

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

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 :  
Incumbent Local Exchange Carriers :  
 Investigation into the obligations of :  
 incumbent local exchange carriers to :  
 unbundled local circuit switching for :  
 the enterprise market. :  
 :  
 Initial Telephone Prehearing :  
 Conference. :  
 :  
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Docket No. I-00030100

DOCKETED  
OCT 31 2003

Pages 1 through 23

Hearing Room 2, Plaza Level  
Commonwealth Keystone Building  
Harrisburg, Pennsylvania

Friday, October 24, 2003

Met, pursuant to notice, at 2:00 p.m.

BEFORE:

MICHAEL C. SCHNIERLE, Administrative Law Judge

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WITNESS INDEX

WITNESSES

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(None.)

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FORM 2

EXHIBIT INDEX

NUMBER FOR IDENTIFICATION IN EVIDENCE

(None.)

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FORM 2

P R O C E E D I N G S

1  
2 ADMINISTRATIVE LAW JUDGE MICHAEL C. SCHNIERLE: This  
3 is the time and place set for a prehearing conference in the  
4 Commission's investigation into the obligations of incumbent  
5 local exchange carriers to provide unbundled local circuit  
6 switching for the enterprise market.

7 The docket number us I-00030100. My name is  
8 Michael Schnierle.

9 Present in the courtroom are Alan Kohler representing  
10 the Pennsylvania Carriers Coalition; Phillip McClelland and  
11 Barrett Sheridan representing the Office of Consumer  
12 Advocate; Patricia Armstrong representing the Rural Company  
13 Coalition; Kandace Melillo representing the Commission's  
14 Office of Trial Staff; Angela Jones representing the Office  
15 of Small Business Advocate.

16 On the telephone conference call I have Julia Conover  
17 and William Peterson representing Verizon; and Ross Buntrock  
18 representing METEL and Info-Highway.

19 I received a call earlier from Phil Mackrees who said  
20 he would not be participating in this prehearing conference,  
21 and I received an email from Norman Kennard to the same  
22 effect.

23 As I understand it, what we need to do here today is  
24 set a hearing schedule consistent with having briefs due by  
25 November 17. And that's the primary piece of business that

1 we have to transact.

2 It's my understanding that the parties have not  
3 reached an agreement on the day or days of hearing. Is that  
4 correct?

5 MS. MELILLO: Correct.

6 JUDGE SCHNIERLE: You'll have to speak louder.

7 MS. MELILLO: That's correct.

8 JUDGE SCHNIERLE: All right. Well, I'm going to do  
9 something, I'm going to make two comments that hopefully  
10 will open things up a little bit on that score.

11 I don't believe that November 13 is appropriate,  
12 simply because it's too close to the date the briefs are  
13 due. We're going to have one-day turnaround on the  
14 transcript, but even so, that's going to be cutting it  
15 pretty close.

16 I had previously supplied a list of days that I was  
17 available. And those have changed a little bit for the  
18 better. So I'll give you that information at this time.

19 The days that I have available to hold a hearing are  
20 October 30 and 31; November 3 is open, November 5 is open,  
21 and if necessary, November 6 and 7 can be opened up, with  
22 the caveat that on November 7 we're not going to go past  
23 about 5:00 p.m. And November 10 is available. Otherwise  
24 that pretty much covers it.

25 Do you want to go off the record and discuss what day

1 or days you'd like to try to hold the hearings? Let's do  
2 that.

3 (Discussion off the record.)

4 JUDGE SCHNIERLE: Let's go back on the record.

5 After an off-the-record discussion it has been  
6 decided that the hearing will be held on November 7,  
7 starting at 9:00 a.m., in Harrisburg.

8 Ms. Melillo.

9 MS. MELILLO: Thank you, Your Honor.

10 I wanted to bring up the issue of discovery. You  
11 know we have a very short time frame in this case. There  
12 may be a need for some questions about the information we've  
13 received.

14 Perhaps an informal exchange of information might be  
15 best, given the time constraints. But I did want to bring  
16 that matter up at this time.

17 JUDGE SCHNIERLE: Well, has discovery been taking  
18 place?

19 MR. KOHLER: No. Although, again, I don't want to  
20 speak for Verizon. But we've had some discussions, and  
21 we're trying to -- again, being at a handicap because I  
22 haven't seen what they're going to file, we're trying to  
23 avoid the need for discovery, and think we may be able to  
24 avoid the need for discovery.

25 I think we'll have a better feel for that after

1 today's filing. But that's, I think, the goal that's been  
2 discussed between the parties.

3 With that said, we may want to set up some sort of  
4 process in case it's necessary.

5 MS. CONOVER: Your Honor, Julia Conover.

6 Are they and other parties thinking of filing  
7 anything? I'm just wondering what their intent was. I'm  
8 assuming not, but that may have some impact on the  
9 discovery.

10 JUDGE SCHNIERLE: Ms. Melillo?

11 MS. MELILLO: Yes. We would, I think, be wanting to  
12 file a brief, and would need to be able to understand and  
13 have discussions about parties' positions. And we have not  
14 been involved and have not been asked to be involved yet.

15 MS. CONOVER: (Unintelligible.)

16 JUDGE SCHNIERLE: Can you speak a little louder?

17 (Pause.)

18 JUDGE SCHNIERLE: Hello?

19 MS. CONOVER: Hello. I'm sorry.

20 JUDGE SCHNIERLE: You need to speak a little louder.  
21 We didn't hear you on this end.

22 MS. CONOVER: I apologize.

23 I had expected that they would be filing a brief. I  
24 really didn't inquire about testimony. If that answers that  
25 question.



1           And based upon that, I don't think that there's going  
2 to be a need for any extended discovery. And the parties  
3 can probably deal with anything like that informally.

4           I've had some discussions with Alan, and we've had  
5 some discussions about those issues.

6           JUDGE SCHNIERLE: Well, it sounds like most of what  
7 the exchange of information that's going back and forth  
8 between the CLECs and Verizon at this point. Is that  
9 correct?

10          MR. KOHLER: Yes, other than all of those discussions  
11 took place, a lot of them took place before we even filed.

12          And as to OTS, most of the discussions, I think, with  
13 Kandy have been with regard to scheduling. So I didn't know  
14 that she was thinking about discovery.

15          JUDGE SCHNIERLE: Well, let me put it this way. In  
16 the absence of knowing what you're planning on asking, if  
17 anything, would it be satisfactory if at least initially we  
18 just say that anything that's exchanged between Verizon and  
19 the CLECs also goes to the public advocates?

20          MR. KOHLER: Oh, sure. That's fine with me.

21          MS. CONOVER: That's fine with me also.

22          JUDGE SCHNIERLE: And I would say that basically  
23 you've got two weeks to get what you need to get. I can't  
24 see setting up a specific series of deadlines.

25          I would say that ask for it; if it's refused, you can

1 call me and I'll set up a conference call, and we'll see  
2 what we can work out, rather than try to set up a formal  
3 process, because there's just not much time involved, time  
4 left.

5 Is that acceptable, Ms. Conover?

6 MS. CONOVER: Yes, it is, Your Honor.

7 JUDGE SCHNIERLE: Mr. Buntrock?

8 MR. BUNTROCK: Yes, that's acceptable to me.

9 JUDGE SCHNIERLE: Anyone in here have a problem with  
10 that?

11 MS. SHERIDAN: No, Your Honor, that sounds good.

12 I just wanted to note, OCA does have expert  
13 consultants that we've engaged, although we don't anticipate  
14 presenting a witness at the hearings.

15 But to the extent that there is information  
16 exchanged, we would hope that it could be shared with our  
17 experts as well. I've shared email addresses and have them  
18 available if anyone who may not have the appropriate email  
19 addresses.

20 JUDGE SCHNIERLE: I got copies of, they signed the  
21 proprietary --

22 MS. SHERIDAN: Right, the Appendix A for this  
23 proceeding.

24 JUDGE SCHNIERLE: Just as a tangential, I got three  
25 copies of that.

1 MR. KOHLER: Yes, I got a whole bunch of copies too.

2 MS. SHERIDAN: You were on the CC for the ones we  
3 filed in the other two dockets as well. So it looks the  
4 same, but yesterday we filed the same sort of agreements in  
5 the other two dockets. And you've been on the CC for the  
6 original letter.

7 MR. KOHLER: Oh, okay.

8 JUDGE SCHNIERLE: All right.

9 MS. SHERIDAN: But this docket --

10 MR. KOHLER: You filed the nine-month.

11 MS. SHERIDAN: If you're not doing the other two  
12 dockets, ditch them.

13 (Laughter.)

14 MS. SHERIDAN: But we have the same consultants for  
15 all three proceedings.

16 JUDGE SCHNIERLE: Okay, I understand. Well,  
17 particular sordid gamaklese (phonetic) is still hanging out  
18 there somewhere.

19 (Laughter.)

20 MS. SHERIDAN: But just then with regard to the  
21 hearing in the time allowance, it's not beyond the realm of  
22 possibility of OCA doing cross examination even if we're not  
23 presenting a witness. And we need to see both sides of the  
24 case.

25 JUDGE SCHNIERLE: Right.

1           Let me ask a question. Are the main contenders here  
2 going to object to participation by the public advocates?

3           MS. CONOVER: Your Honor, this is Julia Conover.

4           I had not planned on objecting, but I do have some  
5 questions, frankly, as to what interest the Office of  
6 Consumer Advocate would have in this specific case.

7           I understand they've retained witnesses in other  
8 proceedings, but this really seems pretty far afield from  
9 the Consumer Advocate's area where they are charged with  
10 having an interest.

11           MS. SHERIDAN: Ms. Conover, we did put in our public  
12 statement that accompanied the Notice of Intervention that  
13 the general concerns for those CLECs that maybe supply  
14 service to an apartment building, that if the CLEC's unable  
15 to continue providing service as a result of developments in  
16 this proceeding, then that clearly would affect service to  
17 residential customers.

18           So you're right, it's not as direct as in some other  
19 instances, but we believe there's still an interest.

20           MR. PETERSON: (Unintelligible.)

21           JUDGE SCHNIERLE: Try again. We didn't hear you.

22           MS. CONOVER: That's fine. I understand your  
23 position. I'm not saying that I agree with it, but we  
24 understand your position. Thank you, Ms. Sheridan.

25           JUDGE SCHNIERLE: All right.

1           Is there any other business we need to discuss this  
2 afternoon?

3           Mr. Kohler?

4           MR. KOHLER: Yes, I have two items, both of which  
5 I've talked about with the other parties. But again, some  
6 of the discussions took place early, and this would all be  
7 new to the public advocates.

8           The first is that we raised an issue as to burden of  
9 proof. Presuming we end up with the burden of proof, I  
10 think under Commission process we have a right to rebuttal  
11 testimony, and would want to know how that would be  
12 accommodated. That would be the first item.

13           And the second item is -- you might want to address  
14 that first one. But the second item would be related to the  
15 protective order in this proceeding.

16           JUDGE SCHNIERLE: Well, I looked at that, and I'll  
17 tell you what my view on the burden of proof thing is. This  
18 goes back to the old line about burden of proof and the  
19 burden of going forward are not the same.

20           I understand the counter arguments on the burden of  
21 proof business. But I think clearly, given the nature of  
22 this thing, the burden of going forward rests on the CLECs.

23           And so consequently you're going to have to start the  
24 ball. If we have a hearing, your witnesses have got to go  
25 first, in my view.

1 MR. KOHLER: Okay. And I accept that, and expected  
2 that would be the ruling. And then with that said, because  
3 we have the burden, again, the first-in-last-out rule, that  
4 we would have some opportunity, whether orally or, I guess  
5 in this case, because if we were able to schedule the  
6 hearings toward the back of the schedule, possibly in  
7 writing for rebuttal.

8 MS. CONOVER: Your Honor, this is Julia Conover.

9 We agreed that they would have the burden of proof  
10 here. And based upon that, it's plain that they would have  
11 an opportunity to have the last word on rebuttal. And we  
12 don't object to that.

13 I think it would be our preference to have it in  
14 writing, or at least an outline. And again, we would expect  
15 that that would be things that would be genuinely rebuttal,  
16 and not a amending their direct case.

17 MR. KOHLER: Yes, I understand that. I understand  
18 the scope issue.

19 And actually, we would prefer that it be in writing  
20 as well. And I haven't specifically talked to Ms. Conover  
21 about that.

22 And I think again, if there is written rebuttal, we  
23 may be able to avoid hearings completely. Obviously, while  
24 I can't make that decision until after I see Verizon's case,  
25 Verizon can't make that decision until after they see our

1 rebuttal.

2 But I think that moves the ball forward in an attempt  
3 to have an efficient case as possible, and possibly even  
4 avoid discovery and hearings.

5 JUDGE SCHNIERLE: Well, Ms. Conover, is Verizon  
6 filing its --

7 MS. CONOVER: Yes, we're filing something today.

8 JUDGE SCHNIERLE: Okay.

9 MS. CONOVER: Just so you know, we'll be filing an  
10 answer. And essentially we'll be filing a motion to  
11 dismiss. But we will also be filing a short piece of  
12 testimony.

13 JUDGE SCHNIERLE: He sighs.

14 (Laughter.)

15 JUDGE SCHNIERLE: What is the basis of the motion to  
16 dismiss?

17 MS. CONOVER: That they've not met their burden; that  
18 essentially everything that is stated in the petition, and  
19 we related that more fully, does not in any way rebut the  
20 finding and provide a factual basis for the finding as  
21 delineated by the FCC; that he arguments that they're  
22 raising -- I'm shortening this, but the arguments they are  
23 raising are essentially things that the FCC has already  
24 heard and rejected, and do not in any way show any  
25 specifics.

1 JUDGE SCHNIERLE: All right. Well, I hope you're not  
2 expecting me to rule on that.

3 MS. CONOVER: No, no. Not necessarily, no. We  
4 understand that that would probably go directly to the  
5 Commission, and that given the time constraints that there's  
6 probably not time to decide that before the hearing.

7 But we do want to put on the record that we don't  
8 believe that the burden has been met by the testimony that's  
9 been submitted so far.

10 JUDGE SCHNIERLE: Well, I obviously can't preclude  
11 the Commission from taking it up. But I can't imagine that  
12 they would rule on that until they've ruled on the whole  
13 case, given the time frame on this thing.

14 Well, if they file their testimony and so forth  
15 today, when do you envision filing your rebuttal? And not  
16 having seen it, I understand you haven't seen it.

17 (Pause.)

18 MR. BUNTROCK: Your Honor, I wasn't able to hear the  
19 question.

20 JUDGE SCHNIERLE: Pardon me?

21 MR. BUNTROCK: I think we're asking a question of the  
22 CLECs, and I'm not sure that I --

23 MR. KOHLER: He couldn't hear you, Your Honor.

24 JUDGE SCHNIERLE: Oh, okay. I'm sorry. I said if  
25 Verizon files its testimony today, when do the CLECs think



1 they could file rebuttal?

2 MR. KOHLER: I don't want to undercut Mr. Buntrock,  
3 because he has a say here as well. I was thinking somewhere  
4 along the lines of the 31st.

5 MR. BUNTROCK: Yes, that would be the date I was  
6 looking at as well.

7 MR. KOHLER: And that allows us --

8 MR. BUNTROCK: Two weeks between now and before the  
9 hearing.

10 MR. KOHLER: Yes. But we can have some discussions  
11 with Verizon on November 3 as to what we need to do as far  
12 as hearings go.

13 MS. MELILLO: Your Honor, I'd like to also state, the  
14 public advocates have some cross examination to do, so they  
15 need to be contacted as well in terms of whether there's a  
16 need for hearings. Because we want to look at both sides of  
17 this picture and get as much information as we can.

18 MR. KOHLER: Absolutely. I misspoke.

19 MS. MELILLO: And to get information. And so far  
20 we've been left out.

21 MR. KOHLER: I misspoke, Your Honor. We'll have  
22 discussions among all of the participants.

23 JUDGE SCHNIERLE: All right.

24 You were going to bring up something else,  
25 Mr. Kohler?

1 MR. KOHLER: Yes. And I've spoken to Verizon and  
2 Mr. Buntrock about this.

3 The protective order in this proceeding, I mean it's  
4 a somewhat unusual situation because the protective order  
5 went through public meeting.

6 This paragraph flavor of protective order, which I  
7 think the actual one -- the words of the one that was issued  
8 may be unique to Commission process, but there are ones like  
9 it that have been utilized previously.

10 The problem with it here is that this case which  
11 essentially involves small carriers. There's no carriers in  
12 this proceeding with government affairs departments and the  
13 ability to completely bifurcate their advocacy operations  
14 from their operational operations. And the protective order  
15 in this case is essentially drafted for large companies.

16 The problem I have is that, as drafted, two of the  
17 three of my witnesses can't sign the confidentiality  
18 endorsement because they're officers in their company.

19 And I have had discussions with Ms. Conover about  
20 this, and Verizon's indicated that they'd be willing to be  
21 flexible on the protective order, and that we could even  
22 negotiate a protective order.

23 But the problem is I don't know whether Your Honor  
24 has authority or how much authority you might have given the  
25 circumstances. And I wanted to raise it as an issue and

1 seek your guidance as to how I might address it.

2 Now, it may be that I get the filing today and have  
3 no need to address this issue at all. That's very possible.  
4 But I wanted to raise it here today so at least Your Honor  
5 is aware of the issue.

6 JUDGE SCHNIERLE: Well, nothing in the Commission's  
7 order that I see precludes me from signing off on an agreed-  
8 upon alternative protective order.

9 I'd have to go back and look and see if I can pose  
10 some other one, but I don't see where anything in there  
11 precludes me from approving a procedural agreement of the  
12 parties that doesn't extend the briefing date.

13 (Laughter.)

14 MR. KOHLER: Okay. With that said, what I would  
15 propose is that let us take a look at Verizon's filing. And  
16 I understand Mr. Buntrock has the same problem I do.

17 So let me take a look, let us take a look at  
18 Verizon's filing. We will try to speak with them on Monday  
19 about this to either try to resolve it or to indicate that  
20 it's no longer an issue.

21 And assuming that if it is an issue, we can resolve  
22 it, we'll bring that before Your Honor.

23 JUDGE SCHNIERLE: I'm sure that would be not a  
24 problem, and that would be the expeditious way to handle it.

25 MS. CONOVER: Your Honor, I think we will be able to

1 resolve this. I just want to raise one other thing. And  
2 that is that there was some information that we marked  
3 highly confidential.

4 And we'll try to work it out with the parties. But  
5 our concern is that if we have people who are participating  
6 in this case and who are signing proprietary, willing to  
7 sign a proprietary agreement and are only using the  
8 documentation in the case, who are not lawyers, we may have  
9 those people look at the documentation, and under the  
10 proprietary agreement, if it's highly confidential, for  
11 attorneys' eyes only. And some of this material, in my  
12 view, is very difficult to defend as highly confidential.

13 So if we're not able to work that out, we may bring  
14 that issue back to you as well.

15 MR. KOHLER: And we've had discussions between the  
16 parties about that. And I don't know if I've indicated this  
17 to Ms. Conover, but I think the protective order also allows  
18 us to agree to broader dissemination of highly confidential  
19 materials.

20 And speaking for my clients, we'd certainly be  
21 willing to discuss broader dissemination as long as we know  
22 what that dissemination is.

23 JUDGE SCHNIERLE: Well, I haven't read the protective  
24 order lately, but I think this is the kind we usually use.  
25 And you're always entitled to challenge the designation.

1 MR. KOHLER: Sure.

2 JUDGE SCHNIERLE: So if that's a problem, I'll deal  
3 with it.

4 MR. KOHLER: Okay.

5 JUDGE SCHNIERLE: All right. Anything else,  
6 Ms. Conover?

7 MS. CONOVER: No, Your Honor.

8 JUDGE SCHNIERLE: Mr. Buntrock?

9 MR. BUNTROCK: No, Your Honor.

10 JUDGE SCHNIERLE: Mr. Kohler?

11 MR. KOHLER: No.

12 JUDGE SCHNIERLE: Ms. Melillo?

13 MS. MELILLO: No, Your Honor.

14 MS. SHERIDAN: No, Your Honor.

15 MS. JONES: No, Your Honor.

16 JUDGE SCHNIERLE: Ms. Armstrong?

17 MS. ARMSTRONG: No, Your Honor.

18 JUDGE SCHNIERLE: All right. In that case, I'm going  
19 to be issuing a prehearing order that's going to be short.  
20 It's basically going to say rebuttal testimony by  
21 October 31, hearings on November 7 at 9:00 a.m., and  
22 everything's to be exchanged by email, followed by  
23 overnight, except in the case of OTS, which can put a stamp  
24 on it and throw it in the mail.

25 Anything else?

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(No audible response.)

JUDGE SCHNIERLE: The prehearing conference is adjourned. Thank you very much.

(Whereupon, at 2:30 p.m., the hearing was adjourned, to reconvene on Friday, November 7, 2003, in Harrisburg, Pennsylvania.)

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FORM 2

C E R T I F I C A T E

I hereby certify, as the stenographic reporter,  
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