

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

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 :  
 \ U.S. LEC of Pennsylvania, Inc. : Docket No.  
 :  
 Petition for abbreviated dispute : A-310814,  
 resolution of interconnection : F0002  
 agreement conflict with Verizon :  
 Pennsylvania, Inc. :  
 :  
 Initial telephonic :  
 prehearing conference. :  
 :  
 -----X

DOCKETED  
MAY 09 2001

Pages 1 through 23 Judge's Chambers  
 State Office Building  
 Broad and Spring Garden Streets,  
 Philadelphia, Pennsylvania  
 Tuesday, May 8, 2001

DOCUMENT  
FOLDER

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

HERBERT SMOLEN, Administrative Law Judge

*HS*

APPEARANCES:

LINDA C. SMITH, Esquire  
 Dilworth Paxson LLP  
 Suite 403  
 305 North Front Street  
 Harrisburg, Pennsylvania 17101  
 (For U.S. LEC)

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ANTHONY E. GAY, Esquire  
 32nd Floor Northwest  
 1717 Arch Street  
 Philadelphia, Pennsylvania 19103  
 (For Verizon Pennsylvania, Inc.)

Commonwealth Reporting Company, Inc.  
 700 Lisburn Road  
 Camp Hill, Pennsylvania 17011

## APPEARANCES (CONTINUED):

MICHAEL L. SHOR, Esquire  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street Northwest  
Washington, D.C. 20007  
(For U.S. LEC)

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**Commonwealth Reporting Company, Inc.**

700 Lisburn Road  
Camp Hill, Pennsylvania 17011

(717) 761-7150

1-800-334-1063

WITNESS INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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(None.)

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EXHIBIT INDEX

<u>NUMBER</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
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(None.)

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## P R O C E E D I N G S

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2 ADMINISTRATION LAW JUDGE HERBERT SMOLEN: This is  
3 the matter of the petition of U.S. LEC of Pennsylvania,  
4 Incorporated for abbreviated dispute resolution of  
5 interconnection agreement conflict with Verizon  
6 Pennsylvania, Inc. in Docket A-310814, Folder 2.

7 My name is Herbert Smolen, Administrative Law Judge  
8 assigned by the Commission to hear this matter and to  
9 issue an initial decision in writing.

10 This is a telephonic prehearing conference and I am  
11 going to ask the parties to enter their appearance for  
12 this record.

13 Let's start with Linda Smith.

14 MS. SMITH: Yes, Your Honor. I am Linda Smith with  
15 Dilworth Paxson and my business address is 305 North  
16 Front Street, Suite 403, Harrisburg, Pennsylvania  
17 17101-1236.

18 JUDGE SMOLEN: All right.

19 Mr. Gay.

20 MR. GAY: Yes, Your Honor. This is Anthony Gay for  
21 Verizon. I am here with my colleague William Peterson.  
22 Our address is 1717 Arch Street, 32nd floor northwest,  
23 Philadelphia, Pennsylvania 19103.

24 JUDGE SMOLEN: All right. The first item on the  
25 agenda -- we will get the appearance of Michael Shor

1 after we deal with this motion to grant admission pro hac  
2 vice for Michael Shor, Esquire, for the limited purpose  
3 of representing U.S. LEC, Inc. in this proceeding.

4 Is there any objection by Verizon here?

5 MR. GAY: No, Your Honor.

6 JUDGE SMOLEN: Then without objection Mr. Shor is  
7 admitted for the purposes set forth in the motion for  
8 admission.

9 Now, Mr. Shor, would you now enter your appearance?

10 MR. SHOR: Thank you, Your Honor.

11 My name is Michael Shor, S-H-O-R. I am with the  
12 law firm of Swidler Berlin Shereff Friedman, LLP at 3000  
13 K Street Northwest, Suite 300, Washington, D.C. 20007.

14 JUDGE SMOLEN: Do you have anyone with you?

15 MR. SHOR: No, I do not.

16 JUDGE SMOLEN: Before we get into the prehearing  
17 conference, are there any preliminary preliminary  
18 matters?

19 MR. GAY: Yes, Your Honor. I think Michael Shor  
20 and I are in agreement that we have a settlement proposal  
21 in principle. Our contract people have to sort of work  
22 out the details but that probably should be something we  
23 should mention at the outset.

24 MR. SHOR: I think it is fair to say that we have  
25 had discussions and I made an offer to Verizon which

1 Verizon has accepted in principle. But moving from in  
2 principle to an agreed term sheet is often fraught with  
3 peril.

4 Our contract people are going to speak right after  
5 this call but I would like to go forward with the call  
6 and keep the hearing on the calendar to ensure that the  
7 parties get this resolved promptly one way or another.

8 JUDGE SMOLEN: I like that thought.

9 Any comments from any of the other parties?

10 MR. GAY: Verizon is in agreement with that. The  
11 devil is usually in the details, so we are willing to  
12 proceed.

13 JUDGE SMOLEN: That's fine.

14 Let's put one other thing on the record here.  
15 Originally when service of the petition was made by the  
16 Commission the Office of Consumer Advocate, the Office of  
17 Small Business Advocate and the Commission's Office of  
18 Trial Staff were served. Am I correct that none of those  
19 parties, that is, OTS, OSBA and OCA are participating or  
20 will participate in this case?

21 MS. SMITH: Your Honor, this is Linda Smith.

22 I did personally contact the OSBA and OTS and they  
23 are not interested in participating and they have not  
24 made any filings to indicate otherwise. I also spoke  
25 with OCA and they did get back to my office. I

1 understand they contacted you directly to indicate that  
2 they are not interested in participating in this case at  
3 this point in time.

4 JUDGE SMOLEN: That's correct.

5 Having put those facts on the record, let's then  
6 proceed with the prehearing conference. Since this is  
7 U.S. LEC's petition, do you want to go forward? I read  
8 the prehearing memoranda. They are relatively clear. If  
9 you want to just summarize the positions in very brief  
10 discourse I will listen to it.

11 MR. SHOR: Yes, Your Honor. This is Michael Shor  
12 on behalf of U.S. LEC.

13 Very briefly, U.S. LEC has been attempting to adopt  
14 an agreement in Pennsylvania for many months now. We  
15 have submitted at least two requests to Verizon. One  
16 back in January was rejected. The request to adopt a  
17 global GNAPS New Hampshire agreement was rejected and in  
18 March we submitted a request to adopt the arbitrated  
19 Focal/Verizon agreement. It is my understanding that  
20 Verizon initialled acceded to that request but then  
21 withdrew that acceptance on the basis that Verizon  
22 believed that agreement wasn't available.

23 U.S. LEC respectfully submits that we had submitted  
24 a valid request to adopt a viable and available agreement  
25 and that Verizon is unreasonably withholding its consent

1 -- if that is even permitted -- to our adoption and we  
2 believe the Commission needs to step in expeditiously to  
3 permit that adoption to go forward.

4 JUDGE SMOLEN: Fine. Let's go off the record for a  
5 minute.

6 (Discussion off the record.)

7 JUDGE SMOLEN: Back on the record.

8 Go ahead. Is there a response?

9 MR. GAY: Yes. This is Tony Gay for Verizon.

10 JUDGE SMOLEN: Go ahead.

11 MR. GAY: Briefly our position is that the dispute  
12 in question as envisioned by the ADRP rules is the Focal  
13 agreement and whether U.S. LEC can opt into it. The  
14 Focal agreement was effective on February 6. We received  
15 a request from U.S. LEC to opt into that agreement on  
16 March 28.

17 JUDGE SMOLEN: Of what year?

18 MR. GAY: 2001. I'm sorry.

19 JUDGE SMOLEN: Okay. Both dates are 2001?

20 MR. GAY: Right. It was effective February 6,  
21 2001. We received U.S. LEC's request to opt into the  
22 Focal agreement on March 28, 2001. And we proceeded that  
23 process that request.

24 However, Focal -- not Verizon -- Focal wanted to  
25 change that agreement and so the Focal agreement is no

1 longer in effect and we are in the process of getting a  
2 new agreement filed.

3 JUDGE SMOLEN: Stop for a minute. Are you saying  
4 there is no agreement Verizon/Focal?

5 MR. GAY: Well, the Focal agreement that U.S. LEC  
6 originally sought to adopt was terminated when Focal  
7 entered into a new arrangement with Verizon. The  
8 supplemental agreement should be filed with the  
9 Commission shortly.

10 JUDGE SMOLEN: What does shortly mean?

11 MR. GAY: They are working on it right now. I  
12 can't give you a specific date because Focal and Verizon  
13 are finalizing the terms. But I don't expect it to be a  
14 substantial amount of time.

15 JUDGE SMOLEN: Let me just go back one second. My  
16 specific question: Focal/Verizon, is there an agreement  
17 now in place?

18 MR. SHOR: Your Honor, Michael Shor for U.S. LEC.

19 It is our position that the Focal/Verizon agreement  
20 is in place until a new agreement is approved by the  
21 Commission. And by Verizon's own admission it has not  
22 even been filed yet and the Commission has up to 90 days  
23 to approve the new agreement.

24 JUDGE SMOLEN: All right. Okay.

25 Go ahead, sir.

1 MR. GAY: Your Honor, we don't agree that a  
2 terminated agreement remains in effect because the  
3 approved successor has not been put into place with the  
4 Commission yet.

5 JUDGE SMOLEN: And again, just one answer, there is  
6 some kind of arrangement, is there not, between Focal and  
7 Verizon today, right this minute?

8 MR. GAY: We believe it is the supplement to the  
9 February 6 agreement. So if the question is is the  
10 February 6 agreement in effect, we say no.

11 JUDGE SMOLEN: Okay. I don't want to get into the  
12 merits of the case. I just wanted to get positions.  
13 That is your position and we know the other side's  
14 position.

15 Allk right. Do you want to continue?

16 MR. GAY: This is Tony Gay, Your Honor.

17 Just to finish out our position, we really have  
18 three responses to U.S. LEC's petition. We don't believe  
19 under the ADRP rules that they have negotiated for 30  
20 days and they have not negotiated to an impasse.

21 Secondly, as we stated before, we don't believe  
22 that the February 6 Focal agreement is in effect because  
23 Focal wanted to change that agreement. And as soon as  
24 the new agreement is on file -- I mean, no one has ever  
25 said we are not going to let U.S. LEC look at that

1 agreement and work on opting into it.

2 JUDGE SMOLEN: And is the third the FCC?

3 MR. GAY: I'm sorry, Your Honor?

4 JUDGE SMOLEN: You said you had three positions.

5 MR. GAY: With the change of law provisions in the  
6 old Focal agreement, in any event the reciprocal  
7 compensation rates in that agreement would not be in  
8 effect because the FCC's order is a significant change in  
9 law which changes those rates. In essence it means that  
10 they have to be --

11 JUDGE SMOLEN: Well, would that really affect this  
12 case? Whatever conditions that the old agreement were  
13 subject to if indeed U.S. LEC could opt into that  
14 agreement, the fact that the law may have been changed or  
15 that the old agreement is subject to conditions, that  
16 would not effect their ability to opt in assuming that  
17 agreement is still in effect, would it?

18 MR. GAY: Assuming that agreement is still in  
19 effect, no. But that is an assumption that we don't  
20 agree with.

21 JUDGE SMOLEN: I understand that. I was just  
22 addressing the third prong of your argument or of your  
23 position.

24 MR. GAY: The third prong of my argument is that we  
25 believe that assuming that the old Focal agreement could

1 be opted into it would be in our opinion a futile gesture  
2 because we just would have to renegotiate the recip comp  
3 provisions.

4 JUDGE SMOLEN: What you are saying is if that be  
5 the case and U.S. LEC did decide to opt in and they were  
6 permitted to opt in, they would be going in at their own  
7 peril depending on what the conditions are eventually are  
8 worked out to be with reciprocal compensation.

9 MR. GAY: That's correct, Your Honor.

10 JUDGE SMOLEN: Okay.

11 MR. SHOR: Your Honor, can I respond very briefly  
12 to his delineated three points?

13 JUDGE SMOLEN: Yes. Go ahead.

14 MR. SHOR: It would be our position that the  
15 negotiations have extended far beyond 30 days, that the  
16 initial request to adopt an agreement was submitted to  
17 Verizon in January. And it is not my understanding that  
18 filing one request and then having to file a second one  
19 starts a new clock for negotiations. The negotiation at  
20 issue is the negotiation of a new interconnection  
21 agreement, whichever one we adopt, and therefore that  
22 began in January and has extended well past 30 days and  
23 that we have in fact reached an impasse in that both  
24 agreements we have sought to adopt we have been entirely  
25 stymied and told, no, they are not available.

1 JUDGE SMOLEN: That is set forth in your petition.

2 MR. SHOR: We have already set forth our position  
3 on whether the Focal agreement is available or not.

4 As to the third prong, whatever the change of law  
5 provision says, it says. It is not a self-effectuating  
6 arrangement and Verizon and U.S. LEC would have to sit  
7 down and see how it impacts it. To the extent that the  
8 FCC's order is stayed or is reversed then plainly if we  
9 are in the old Focal agreement then the rates that are in  
10 place in that agreement would revert back and would  
11 govern the parties' relationship.

12 So I am not sitting here telling you that we get  
13 that agreement without change because I have looked at  
14 the change of law provision and it is pretty clear. So  
15 we go into it knowing that we may be forced to negotiate  
16 how the FCC framework fits in it, but that is certainly  
17 not the only provision in that agreement. And I think it  
18 is U.S. LEC's position that given the arbitrator's Focal  
19 agreement and the new one that may be coming down the  
20 pike, the old one presents a more viable framework for  
21 our operations and our business and that we are entitled  
22 to adopt it with whatever change we might need to make to  
23 one aspect of it, recip comp.

24 So I think we have pretty clearly set out the  
25 impasse that exists between the parties on our position

1 and their's.

2 JUDGE SMOLEN: Let me ask this question. Let's  
3 assume that it is a fait accompli that U.S. LEC opts into  
4 the old Verizon/Focal agreement subject to whatever  
5 conditions or changes there may be. Is it U.S. LEC's  
6 position that U.S. LEC can negotiate those conditions?  
7 Or is it merely Focal/Verizon to negotiate those  
8 conditions or the reciprocal compensation and whatever  
9 that comes out to be U.S. LEC is bound by it because it  
10 has opted into an agreement with conditions?

11 MR. SHOR: It is my understanding, Your Honor --  
12 and I have certainly been wrong on many occasions in my  
13 life -- that the way section 252(i) of the act operates  
14 is this: whatever shape the Focal/Verizon agreement  
15 exists in as of the date that we adopt it we have the  
16 right under 252(i) and the pick and choose rules to take  
17 that agreement in its entirety or to take those portions  
18 of that agreement that can stand alone and are not  
19 integrally related. But assume for these purposes that  
20 the Focal/Verizon agreement as it exists on the date we  
21 adopt it, which is March 28, we would take that.

22 We then sign a separate contract with Verizon that  
23 governs going forward how we impact it. So what Focal  
24 does after we have adopted the agreement cannot impact  
25 what we do after we have adopted the agreement. What

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1 Focal does before we have adopted the agreement does  
2 because we take it on the same terms and conditions that  
3 they do. But once we have adopted it we then have to  
4 negotiate the recip comp provisions separately with  
5 Verizon.

6 JUDGE SMOLEN: All right. Let's hear what Verizon  
7 has to say on that point.

8 MR. GAY: Your Honor, I think to answer the  
9 question briefly, they take the agreement as it is if it  
10 is effective on the date that they opt into it.

11 JUDGE SMOLEN: Okay. I understand. I understand  
12 the positions.

13 Does anybody want to say anything else?

14 MR. GAY: Well, Your Honor, I would just add --

15 JUDGE SMOLEN: And who is this?

16 MR. GAY: -- just for the purposes of the record we  
17 think when there is a new agreement that has been reached  
18 by the parties that it would be incorrect, we say  
19 respectfully to you, Your Honor, incorrect to allow  
20 someone from outside that agreement to opt into an  
21 agreement that the parties can no longer operate under.

22 JUDGE SMOLEN: I understand that position.

23 One other thing before we go forward, and so that  
24 it is on this record. I do understand that at least for  
25 purposes right now that the proceeding has been extended

1 to June 8 of 2001. Is that correct?

2 Let's go to U.S. LEC.

3 MR. SHOR: I am not sure I understand what you  
4 mean, Your Honor.

5 MS. SMITH: Yes, Your Honor. The initial decision  
6 is due on June 8 pursuant to our discussion over the  
7 telephone of last week. And I believe that both parties  
8 have sent you a letter indicating that the extension to  
9 June 8 is acceptable.

10 JUDGE SMOLEN: Well, I know I got one letter. I  
11 don't know if I got a second letter.

12 MR. GAY: This is Tony Gay from Verizon.

13 Your Honor, in our transmittal letter we agreed to  
14 the June 8 decision date.

15 JUDGE SMOLEN: Okay. That's fine. So it is on the  
16 record, both parties agree. Even if we don't have those  
17 letters around it is on the record now.

18 Anything else we have to discuss? There is no  
19 problem with keeping the hearing date on schedule. And  
20 hopefully the parties will continue to negotiate this  
21 thing out to an amicable settlement.

22 Does anybody else want to add anything?

23 MR. SHOR: Your Honor, just in terms of the  
24 procedure for the hearing do you intend to address any of  
25 that coming up? Or may I raise that at this moment?

1 JUDGE SMOLEN: Say again.

2 MR. SHOR: The procedure for the hearing itself. I  
3 have a couple of questions and would have a couple of  
4 proposals.

5 JUDGE SMOLEN: I'm not following you.

6 MR. SHOR: Well, for example, U.S. LEC identified  
7 its witness in its brief. Verizon has not. I would like  
8 to request that Verizon be directed to identify its  
9 witness. And I would also like to request that to the  
10 extent that the parties are going to rely on exhibits in  
11 their case in chief that they exchange those exhibits by  
12 Friday.

13 JUDGE SMOLEN: Well, let's ask -- let me look at  
14 the prehearing.

15 (Pause.)

16 JUDGE SMOLEN: Can you identify who your witness  
17 will be, Mr. Gay?

18 MR. GAY: Yesterday we could not. This is Tony  
19 Gay. I believe it is going to be Gary Librizzi. He is  
20 one of Verizon's employees in their product group.

21 JUDGE SMOLEN: Gary -- what is it?

22 MR. GAY: L-I-B-R-I-Z-Z-I.

23 MR. SHOR: L-I-B-R-I-Z-I?

24 MR. GAY: Two z's.

25 JUDGE SMOLEN: Two z's. Librizzi. Okay.

1 Now, what was the other request that was made by  
2 U.S. LEC?

3 MR. SHOR: We would just ask that we be given any  
4 of Verizon's exhibits at that time.

5 MR. GAY: Of course we will exchange exhibits.

6 JUDGE SMOLEN: All right. Is Friday of this week a  
7 good date for exchange of exhibits by both parties?

8 MR. GAY: This is Tony Gay for Verizon.

9 Yes, Your Honor, for Verizon.

10 MR. SHOR: Yes, it would be for U.S. LEC. Since  
11 the hearing is Tuesday getting them Friday would give us  
12 both time to prepare.

13 JUDGE SMOLEN: Then that is in hand on Friday.

14 MR. SHOR: Yes. Either by fax or hand delivery or  
15 Federal Express to be received Friday.

16 JUDGE SMOLEN: That's fine.

17 Are there any other procedural concerns concerning  
18 the hearing, the scheduled hearing?

19 MR. GAY: This is Tony Gay for Verizon.

20 Not on our part.

21 MR. SHOR: This is Michael Shor for U.S. LEC.

22 Not on our part, Your Honor.

23 MS. SMITH: Your Honor, I would just like to  
24 clarify whether it is the parties' intentions to file any  
25 further pleadings via E-mail.

1 JUDGE SMOLEN: Well, there is some new matter in  
2 one of the documents so I would assume that there is  
3 going to be some kind of reply.

4 MS. SMITH: Yes, there would be a reply and there  
5 is also briefs. And I don't know if there will be any  
6 motions forthcoming. But the question, I guess, is is  
7 there an agreement to serve each other by E-mail or fax  
8 or anything of that nature given the accelerated process  
9 we are using. I am proposing that we do agree to serve  
10 by E-mail or fax.

11 JUDGE SMOLEN: Either one or both is satisfactory.

12 MS. SMITH: Your Honor, do you have any special  
13 requests in regard to the brief? Did you want us to  
14 serve you with a disk or an E-mail version of the brief?

15 JUDGE SMOLEN: Well, I would like to get both. I  
16 am not sure about the E-mail because our E-mail sometimes  
17 does not accept E-mail from outside our internal E-mail  
18 thing. So what I would like to get is a fax of the brief  
19 and a disk followed up. Is that okay?

20 MR. GAY: This is Tony Gay for Verizon, Your Honor.

21 That is fine with us. We don't expect that we will  
22 be filing anything in advance of the hearing but we will  
23 serve anything on U.S. LEC by fax. I think fax would  
24 probably be best for us.

25 MR. SHOR: That works fine.

1 I think the brief we are referring to is the  
2 post-hearing brief?

3 MR. GAY: Right. That's what I take it as.

4 JUDGE SMOLEN: So let's do that by fax. And then  
5 if you can follow up with a disk it would be very helpful  
6 to the secretaries here and to me.

7 Anything else we have to discuss before we  
8 conclude?

9 MR. SHOR: Nothing from U.S. LEC, Your Honor.

10 MR. GAY: This is Tony Gay.

11 Nothing from Verizon, Your Honor.

12 JUDGE SMOLEN: Okay. Then I want to thank you for  
13 participating at the prehearing and urge the parties to  
14 move ahead with their negotiations toward amicable  
15 resolution. If you do resolve it amicably prior to the  
16 hearing date please notify me so that we can cancel the  
17 court reporter.

18 MR. SHOR: Tony, would you give me a buzz?

19 MR. GAY: I certainly will, Michael.

20 MR. SHOR: Okay.

21 JUDGE SMOLEN: Anything else?

22 (No audible response.)

23 JUDGE SMOLEN: Then we are going to adjourn. Thank  
24 you very much and I look forward to hearing from you  
25 promptly.

1 MR. GAY: Thank you, Your Honor.

2 MR. SHOR: Thank you, Your Honor.

3 MS. SMITH: Thank you, Your Honor.

4 (Whereupon, at 10:30 a.m., the prehearing  
5 conference was concluded.)

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C E R T I F I C A T E

I hereby certify, as the stenographic reporter,  
that the foregoing proceedings were taken  
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By:

*Robert J. Stonaker*

Robert J. Stonaker

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