is a concern that has been raised as a result of statements at paragraph 195 where the FCC observed that:

195. Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and “substantially prevent” implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instance for the subject states to amend their rules and to alter their decision to conform to our rules.

The preemption of state law resulting from the TRO was an issue expressly raised by this Commission in the appeal. The D.C. Circuit Court concluded that the state commission challenge to this aspect of the TRO was unripe. *See USTA v. FCC*, slip op. at 61. Notwithstanding the filing of Verizon PA’s proposed tariff supplement, this Commission finds that any conclusion regarding the authority of the state commission to require unbundling of the HFPL independent of the analysis engaged in by the FCC, should be deferred at this time. We observe that the course of TRO litigation is uncertain at this time and that FCC initiatives could, perhaps, obviate the need to resolve the preemption. Our decision to decline to answer Verizon PA’s first material question at this time is consistent with the conclusions we reach relative to the second material question raised as addressed in the discussion that follows.

On consideration of the positions of the Parties, we shall decline to answer the second material question as presented by Verizon PA, but shall re-phrase the question as follows:

**(2) RE-PHRASED: Whether this Commission lacks independent authority under Section 271 of the Act to relieve Verizon PA of a line sharing requirement.**

On consideration of the positions of the Parties, we shall answer the material question, as re-phrased, in the affirmative, clarified by our discussion below.

We agree with the positions of Covad and the OCA, which are in accord with the conclusions of ALJ Corbett, that Section 271 of the Act provides an independent source of authority by which Verizon may still be under a requirement to provide non-discriminatory access to the HFPL. At para. 653 of the TRO, the FCC concluded:

For reasons set forth below, we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Verizon PA does not dispute the fact that Section 271 obligations are not necessarily relieved based on the FCC's Section 251 unbundling analysis. (*See* VZ Brief at 16; I.D. at 6) Also, the FCC conclusion that Section 271 requirements are distinct from the "impairment" analysis of Section 251 of TA96, has been affirmed by the D.C. Circuit Court:

The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases in order to enter the interLATA market. Order ¶¶ 653-55.

*USTA v. FCC*, slip op.

While we agree with the positions of Covad and the OCA concerning the independent basis under Section 271 for non-discriminatory access to the HFPL, we acknowledge that the state commission's role in this regard is consultative and that the ultimate adjudicative authority lies with the FCC. We also note that the TRO and the D.C. Circuit Court have not specifically addressed the extent of loop unbundling.

Notwithstanding the distinction between Verizon PA's possible obligations arising from Section 271 of TA96, Verizon PA raises a substantial question as to whether the unbundling requirement for local loop transmission (Checklist item # 4) would include the HFPL. Verizon PA asserts; in pertinent part, that:

. . . Covad is wrong in implying that line sharing is a section 271 requirement because a straightforward reading of that section demonstrates that it is not. Covad contends that Verizon is required to provide line sharing because Checklist Item 4 requires "[l]ocal loop transmission from the central office to the customer's premises, unbundled from switching or other services." (Covad Motion at 5). Checklist Item 4, however, requires Verizon to provide **only** a "loop" unbundled from switching, not some portion of the capacity of the loop. The plain language of the statute, therefore, does not require unbundling of the high frequency portion of the loop (*i.e.* line sharing). The limited and specific language of section 271 is in direct contrast to the more expansive language of section 251(c)(3), which requires ILECs to provide unbundled "access" to "network elements," including their "features, functions, and capabilities."

(VZ Brief at 17) (Notes omitted; emphasis original).

While this Commission does not have the authority to ultimately construe the statutory requirements for Checklist item # 4, we need not engage in an extensive analysis. We are able to conclude that we would agree with the position of Covad to the extent that under prior line sharing rules, unbundling of the HFPL of the stand-alone

copper loop has been invariably discussed by the FCC in conjunction with that agency's review of RBOC compliance with Checklist item # 4. *See In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*; 16 FCC Rcd 17419 (September 19, 2001) Paras. 76-78; *In the Matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*; 16 FCC Rcd 14147 (July 20, 2001) Para. 10-11; *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*; 17 FCC Rcd 17595 (September 18, 2002); *In the Matter of Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*; 18 FCC Rcd 5212 (March 19, 2003); *In the Matter of Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Hampshire and Delaware*; 17 FCC Rcd 18660 (September 25, 2002); and *In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*; 18 FCC Rcd 25504 (December 3, 2003).

Section 271 Checklist item # 4, provides, in pertinent part, as follows:

- (B) COMPETITIVE CHECKLIST: Access or inter-connection provided or generally offered by a Bell

operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

\* \* \*

- (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

The language of Checklist item #4 provides for the unbundling of the local loop transmission *from switching or other services*. The FCC TRO has stated:

- 268. In order to implement the line sharing transition plan described above, we find that it is necessary to reinstate certain rules concerning the HFPL. Specifically, we define the HFPL as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions. The features, functions and capabilities of the HFPL network element are those that establish a complete transmission path on the frequency range above the one used to carry analog circuit-switched voice transmissions between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises, and includes any inside wire owned by the incumbent LEC. Incumbent LECs must condition loops to enable requesting carriers to access the HFPL. Finally, incumbent LECs must provide physical loop test access points on a nondiscriminatory basis for the purpose of loop testing, maintenance, and repair activities. (Notes omitted).

In light of the above quoted language and the inclusion of line sharing arrangements in determining RBOC compliance with Checklist item # 4, we find that it is a reasonable interpretation of Checklist item #4 to also include the HFPL of the local loop.

Based on the conclusion that line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations, we conclude that there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders. We further note that on October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forbear from § 271 obligations. See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); CC Docket No. 01-338. The matter is pending. Therefore, we conclude that it would be improvident to adjudicate Verizon PA's request to remove line sharing from its PA 216 Tariff until the ambiguity surrounding its obligation to maintain line sharing based on Section 271 has been addressed by the FCC.

If Verizon PA believes that line sharing should no longer be a part of its Section 271 obligations, that issue should be put to the FCC either in conjunction with or separate from, its forbearance request. Our determination to answer the second material question on Section 271 TA96 authority, makes it unnecessary to address state authority or preemption issues at this time. We express no opinion regarding the enforceability of our independent state authority preserved by 47 U.S.C. § 251(d)(3) and any other applicable law. After Verizon obtains a determination from the FCC as to its ongoing obligation to maintain line sharing as part of its 271 commitments, Verizon may then petition the Commission for such further action as may be appropriate.

### **Conclusion**

We decide that Verizon PA's request for interlocutory review is appropriate to a limited extent. Due to pending court litigation, we decline to answer Verizon PA's first material question regarding the preemptive effect of the FCC's TRO at this time. We agree to answer Verizon PA's second material question in part, but rephrase the

question to clarify the scope of our jurisdiction based on the unique circumstances of this case. The question answered, as rephrased, is whether this Commission lacks independent authority under 47 U.S.C. § 271 to relieve Verizon PA of a line sharing requirement. We answer in the AFFIRMATIVE.

This Commission lacks independent authority under Section 271 of TA96 to relieve Verizon PA of the obligation to provide access to line sharing, which is imposed by the FCC as a condition of Verizon PA's authority to enter the long distance market. Unless or until the FCC affirmatively relieves Verizon PA of this Section 271 access obligation imposed as a condition of Section 271 approval, we will not relieve Verizon PA of its corresponding tariff obligation to provide such access. This proceeding is remanded to the Office of Administrative Law Judge for further proceedings as may be necessary to address any remaining issues; **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition of Verizon Pennsylvania Inc. for Interlocutory Commission Review and Answer to a Material Question and a Stay of Proceedings is granted.
2. That the Commission declines, at this time, to answer the following material question:

Whether this Commission is preempted by federal law from requiring Verizon to provide "line-sharing" under state tariff under terms, conditions and prices differing from those that the FCC has determined are appropriate under the federal Telecommunications Act ("Act"); and

3. That the Commission declines to answer the second material question presented in the instant Petition as stated. The Commission re-phrases the second material question, as follows, and answers the question in the AFFIRMATIVE, consistent with our discussion contained in this Opinion and Order:

**RE-PHRASED:** Whether this Commission lacks independent authority under Section 271 of the Act to relieve Verizon PA of a line sharing requirement.

4. That the matter shall be returned to the Office of Administrative Law Judge for such proceedings as may be deemed necessary.

**BY THE COMMISSION,**

James J. McNulty,  
Secretary

(SEAL)

ORDER ADOPTED: July 8, 2004

ORDER ENTERED: July 8, 2004