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ORIGINAL

MCI

January 21, 2004

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JAN 21 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Via Overnight Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100

Dear Mr. McNulty:

Please find enclosed an original and nine (9) copies of MCI WorldCom Network Services, Inc.'s ("MCI") Answer to Verizon's Motion to Strike the Answer of MCI to Verizon's Petition for Reconsideration in the above-referenced case.

Please contact me if you have any questions or concerns with this filing.

Very truly yours,

Michelle Painter

Michelle Painter

cc: Certificate of Service
Maryanne Reynolds Martin, Esq

Enclosure

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SERVICE LIST

I hereby certify that I have this day caused a true copy of MCI's Answer to Verizon's Motion to Strike to be served upon the parties of record in Docket Nos. I-00030100 in accordance with the requirements of 52 Pa. Code Sections 1.52 and 1.54 in the manner and upon the parties listed below.

Dated in Washington, DC on January 21, 2004

VIA OVERNIGHT DELIVERY

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Philadelphia, PA 19103

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Michelle Painter

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching For the Enterprise Market	)))	Docket No. I-00030100

ANSWER OF
MCI WORLDCOM NETWORK SERVICES, INC.
TO MOTION TO STRIKE ANSWER TO
VERIZON PETITION FOR RECONSIDERATION

Verizon Pennsylvania, Inc.'s ("Verizon") Motion to Strike MCI WorldCom Network Services, Inc.'s ("MCI") Answer to Verizon's Petition for Reconsideration in the above-captioned case only emphasizes why Verizon's Petition for Reconsideration must be denied. Contrary to Verizon's assertion, the issues raised by Verizon's Petition for Reconsideration absolutely affect all competitors and affect the ability to serve all customers in Pennsylvania. For that reason, the Commission should consider the issues raised in MCI's Answer, should deny Verizon's Motion to Strike and deny Verizon's Petition for Reconsideration.

There is nothing in 52 Pa. Code §5.572 that prohibits MCI from filing an Answer to Verizon's Petition for Reconsideration. It is true that MCI did not formally intervene in this case. That is because MCI did not intend to present evidence on issues specifically dealing with the enterprise market. So long as MCI's rights with respect to unbundled switching and other network elements were not affected for customers other than enterprise customers, MCI did not intend to participate in the case. Verizon, through its Petition for Reconsideration, brought other

issues into this case and made it into a broader case that directly affects MCI's rights. For that reason, MCI must be entitled to respond to Verizon's Petition for Reconsideration. Otherwise, just as MCI noted in its Answer to Verizon's Petition, the Commission will impact MCI and other CLECs' rights without the benefit of having input from those CLECs.

Verizon's claim that the issues in its Petition for Reconsideration do not affect any customers other than enterprise customers is completely out of touch with reality. Verizon is attempting to overturn the Commission's interpretation of the *Global Order* legal requirements. Those *Global Order* findings were not solely related to enterprise customers. Tariff 216 does not deal solely with enterprise customers. If this Commission were to grant Verizon's Petition for Reconsideration and find that the *Global Order's* legal findings with respect to unbundling requirements are preempted by federal law, Verizon's claim that such a finding will not affect any customers but enterprise customers is disingenuous. Verizon would most definitely argue that if the *Global Order's* legal basis for requiring unbundling of network elements is preempted with respect to enterprise customers, it should also be preempted with respect to mass market customers.

Verizon's arguments in its Petition for Reconsideration suggest that the FCC has now preempted all state unbundling requirements that go beyond those required under FCC rules – that argument goes well beyond enterprise customers only. A Petition for Reconsideration where most CLECs are not involved, and in which Verizon is requesting that MCI not be heard at all, is not the correct avenue to make such a finding. The FCC has said that if a party believes that a particular state unbundling requirement exceeded the limits of state authority, it could petition the FCC for a declaratory ruling. If Verizon believes the requirements of the *Global Order* are preempted for enterprise customers, that is the course it should pursue. In addition, the

Commission specifically permitted Verizon to separately petition for removal of the unbundling requirements that were laid out in the *Global Order*.[1] If Verizon disagrees that the *Global Order* creates a continuing legal obligation, it should petition the Commission separately, but should not use this proceeding to make such a monumental change in the current legal landscape in Pennsylvania.

This docket is not the place for Verizon to challenge the Commission's *Global Order* decision that Verizon is required to unbundle network elements. As the Commission properly found, "Since the record in this case was developed for the specific purpose of deciding whether to petition the FCC for a waiver of the national no-impairment finding for switching in the enterprise market, it is an inadequate basis upon which to make a determination as to whether enforcement of the *Global Order* requirement would 'substantially prevent' implementation of the purposes of the federal Act in opening local telecommunications markets to competition."[2] The Commission also noted that the record was not properly developed on these issues and that since Verizon can file a separate petition related to these matters, the Commission should not modify the status quo.[3]

The Commission has recently upheld its decision that Verizon has an independent unbundling obligation, and has emphasized it in several proceedings over the years. In Verizon's Petition to have its business services declared competitive, the Commission specifically affirmed its finding that Verizon is required to unbundle network elements, independent of other federal requirements.[4] That decision was issued on August 13, 2003, which was well after the FCC

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[1] Opinion and Order at 15-16.
[2] Opinion and Order at pg. 15.
[3] *Id.* at 15-16.
[4] Petition of Verizon Pennsylvania, Inc. for a Determination that its Provision of Business Telecommunications Services to Customers Generating Less than $10,000 in Annual Total Billed Revenue

announced its decision in the Triennial Review matter. Verizon is requesting that the Commission overturn all of its prior rulings interpreting separate state unbundling requirements – such a request is wholly inappropriate in this docket.

Interpretations about the legal affect of Section 271 requirements with respect to unbundling also are clearly relevant to both enterprise and mass markets customers. Again, whatever the Commission decides regarding that issue with respect to enterprise customers, Verizon would argue applies equally to mass markets customers. Thus, Verizon's arguments on this issue directly affect MCI and other CLECs. For that reason, the Commission should not strike MCI's Answer, or alternatively must deny Verizon's Petition specifically because MCI's arguments are not considered.

The fact that Verizon is attempting to eliminate MCI's arguments from consideration in this matter only strengthens the need for the Commission to deny Verizon's Petition for Reconsideration. There are numerous CLECs that would be affected by the outcome of these issues, and that likely do not even know that these issues are being litigated in this proceeding. Although MCI did know that these issues were being addressed, Verizon is attempting to preclude MCI from presenting its position on the issues.

Verizon's Petition is incorrect on its interpretations of preemption of state law, and its interpretation of the state's role in Section 271 matters. Verizon does not want MCI to have the right to point out the areas where its interpretations are flawed. However, MCI's rights are directly affected by Verizon's misleading and inaccurate arguments regarding those issues, and therefore MCI must have a right to present its arguments on those matters.

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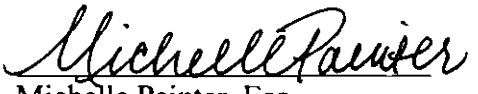
is a Competitive Service Under Chapter 30 of the Public Utility Code, Docket No. P-00021973, Opinion and Order at pages 24-26.

For all of the reasons discussed herein, the Commission should deny Verizon's Motion to Strike MCI's Answer to Verizon's Petition for Reconsideration. Alternatively, if the Commission grants the Motion to Strike, then it should deny Verizon's Petition for Reconsideration, as it proves the point that an issue this critical to all industry participants simply cannot be decided in a case where other CLECs are not active parties.

Respectfully submitted,



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Dated: January 21, 2004

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Choice One Communications

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Rochester, NY 14604
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February 4, 2004

RECEIVED
2004 FEB -6 AM 11:21
SECRETARY'S BUREAU

Pennsylvania Public Utility Commission
Bureau of the Secretary
PO Box 3265
Harrisburg, PA 17105-3265

DOCKETED
FEB 26 2004

RE:

Dear Madam or Sir:

Choice One Communications, Inc. ("Choice One") is a certified competitive local exchange carrier operating in the state of Pennsylvania. Please add Stephanie Ayers-Hamilton to the service list for the following dockets at the address listed below. (1) Docket R-00016683 Generic Investigation Regarding Verizon Pennsylvania, Inc's Unbundled Network Element Rates. (2) Docket I-00030099 Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements. (3) Docket M-00031754 Development of Efficient Loop Migration Process. (4) Docket P-00930715 Verizon Pennsylvania Inc. Petition and Plan for Alternative Form of Regulation Under Chapter 30. (5) Docket I-00030100 Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market.

Choice One Communications, Inc.
Attn: Stephanie Ayers-Hamilton
Network Planning Analyst
100 Chestnut Street
Rochester, New York 14604
(585) 697-2163
sayers@choiceonecom.com

DOCUMENT

Should you have any questions, please feel free to contact me at the number listed above.

Sincerely,

Stephanie Ayers-Hamilton
Network Planning Analyst
Choice One Communications, Inc.

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Julia A. Conover
Vice President and General Counsel
Pennsylvania

verizon

May 12, 2004

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VIA UPS OVERNIGHT DELIVERY

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RECEIVED

MAY 12 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100

DOCKETED

JUL 26 2004

Dear Mr. McNulty:

On behalf of Verizon Pennsylvania Inc. ("Verizon") I am writing to bring to the Commission's attention a recent opinion of the Pennsylvania Supreme Court, which bears upon the matters raised in Verizon's Petition for Reconsideration in this proceeding filed January 2, 2004 and currently pending before the Commission.[1]

In *MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*, 844 A.2d 1239 (Pa. 2004), the Supreme Court addressed the extent to which this Commission is governed by federal standards and a federal review process when regulating competitive access requirements for local telephone markets, and held that jurisdiction to review this Commission's actions under the Telecommunications Act of 1996 lies exclusively in the federal courts. In the context of that decision, the Supreme Court explained that:

> [t]he purpose of the 1996 Act was to eliminate the state-regulated monopolies of local telecommunications markets in favor of a regulatory scheme that encourages a competition-based market. The new scheme involved both state and federal participants, ***whose actions are to be governed uniformly by standards established by federal law***. (slip op. at 15) (emphasis added).

[1] The order was entered on March 22, 2004. Although the Supreme Court extended the deadline to petition for reargument of its order to May 5, 2004, no such petition was filed. The order is therefore final as of May 5.

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Verizon's petition for reconsideration seeks clarification that there is no separate state law basis for the Commission to require Verizon to unbundle enterprise switching where the FCC in its *Triennial Review Order* (now affirmed by the D.C. Circuit)[2] expressly found that such unbundling is ***not*** required by federal law. The Pennsylvania Supreme Court's opinion further confirms that this Commission's attempt to impose unbundling requirements that are not "uniform" with the standards established by federal law is contrary to the purposes of the Act and beyond this Commission's authority.

The Supreme Court's holding confirms what the Commonwealth Court had already noted in the unbundling context in the order under review, *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa. Commw. 2000) (*Global Appeal).* While the Commonwealth Court affirmed the Commission's unbundling requirements, it did so only as the Commission's exercise of authority conferred by the federal Act. Significantly, the Commonwealth Court stated that if there is a "mismatch" between state and federal unbundling requirements, "the state classification would be ***illegal***." 763 A.2d at 486 (citing 47 U.S.C. § § 251(d)(3), 261) (emphasis added). Now that there is such a "mismatch," the federal rules govern.

Accordingly, both the Pennsylvania Supreme Court's recent opinion and the Commonwealth Court opinion it reviewed support Verizon's request that the Commission reconsider and remove any suggestion in its December 18, 2003 Order that Verizon must continue to unbundle switching or provide the UNE-platform to serve enterprise customers in contravention of the requirements of federal law as set forth in the *Triennial Review Order*.

Very truly yours,

Julia A. Conover

Julia A. Conover

JAC/meb

Via UPS Overnight Delivery

cc: Bohdan Pankiw
Maryanne Martin
Certificate of Service

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[2] *USTA v. FCC*, No. 00-1012, 2004 U.S. App. LEXIS 3960 (D.C. Cir. 2004) at LEXIS pp. 86-87 ("*USTA II*") (leaving in place the FCC's "nationwide" finding that "CLECs are not impaired by lack of unbundled access to switching for the enterprise market at DS1 capacity and above.") This portion of the D.C. Circuit's Order was not subject to the 60 day stay, which applies only to the portions of the TRO that were vacated. *See USTA II*, 359 F.3d at 595 ("As to the portions of the Order that we vacate, we temporarily stay the vacatur (i.e., delay the issue of the mandate)") (emphasis added); *United States Telecom Ass'n v. FCC*, No. 00-1012 (Order entered April 13, 2004) (extending stay of mandate through June 15, 2004).

[J-150-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MCI WORLDCOM, INC.,	:	No. 1 EAP 2002
Appellant,	:	Appeal from the Order of the Commonwealth Court entered October 25, 2000 at 2916 CD 1999, affirming the Order of the Pennsylvania Public Utility Commission entered September 30, 1999 at Nos. P-00991648 -- P-00991649
v.	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	763 A.2d 440 (Pa. Cmwlth 2000)
Appellee.	:	ARGUED: October 21, 2002

OPINION

MR. JUSTICE CASTILLE **DECIDED: March 22, 2004**

This is an appeal from an *en banc* decision of the Commonwealth Court that affirmed the order of the Pennsylvania Public Utility Commission ("PUC") setting rates for access to Verizon Pennsylvania Inc.'s network for local telephone service. Appellant, MCI WorldCom, Inc. ("WorldCom"), presents issues regarding the propriety of the rates set by the PUC. Before we may reach those substantive issues, however, the threshold issue of whether federal courts have exclusive jurisdiction over such disputes must be addressed. As we find that jurisdiction over state commission decisions under the Telecommunications Act of 1996 lies exclusively in federal courts, we vacate the Commonwealth Court's decision for lack of jurisdiction.

The United States Congress enacted the Telecommunications Act of 1996 ("the 1996 Act") to end the "longstanding regime of state-sanctioned monopolies" that existed in the nation's local telephone service markets and to replace that regime with competitive markets. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). In creating the 1996 Act, Congress realized that it would require sweeping changes in the governing law and economic structure of the long-standing local telecommunication market. Prior to the passage of the 1996 Act, the Communications Act of 1934 divided responsibility for regulating telecommunications into (1) federally-regulated long distance services and (2) state-regulated intrastate services. States generally granted incumbent local exchange carriers (ILEC's), such as Verizon, exclusive monopoly franchises to provide local services with an infrastructure that connects virtually every home and business in a local service area.

The effect of the 1996 Act was to implement a uniform national policy of market competition in local telephone services. The 1996 Act preempted all state laws and regulations that "prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Recognizing that more intrusive federal regulation was necessary in order to make local telecommunication markets competitive, Congress authorized new entrants into the local telephone service market to make use of existing local networks in order to expedite competition.

Section 251 of the 1996 Act establishes three routes through which new telecommunication competitors can enter and compete in local markets: (1) by constructing new competing networks; (2) by reselling to consumers retail services that they have purchased from ILECs at wholesale prices and have repackaged under their own brand names; or (3) by obtaining nondiscriminatory access to ILEC network elements on an unbundled ("separately priced") basis. In order to achieve market efficiency, Congress

required that the network element price rates be "just, reasonable and nondiscriminatory" and "based on the cost . . . of providing" the element or interconnection. 47 U.S.C. § 251(c)(3); 47 U.S.C. § 252. Congress specifically prohibited the traditional rate-of-return approach to pricing. 47 U.S.C. § 252 (d)(1).

Congress empowered new telecommunication entrants to request from ILECs interconnection, resale or access to unbundled network elements ("UNEs") and required incumbents to negotiate with new entrants over the particular terms of such arrangements. Congress authorized state public utility commissions, such as the PUC, to adjudicate under federal law all disputed issues in a process termed "arbitration," the result of which is an "interconnection agreement" incorporating the final terms of the relationship between the subject ILEC and the new entrant. See 47 U.S.C. § 252(b)(1). Although it made state utility commissions responsible for the arbitration process, Congress also directed the Federal Communications Commission ("FCC") to establish regulations to implement the requirements of Section 251 so that uniform federal standards would be in place to guide the Section 252 negotiation and arbitration processes at the state level.

Pursuant to Congress' mandate, the FCC issued pricing regulations governing UNE rates. Section 51.503 of the FCC's regulations requires state utility commissions to set prices for UNEs "pursuant to forward-looking economic cost-based pricing methodology set forth in section 51.505." 47 C.F.R. § 51.503(b)(1). Section 51.505 describes the "Total element long-run incremental cost" methodology or "TELRIC." Therefore, under the FCC's regulations, the Pennsylvania PUC must set prices for network elements based on forward-looking costs as determined by a particular methodology: TELRIC.

On July 31, 1996, the PUC opened the docket known as the "MFS III"[1] proceeding to set permanent rates for the leasing of UNEs in Pennsylvania. The rates set in MFS III were to be incorporated into Verizon's interconnection agreements with WorldCom and other new entrants into Pennsylvania's local communications market. On April 10, 1997, the PUC issued an interim order indicating that it did not plan to base UNE rates strictly on cost, but instead intended to balance the cost-based mandate of the 1996 Act with the PUC's competing desire to ensure that Verizon earn profits in an amount sufficient to cover the expense of deploying new high frequency broadband technology across the Commonwealth. In order to achieve this goal, the PUC adopted Verizon's cost model, which did not employ the TELRIC methodology but which allowed Verizon to attempt to recoup its substantial capital investment in the proposed broadband technology network. On August 7, 1997, the PUC issued its Final Opinion and Order in which it reaffirmed, with one exception not relevant here, the findings set forth in the MFS III Interim Order. Two commissioners dissented.

The rates established in the MFS III proceeding were incorporated into WorldCom's interconnection agreement with Verizon. On December 8, 1997, WorldCom filed a complaint in the United States District Court for the Middle District of Pennsylvania, pursuant to Section 252 of the 1996 Act, for review of the parties' interconnection agreement. Verizon, AT&T and the PUC all participated as parties to the lawsuit. On September 16, 1999, the Magistrate Judge issued a Report and Recommendation in which he concluded that the UNE rates set in the MFS III proceeding, based as they were upon

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[1] Although not clearly explained by any party, "MFS III" appears to be a short-form reference to the origins of the proceeding below. The record reveals that MFS Intelenet of Pennsylvania, Inc. filed an application with the Pennsylvania PUC under the 1996 Act. R.R. 61a. The PUC apparently shortened the reference name of that proceeding to the "MFS" proceeding. The PUC proceeding which is the basis of the instant action was the third phase of the "MFS" proceeding and was thus dubbed the "MFS III" proceeding.

Verizon's non-TELRIC cost model, were inconsistent with the FCC's binding regulations and, therefore, were unlawful. In a memorandum opinion, the Honorable Sylvia H. Rambo of the Middle District adopted the Magistrate Judge's report with respect to the issue of UNE rates and remanded the matter to the PUC to reconsider its UNE pricing decisions in light of the FCC's binding pricing regulations. See Bell Atl.-Pa., Inc. v. The Pennsylvania Pub. Util. Comm'n, 273 F.3d 337 (3d Cir. 2001).

In July 1998, the PUC initiated a comprehensive review of Verizon's UNE rates and terms for providing access to its network. In addition to the issue of UNE pricing, the PUC had before it several other unresolved issues concerning local telephone competition. The PUC attempted to resolve all of these matters through a global settlement conference. WorldCom participated in settlement proceedings conducted by the PUC along with Verizon. On March 18, 1999, two sets of parties, one group including Verizon and the other including WorldCom, submitted competing joint settlement petitions to the PUC proposing resolutions of the issues in the petitions and in the stayed PUC dockets. Those petitions were offered as non-negotiable settlement propositions, intended to either be accepted or rejected in their entirety by the PUC. WorldCom proposed in part, as did Verizon, to establish a compromise, non-TELRIC-based statewide average UNE loop rate of $14.01. The TELRIC-based average loop rate was asserted to be $10.09. WorldCom alleges that it made clear to the PUC that the $14.01 rate was acceptable to them only if the PUC adopted their petition in full.

By order dated April 2, 1999, the PUC terminated the global settlement conference and consolidated the two petitions for a contested hearing on the merits. After eight days of hearings, the PUC issued a 283-page Global Order, ruling on nearly all outstanding issues in the pending dockets. The PUC adopted the rates set forth in the parties' settlement petitions: $14.01. Several parties, including WorldCom, AT&T and Verizon, appealed the Global Order to the Commonwealth Court. Verizon simultaneously appealed

the Global Order to the United States District Court for the Eastern District of Pennsylvania essentially raising the same arguments asserted before the Commonwealth Court.[2] In Verizon's federal action, WorldCom and AT&T filed cross-claims also challenging the Global Order. During the pendency of the federal action, the district court expressly denied the PUC's motion to abstain in favor of the Commonwealth Court's review of the Global Order. On October 25, 2000, the Commonwealth Court issued an *en banc* decision, affirming the Global Order with respect to all appeals before it. Bell Atl.-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n, 763 A.2d 440 (Pa. Cmwlth. 2000). On January 8, 2001, the Commonwealth Court denied reargument.

This Court granted allocatur to determine if earlier decisions from the United States District Court for the Middle District of Pennsylvania or the United States Third Circuit Court of Appeals concerning the issue of the lawfulness of the cost model relied upon by the PUC to set UNE rates should be given preclusive effect. At oral argument on October 21, 2002, this Court directed the parties to provide supplemental briefing on the issue of whether the 1996 Act contemplates exclusive federal jurisdiction to review appeals arising under it, or whether concurrent state-federal subject matter jurisdiction exists over any such appeal. The parties have since complied. As a matter of comity and efficiency, this Court has tracked the pending federal action.

On December 12, 2003, the Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania denied the PUC's Motion for Summary Judgment in the federal appeal from the Global Order. Judge Katz found, *inter alia*, that (1) federal district courts have exclusive jurisdiction over appeals arising from determinations by state commissioners regarding interconnection agreements under the 1996 Act; and (2)

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[2] Verizon also sought simultaneous review in this Court via this Court's King's Bench powers. On June 2, 2000, this Court denied Verizon's King's Bench application.

Section 252(e)(4) is constitutional because Congress acted within the scope of its Commerce Clause power. The issues raised before the Eastern District are virtually identical to the arguments made before this Court. As a result, on December 16, 2003, the PUC promptly filed a Post-Submission Communication under Pa.R.A.P. 2501(b), submitting a copy of the opinion and order entered by Judge Katz. On December 19, 2003, WorldCom filed an Application to Present a Post-Argument Submission requesting leave to present this Court with the opinion and order entered by Judge Katz. Since Judge Katz' decision is obviously relevant to the issues currently before this Court, we accept the parties' post-argument submissions pursuant to Pa.R.A.P. 2501(b).

WorldCom argues that the Commonwealth Court lacked jurisdiction to review the UNE rates and, therefore, this Court must vacate the portion of the Commonwealth Court order affirming the Global Order's UNE rates.[3] WorldCom notes that Section 252(e)(4) of the 1996 Act unequivocally states that "[n]o State Court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." Brief of Appellant at 27 (citing 47 U.S.C. § 252(e)(4) (emphasis added)). WorldCom further notes that Section 252(e)(6) of the 1996 Act directs that in any case where a State commission makes a determination, an aggrieved party may bring an action in an appropriate federal District Court to determine if the agreement meets the requirements of Section 251. WorldCom argues that these sections when read together require that legal challenges to a state commission's approval of terms for interconnection agreements are exclusively within the jurisdiction of the federal courts. WorldCom finally notes that the United States Supreme Court has concluded that Section 252(e)(4) was expressly meant to exclude state court jurisdiction over appeals like this. See Reply Brief of Appellant at 1 (citing Verizon Md., Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635 (2002)).

[3] The question of jurisdiction is a pure question of law, as to which our review is plenary.

The PUC responds that Section 252(e)(4) of the 1996 Act only prohibits state court review in a narrowly tailored instance -- in "approving or rejecting an agreement." See 47 U.S.C. § 252(e)(4). The PUC submits that, in the instant matter, the Global Order does not specifically approve or reject an agreement between an ILEC and a potential competitor. See Supplemental Brief of Appellee at 11 (citing Bell Atl.-Pa, Inc. v. Pennsylvania Pub. Util. Comm'n, 107 F. Supp. 2d 653, 665 (E.D. Pa. 2000)). Verizon, as intervenor, similarly argues that the Global Order was not an action "approving or rejecting an agreement" under Section 252(e)(4) and, therefore, Pennsylvania appellate courts are not divested of jurisdiction over this matter arising from the order of a Commonwealth agency.[4] The general order in the Global case did not specifically approve or reject an interconnection agreement, but merely required Verizon to change the rates it offered to all of its competitors, including WorldCom. Thus, the PUC concludes, jurisdiction over an appeal of

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[4] Verizon further argues that, when the Court is faced with a question of whether state court jurisdiction exists over a federal claim, there is a presumption in favor of concurrent state court jurisdiction which can only be overcome by a specific directive or unmistakable implication from Congress that exclusive federal jurisdiction over an issue was intended. In Verizon's view, as Congress has not provided a specific directive or implication, and because Congress limited its exclusion of state court review to orders approving or rejecting interconnection agreements, there is concurrent jurisdiction in state and federal courts.

We find no merit in this argument. The presumption of concurrent jurisdiction can be rebutted in three ways: (1) by explicit statutory directive; (2) through an unmistakable implication from the statute's legislative history; or (3) by a clear incompatibility between federal and state-court jurisdiction. See Bell Atl.-Pa., Inc. v. The Pennsylvania Pub. Util. Comm'n, 295 F. Supp. 2d 529, 536 (E.D. Pa. 2003) (citing Tafflin v. Levitt, 493 U.S. 455, 459-60 (1990)). As discussed below, we agree with Judge Katz that, reading Sections 252(e)(4) and 252(e)(6) together, it is apparent that "Congress made an explicit statutory directive divesting state courts of jurisdiction to review state commission determinations on interconnection agreements. Such authority is enjoyed exclusively by the federal courts." Id.

the PUC's UNE rate decision in the Global Order properly lies in the Commonwealth Court under 42 Pa.C.S. § 763(a)(1).

Section 252 of the 1996 Act sets forth a process which oversees the establishment of interconnection agreements. First, an ILEC and a requesting carrier can enter into negotiations and a binding agreement. 47 U.S.C. § 252(a)(1). At any time during these negotiations, either party may ask the state utility commission to participate in the negotiations and mediate any differences arising during the negotiations. 47 U.S.C. § 252(a)(2). Additionally, the state commission may, by request of any of the parties, arbitrate any open issues. 47 U.S.C. § 252(b)(1). Once the parties have reached an agreement, either by negotiation or arbitration, the agreement must be submitted for approval to the state commission. 47 U.S.C. § 252(e)(1). The state commission must formally approve or reject the agreement, including written findings noting any deficiencies. Id. Review of the state commission's approval or rejection of the agreement is subject to exclusive federal jurisdiction. 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement . . . ."). Additionally, "[i]n any case in which a State commission makes a determination under [Section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 . . . ." 47 U.S.C. § 252(e)(6).

Thus, Congress explicitly eliminated state court jurisdiction over an appeal involving an approval or rejection of an interconnection agreement. What is not as explicit is the question of proper jurisdiction for review of other claims arising under the 1996 Act. The PUC and Verizon argue in favor of a narrow construction of Section 252, limiting federal court jurisdiction to claims under Section 252(e)(4) regarding approval or rejection of agreements. Numerous federal district and circuit court decisions, however, have ruled in line with WorldCom's argument and rejected such a parsimonious interpretation of Section

252(e)(6). Those decisions are grounded in the unavoidable fact that Section 252(e)(6) explicitly provides that, "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court." Federal courts have declined to read this section narrowly. Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex., et al., 208 F.3d 475 (5th Cir. 2000) ("federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements") (citing Illinois Bell Tel. Co. v. Worldcom Tech., Inc, 179 F.3d 566, 571 (7th Cir. 1999)); see also BellSouth Telecomm., Inc. v. MCImetro Access Transmission Serv., Inc., 317 F.3d 1270, 1277-78 (11th Cir. 2003) (finding that state commission interpretations of contracts are subject to federal review in district courts); MCI Telecomm. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 337-38 (7th Cir. 2000) (declining to read Section 252(e)(6) narrowly); Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla. Inc., 235 F.3d 493, 497 (10th Cir. 2000) (finding that limiting federal court jurisdiction to matters involving state commission's approval or rejection of interconnection agreement "would lead to results Congress could not have intended").

In light of this authority, we are satisfied that federal courts have jurisdiction over appeals from state utility commission determinations involving interconnection agreements which arise under Section 252(e)(6), irrespective of whether they involve approval or rejection on appeal. *Sub judice*, in issuing the Global Order, the PUC ruled on the outstanding claims on the docket and established the UNE rate. As noted above, the FCC, per Congressional mandate, issued pricing regulations governing UNE rates. See 47 C.F.R. §51.503(b)(1). Additionally, Section 252(d) provides that state commissions must determine just and reasonable rates for network elements. See 47 U.S.C. § 252(d). Accordingly, the PUC's ruling regarding the UNE rates plainly constitutes a determination

regarding an interconnection agreement under Section 252(e)(6) and, as such, it is subject to federal court jurisdiction.

Finding that the federal district court has jurisdiction to review the instant appeal, we now turn to the issue of whether that jurisdiction is exclusive. The PUC argues that exclusive federal court jurisdiction is limited because Section 252(e)(6) merely states that an aggrieved party "may" bring an action in an appropriate federal district court, but it does not state that federal district courts have exclusive jurisdiction in all cases where a state commission makes a determination. The PUC thus concludes that there is no unmistakably clear pre-emption of Pennsylvania laws providing for Commonwealth Court review of final PUC orders. The PUC further notes that, if an ambiguity exists as to pre-emption, no pre-emption should be found. Accordingly, the PUC argues that this Court should hold that the Commonwealth Court had concurrent jurisdiction over its order.

Adoption of the PUC's concurrent jurisdiction argument would place this Court squarely at odds with the prevailing weight of federal authority. In MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491 (3d Cir. 2001), the Third Circuit found that Sections 252(e)(4) and 252(e)(6) should be read together and that, when so read, it is clear that "[f]ederal jurisdiction for the review of commission decisions on interconnection agreements is **exclusive.**" Id. at 512 (emphasis added). This conclusion has been reached by other federal courts as well. See, e.g., MCI Telecomm. Corp. v. Illinios Bell Tel. Co., 222 F.3d at 337-38 (reading Section 252(e)(4) in conjunction with Section 252(e)(6) and finding that "Congress envisioned suits reviewing 'actions' by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court."); Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex., 208 F.3d at 481 ("federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements"); Illinois Bell Tel. Co. v.

Worldcom Techs., Inc., 179 F.3d 566, 570-71 (7th Cir: 1999) ("subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court"); see also, e.g., Bell Atl.-Pa., Inc. v. The Pennsylvania Pub. Util. Comm'n, 295 F. Supp. 2d at 537-38 (collecting cases).

Federal Circuit Court decisions, of course, do not bind this Court. Nevertheless our review of the statutory construction rationale articulated by the federal courts that have reviewed this issue and reached the conclusion of exclusivity convinces us that the prevailing federal view is persuasive. Accordingly, we find that Sections 252(e)(4) and 252(e)(6) are indeed meant to be read together and, as a result, it is clear that jurisdiction over matters involving appeals from state commission decisions on interconnection agreements lies exclusively in federal courts. As the matter *sub judice* involves such a decision, the Commonwealth Court lacked jurisdiction to review this matter.[5]

The PUC alternatively argues that the prohibition of state court review under Sections 252(e)(4) and 252(e)(6) is unconstitutional. The PUC notes that the 1996 Act was passed pursuant to Congress's Commerce Clause powers and, while Commerce Clause powers are broad, they do not include the power to abrogate a state's sovereignty. The PUC claims that Section 252(e)(4) is unconstitutional because its prohibition of state court review is neither necessary nor proper. The PUC avers that it is not necessary to prohibit state court review to achieve the overarching congressional goal of developing competitive

[5] It is undisputed that the substantive issue argued before this Court -- the propriety of the UNE rates as established in the Global Order -- is grounded exclusively in federal law. See, e.g., Brief of Appellee at 6-7 ("state commissions, including the PUC, are required to follow federal requirements when they establish UNE rates. Federal requirements are set forth in regulations promulgated by the [FCC] consistent with [the 1996 Act]."). As the issues before this Court are firmly and exclusively grounded in federal law, we do not address whether this Court, or any Pennsylvania state court, has subject-matter jurisdiction over potential claims arising from interconnection agreements that are grounded in state law.

local telephone markets. Additionally, the PUC notes that, under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The PUC argues that Section 252 is not proper because it interferes with a state's sovereignty by eliminating state supervisory powers over a state administrative agency and replacing it with federal review. The PUC thus concludes that Congress exceeded its constitutional authority in enacting Section 252(e)(4) to the extent that the 1996 Act interferes with the States' sovereignty to review state administrative agency actions.

WorldCom counters that the PUC cannot contest Congress' power to enact the substantive local competition provisions of the 1996 Act because the local telephone networks substantially affect interstate commerce and regulation of the networks thus falls within Congress' Commerce Clause powers. WorldCom further argues that when Congress acts under its Commerce Clause powers, it has the authority to do all that is "necessary and proper" for carrying out that power, including preempting inconsistent state laws. See, e.g., U.S. Const. art. I, § 8, cl. 18. Thus, WorldCom concludes that because Congress possesses the power to preempt state law, Section 252(e)(4)'s preemption of state judicial review in certain instances is within Congress' constitutional reach under the Commerce Clause. WorldCom asserts that since Congress is validly legislating in a field within the purview of its Commerce Clause powers, it is authorized to divest state courts of concurrent jurisdiction.

Even if we were to assume that the PUC's constitutional objection had merit, that would not vest jurisdiction where the 1996 Act prohibits it. The proper forum for this constitutional argument, thus, is in the federal court. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex

parte McCardle, 74 U.S. 506, 514 (1868)). The "canon of constitutional avoidance" provides that when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." See Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)). Pennsylvania explicitly recognizes this canon by statute in instances where construction of a Pennsylvania statute is at issue. See 1 Pa.C.S. § 1922; see also Commonwealth v. Bavusa, 832 A.2d 1042, 1050-51 (Pa. 2003).

There is no merit in the claim that the statute is unconstitutional if review is exclusively federal. Congress' commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., et. al., 452 U.S. 264, 281 (1981) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)). Additionally, it is well-settled that "the commerce power permits Congress to preempt the States entirely in the regulation of private utilities." Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 764 (1982); see also Bell Atl.-Pa., Inc. v. The Pennsylvania Pub. Util. Comm'n, 295 F. Supp. 2d at 539. Thus, it is clear that regulation of local telephone markets, as a public utility, was clearly within Congress' exercise of its Commerce Clause powers. See MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d at 503.

The Commerce Clause power is, however, guided by the Federal Constitution's Necessary and Proper Clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." U.S. Const., Art. I, § 8, cl. 18; see also New York v. United States, et. al., 505 U.S. 144, 158-59 (1992). Legislation enacted under the Commerce Clause can only be invalidated if "it is

clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Federal Energy Regulatory Comm'n, 456 U.S. at 754 (quoting Hodel v. Indiana, 452 U.S. 314, 323-24 (1981)). The notion that the necessary and proper clause requires that a Congressional act be "absolutely necessary" has been rejected; the necessary and proper clause is satisfied as long as a statute is "conducive to the due administration of justice" in federal court, and is "plainly adapted" to achieve that end. Bell Atl.-Pa., Inc. v. The Pennsylvania Pub. Util. Comm'n, 295 F. Supp. 2d at 539-40 (quoting McCulloch v. Maryland, 17 U.S. 316 (1819)). Under this settled precedent, the PUC's argument that Section 252's exclusion of state court review is not necessary or proper is not persuasive.

As noted above, the purpose of the 1996 Act was to eliminate the state-regulated monopolies of local telecommunication markets in favor of a regulatory scheme that encourages a competition-based market. This new scheme involved both state and federal participants, whose actions are to be governed uniformly by standards established by federal law. Congress' implementation of exclusive federal jurisdiction to review state regulatory decisions involving interconnection agreements is plainly adopted to carrying out these goals. See Bell Atl.-Pa., Inc. v. The Pennsylvania Pub. Util. Comm'n, 295 F. Supp. 2d at 540. The prohibition of state court review in favor of exclusive federal review is reasonably connected to Congress' goal of uniformity concerning the newly-stated policy of competition in local telecommunication markets.

Additionally, the PUC's argument that Section 252 is not proper because it interferes with the Tenth Amendment's protection of state sovereignty is also without merit. The PUC claims that Congress cannot interfere with state sovereignty by prohibiting state court review over state commission actions.

The Tenth Amendment prohibits Congress from requiring states to administer federal programs against their will. See Printz v. United States, 521 U.S. 898 (1997); see also U.S. West Communications, Inc. v. MFS Intelenet, Inc., et. al, 35 F. Supp. 2d 1221, 1232 (D. Or. 1998). The Tenth Amendment, however, does not prohibit Congress from offering states the choice of either "regulating [an] activity according to federal standards or having state law pre-empted by federal legislation." New York v. United States, 505 U.S. 144, (1992) (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc. 452 U.S. 264 (1981)); see also Verizon Md., Inc. v. RCN Telecom Servs., Inc, 232 F. Supp. 2d 539, 558 (D. Md. 2002). Congress, therefore, may enact legislation that requires the state to either regulate in a certain area or opt not to participate, thereby allowing the federal government to preempt in that area. Federal regulation does not commandeer a state's legislative power or violate the Tenth Amendment as long as the state is given a choice regarding whether or not to enforce the regulation. See Hodel, 452 U.S. at 288.

Pennsylvania, via the PUC, had a choice regarding whether or not to enforce the 1996 Act or in the alternative opt out and allow complete federal preemption. Section 252 provides the states with the alternative to either: (1) carry out their responsibilities under the 1996 Act by mediating, arbitrating, approving, or rejecting interconnection agreements in accord with federal standards; or (2) cede authority to assume such responsibilities to the FCC. 47 U.S.C. § 252 (e)(5); see also Verizon Md., Inc., 232 F. Supp. 2d. at 558. Thus, states have the option not to participate in the federal scheme. Any action on the part of the state or the state commission is therefore voluntary for Tenth Amendment purposes; the federal government is not compelling the states to act. Because participation in the 1996 Act is voluntary, federal regulation, including exclusive federal jurisdiction in reviewing state commission actions, does not infringe on the state's sovereignty in violation of the Tenth Amendment. See MCI Telecom. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 510 (3d Cir. 2001) ("Because Congress validly terminated the states' role in regulating local telephone

competition and, having done so, then permitted the states to resume a role in that process, the resumption of that role by a state is a congressionally bestowed gratuity. The state commission's authority to regulate comes from § 252(b) and (e), not from its own sovereign authority.").

In conclusion, this Court holds that jurisdiction to review state commission actions under the 1996 Act lies exclusively in federal courts. See 47 U.S.C. § 252. Congress had authority under the Commerce Clause to enact Section 252 and prohibit state court review of interconnection agreements. Furthermore, such action by Congress does not exceed its authority under the Commerce Clause, nor the Tenth Amendment. As a result, the Commonwealth Court's order affirming the PUC's order setting rates for access to the local telephone network is hereby vacated.

Former Chief Justice Zappala did not participate in the decision of this case.

Judgment entered
Dated: March 22, 2004

Charles W. Johns

Charles W. Johns, Esquire
Prothonotary

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a copy of the foregoing letter of Verizon Pennsylvania Inc., upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 12th day of May, 2004.

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2004 MAY 14 PM 4:11
SECRETARY'S BUREAU

May 14, 2004

VIA HAND DELIVERY

DOCKETED
JUL 26 2004

James McNulty
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PA Public Utility Commission
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Harrisburg, PA 17105-3265

Re: Investigation into the Obligation Incumbent of Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market; I-00030100

Dear Secretary McNulty:

On behalf of the Pennsylvania Carriers' Coalition ("PCC")[1] I am responding to a letter submitted by Verizon Pennsylvania, Inc. ("Verizon") in the above-referenced matter in support of its pending January 2, 2004 Petition for Reconsideration which attempts to supplement its legal arguments advanced in its brief and pleadings in this case in effort to have the Commission reverse its December 18, 2003 Order in the above referenced matter. Rather than contest the propriety of Verizon's late-arriving legal arguments, the PCC will respond to Verizon's new and meritless claims.

Verizon's May 12, 2004 letter relies on a recent decision by the Pennsylvania Supreme Court[2] which held that only a federal court has jurisdiction to review Commission orders

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1 The PCC is an informal group of competitive local exchange carriers ("CLECs") comprised of Full Service Computing Corp. t/a Full Service Network ("FSN"), ATX Licensing, Inc. ("ATX"), Remi Retail Communications, LLC ("Remi") and Line Systems, Inc. ("LSI").

2 *MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*, 844 A.2d 1239 (Pa. 2004).

DSH:41035.1/FUL022-216383

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establishing the pricing of Unbundled Network Elements("UNEs"), including the UNE rates adopted by the Commission in the *Global Order*.[3] Despite Verizon's inferences to the contrary, the Supreme Court's decision only affected appellate jurisdiction over the Commission's establishment of UNE rates and had no impact on the Commission's underlying decisions, in the *Global Order*, including its unbundling decisions, which remain in full force and effect. Given an accurate assessment of the issues before the Court and the Court's decision, the decision simply has no relevance to the matter before the Commission which involves the continuing application of the *Global Order's* unbundling requirements. In fact, what Verizon fails to disclose to the Commission is that Verizon requested Supreme Court review of the *Global Order's* unbundling requirements at issue in this case, which request was withdrawn by Verizon as a condition of avoiding structural separation. Accordingly, the issue that Verizon is now claiming was resolved by the Supreme Court regarding the propriety of the *Global Order's* unbundling requirements was not before the Court and these *Global Order* requirements continue and remain valid and binding.

What Verizon also does not tell the Commission is that both the Federal Communications Commission ("FCC"), through the *Triennial Review Order* ("TRO")[4] and the United States Court of Appeals for the District of Colombia, through its *USTA II* decision,[5] have both recognized that states retain unbundling authority under state law which is exercised consistent with the requirements of the Telecommunications Act, and, as the FCC stated does "not substantially prevent the implementation of the federal regime."[6] In fact, both the FCC and the Circuit Court recognized that issues over whether state unbundling requirements were consistent with the Act were to be resolved through declaratory order proceedings before the FCC.[7] In this regard, on April 16, 2004, Verizon filed just such a declaratory order petition at the FCC which petition

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3 *Joint Petition of Nextlink Pennsylvania, Inc. et. al.*, P-00991648, P-00991649 (September 30, 1999).

4 *Review of Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 01-338 (August 21, 2003) ("TRO").

5 *United States Telecom Association v. Federal Communications Commission*, 359 F.2d 554 (D.C. Circuit March 2, 2004).

6 TRO at ¶ 93. In fact in its brief to the D.C. Circuit, the FCC expressly argued that " . . . the TRO Order did not preempt states from adding to the unbundling requirements that the FCC adopted."

7 359 F.2d at 594

remains pending before the federal agency.[8] Rather than follow the review process endorsed by both the FCC and D.C. Circuit Court for review of state unbundling decisions, Verizon seeks a Commission reversal of its December 18, 2003 Enterprise Switching Order and the underlying *Global Order*. Its attempt should be disregarded and the Commission should stand by its state policy subject to FCC review of whether the Commission's long-standing *Global Order* unbundling requirements are consistent with the federal regime.

As the Commission is well aware, the *Global Order's* requirements, as they pertain to unbundling issues, were established under both state and federal law. As the Commission stated in the *Global Order* in reaching its unbundling decisions.

> In addition to the federal law requiring BA-PA to unbundled network elements, there are two sources of independent state authority that support a Pennsylvania Commission directive to provide these six (6) UNEs. First, the Pennsylvania Commission can require BA-PA to provide the UNEs under its own independent stat authority. In fact, the Commission has already done this for three (3) of the original seven (7) UNEs. In a July 31, 1996 Opinion and Order, prior to the FCC's issuance of Rule 319, this Commission specifically required BA-PA to unbundled the loop, switch and transport elements. [44] As far back as October 4, 1995 -- prior to the passage of the Telecommunications Act of 1996 -- this Commission "express[ed] support for the proposal that incumbent LECs be required to unbundled and separately price the various types of facilities used to provide local exchange services.[45] The Commission has the authority to determine those UNEs that BA-PA must unbundled and offer to CLECs in order to promote competition in the Commonwealth.
>
> [44] *Application of MFS Intelenet of Pennsylvania, Inc., et. al.*, Docket No. A-310203F0002, Opinion and Order - Short Form, July 31, 1996, pg. 21
>
> [45] *Application of MFS Intelenet of Pennsylvania, Inc., et. al.*, Docket No. A-310203F0002, Opinion and Order - Short Form, October 4, 1995, pg. 44

Global Order at 66-67.[9]

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8 *In the matter of Verizon Pennsylvania, Inc., Petition for Declaratory Ruling and Order Preempting the Pennsylvania Public Utility Commission's Order Directing Verizon Pennsylvania, Inc. to Provide Access to its Enterprise Switches.*

9 It is important to recognize that while Chapter 30 has sunsetted, the Commission expressly recognized that it had and was exercising unbundling authority independent of

Of course, the loops, switching and transport elements referred to by the Commission are the essential elements of the Unbundled Network Element Platform ("UNE-P") at issue in this case. Furthermore, since the *Global Order* the Commission has designated local service to customers with over $10,000 in Total Billed Revenue as "competitive" invoking an even more direct unbundling obligation under Verizon's Alternative Regulation Plan for the enterprise switching element at issue in this case.

While, in *MCI*, the Supreme Court discusses the interplay between following the federal regime and preemption, nothing in the decision can be interpreted to conclude that this Commission's unbundling authority has been preempted or that the *Global Order's* unbundling requirements have not been preserved. To the contrary, the FCC and the D.C. Circuit Court have recognized that consistent state unbundling requirements remain in effect. As fully explained in the PCC's January 13, 2004 Answer to Verizon's reconsideration petition, the *Global Order's* unbundling requirements remain fully consistent with the federal regime and should be affirmed by this Commission.

While the parties can debate the legal niceties of the interplay between state and federal law, there is no reasonable debate regarding what outcome is in the public interest. As reflected in the record of this proceeding, many significant enterprise customers rely on service provided through UNE-P as a source of substantial savings and advanced services. Elimination of enterprise UNE-P will do nothing more than take away those savings and service capabilities by essentially slamming those customers back to Verizon against their respective wills. Furthermore, and equally seriously, as reflected in the record, the maintenance of enterprise UNE-P will provide a critical bridge to the deployment of the Next Generation Network which will finally fulfill the Commonwealth's economic development and network modernization objectives.

The Commission should stay the course and reject Verizon's petition for reconsideration.

Respectfully submitted,

Alan C. Kohler
For WOLF, BLOCK, SCHORR and SOLIS-COHEN LLP

ACK/smw
cc: Bohdan Pankiw
Maryanne Martin

Chapter 30. Furthermore as to Chapter 30, the unbundling requirements applicable to "competitive" services remain a binding obligation for Verizon under its Commission-approved Alternative Form or Regulation Plan.

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MCI

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May 18, 2004

DOCKETED
JUL 14 2004

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MAY 17 2004
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Via Overnight Delivery

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building, 2nd Floor
400 North Street
Harrisburg, PA 17120

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100

Dear Mr. McNulty:

This letter is being filed in response to Verizon Pennsylvania, Inc.'s May 12, 2004 letter regarding the alleged meaning of a recent Pennsylvania Supreme Court opinion – *MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*, 844 A.2d 1239 (Pa. 2004). MCI strongly disagrees with Verizon's interpretation of the effect of that opinion.

First, the Pennsylvania Supreme Court decision has no bearing on the position Verizon is advocating in its letter. That decision was only about the jurisdiction of state courts to review the Commission's federal law determinations concerning interconnection agreements. Indeed, the Pennsylvania Supreme Court expressly declined to reach the question of the state court's jurisdiction over state law determinations concerning interconnection agreements – implicitly acknowledging that there are state law determinations by the Commission in this process.

Second, the Pennsylvania Supreme Court decision does not hold that, or even address whether, any substantive provisions of state law are preempted by federal law standards. The only issue it decides concerns preemption of state courts' jurisdiction to hear certain appeals. The sentence that Verizon quotes and highlights in its letter – that the federal standards apply uniformly – does not mean that all state law in this field is preempted. To the contrary, the Telecommunications Act expressly preserves state law authority in several places. Thus, the statement quoted by Verizon does not present a new concept, but merely confirms a principle with which even MCI agrees – that there are certain areas of Commission decisions that are

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based on federal law. However, that principle says nothing about whether a separate and independent state law determination would be preempted by the same federal law.

Very truly yours,

Michelle Painter

Michelle Painter

cc: Certificate of Service
Maryanne Reynolds Martin, Esq
Bohdan Pankiw, Esq.

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MAY 17 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

SERVICE LIST

I hereby certify that I have this day caused a true copy of MCI's Letter response to Verizon's May 12, 2004 letter to be served upon the parties of record in Docket Nos. I-00030100 in accordance with the requirements of 52 Pa. Code Sections 1.52 and 1.54 in the manner and upon the parties listed below.

Dated in Ashburn, VA on May 18, 2004

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May 21, 2004

VIA UPS OVERNIGHT DELIVERY

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Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100

Dear Mr. McNulty:

Verizon Pennsylvania Inc. ("Verizon") would like to address briefly letters filed by counsel for the Pennsylvania Carriers' Coalition ("PCC") and MCI in response to my letter dated May 12, 2004 bringing to the Commission's attention the Pennsylvania Supreme Court's decision in *MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*, 844 A.2d 1239 (Pa. 2004). PCC and MCI apparently miss the point of my letter.

Both MCI and PCC point out that the precise issue addressed by the Supreme Court was the appellate jurisdiction of state courts, and Verizon agrees. However, Verizon does *not* agree that the Supreme Court case has "no bearing on the position that Verizon is advocating" in this case. Verizon's position in this case is very simple – this Commission's unbundling decisions must be consistent with binding federal law. The Pennsylvania Supreme Court's recent ruling recognizes and reinforces that principle, finding that exclusive federal appellate jurisdiction is "reasonably connected to Congress' goal of uniformity . . ." (slip op. at 15). Indeed, even the Commonwealth Court decision affirming the *Global Order* (upon which this Commission relies in its December 18 Order) recognized that if there is a conflict between state and federal unbundling rules "the state classification would be ***illegal***." 763 A.2d at 486 (citing 47 U.S.C. § § 251(d)(3), 261) (emphasis added).

Significantly, neither MCI nor PCC point to any federal or Pennsylvania cases that support this Commission's authority to adopt unbundling rules that conflict with federal law, because there are none. Indeed, PCC expressly concedes that only "consistent

unbundling requirements remain in effect." (PCC Letter at 4). PCC's claim that the requirements it seeks to preserve are "consistent" with federal unbundling rules is not even remotely credible. It is directly contrary to the federal statutory regime to require unbundling without "impairment," and both the FCC and the D.C. Circuit have stated in no uncertain terms that CLECs are ***not*** impaired without unbundled access to enterprise switching. Indeed, the PCC would not be pressing so hard to keep a state unbundling requirement if it were in fact "consistent" with federal law, which it is not.

Similarly, the PCC's argument that the Commission should simply retain its inconsistent requirements until the FCC formally declares them to be inconsistent requires this Commission to abdicate its independent duty to comply with the law and should be rejected.

This Commission has consistently conformed its rulings to binding federal law both within and outside the telecommunications area.[1] That is all Verizon seeks here. Verizon therefore requests that the Commission grant its Petition for Reconsideration and remove any suggestion in its December 18, 2003 Order that Verizon must continue to unbundle switching or provide the UNE-platform to serve enterprise customers in contravention of the requirements of federal law as set forth in the *Triennial Review Order* and affirmed by the D.C. Circuit.

Very truly yours,

Julia A. Conover

JAC/meb

Via UPS Overnight Delivery

cc: Bohdan Pankiw, Esquire
Maryanne Martin, Esquire
Certificate of Service

[1] For example, when the FCC *added* new UNEs like dark fiber and subloops, the Commission required that Verizon promptly include them in the 216 tariff. *Covad Communications Co. et al. v. Bell Atlantic-Pennsylvania, Inc* Dkt. No. R-00005350C0001 (Order entered June 22, 2000)(expanding the scope of the *Expedited UNE Proceeding* to include the new UNEs "consistent with the prior orders of this Commission, the FCC's *UNE Remand Order* and 37 C.F.R. § 51.319 . ."). Of course, a Commission commitment to promptly comply with federal law cannot apply only to changes that expand UNE obligations.

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a copy of the foregoing letter of Verizon Pennsylvania Inc., upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 21st day of May, 2004.

VIA UPS OVERNIGHT DELIVERY

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Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
& Niesen
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Kelley Drye & Warren LLP
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Kandace Melillo, Esquire
Office of Trial Staff
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Julia A. Conover

Julia A. Conover
Verizon Pennsylvania Inc.
1717 Arch Street, 32W
Philadelphia, PA 19103
(215) 963-6001

ORIGINAL

COMMONWEALTH OF PENNSYLVANIA

ORIGINAL

OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

William R. Lloyd, Jr.
Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

July 15, 2004

HAND DELIVERED

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P. O. Box 3265
Harrisburg, PA 17105-3265

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market Docket No. I-00030100

Dear Secretary McNulty:

I am delivering for filing today the original plus three copies of a:

1. Notice of Withdrawal of Appearance on behalf of the Office of Small Business Advocate in the above captioned matter; and

2. Notice of Appearance on behalf of the Office of Small Business Advocate in the above captioned matter.

Copies of each of the documents listed above are being served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

DOCUMENT FOLDER

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate

Enclosures
cc: Hon. Veronica A. Smith
Chief Administrative Law Judge

Parties of Record

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2004 JUL 15 PM 3:36
SECRETARY'S BUREAU

84

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for The Enterprise Market	: : : :	**Docket No. I-00030100**

NOTICE OF WITHDRAWAL OF APPEARANCE

The Office of Small Business Advocate, pursuant to 52 Pa. Code § 1.24, hereby withdraws the appearance of Angela T. Jones, as counsel of record in the above captioned proceeding.

Angela T. Jones
Assistant Small Business Advocate

For:
William R. Lloyd, Jr.
Small Business Advocate

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525
(717) 783-2831 (fax)

DOCKETED
JUL 16 2004

Dated: July 15, 2004

DOCUMENT FOLDER

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SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of	:	
Incumbent Local Exchange Carriers to	:	**Docket No. I-00030100**
Unbundle Local Circuit Switching for	:	
The Enterprise Market	:	

NOTICE OF APPEARANCE

The Office of Small Business Advocate, pursuant to 52 Pa. Code § 1.24, hereby enters the appearance of **William R. Lloyd, Jr.**, replacing Angela Jones as counsel of record, in the above captioned proceeding.

Documents in this proceeding should now be served on the following:

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Dated: July 15, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for The Enterprise Market	: : : :	**Docket No. I-00030100**

CERTIFICATE OF SERVICE

I certify that I am serving a copy of the Notice of Withdrawal of Appearance and the Notice of Appearance on behalf of the Office of Small Business Advocate by first class mail upon the persons addressed below:

Hon. Veronica A. Smith
Chief Administrative Law Judge
Pennsylvania Public Utility Commission
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William R. Lloyd, Jr.
Small Business Advocate

Date: July 15, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

RE: INVESTIGATION INTO THE OBLIGATION OF INCUMBENT LOCAL EXCHANGE CARRIERS TO UNBUNDLE NETWORK ELEMENTS	:	Docket No. I-00030099
RE: INVESTIGATION INTO THE OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS TO UNBUNDLE LOCAL CIRCUIT SWITCHING FOR THE ENTERPRISE MARKET	:	Docket No. ~~I-00030100~~ I-00030100

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SECRETARY'S BUREAU

NOTICE OF
WITHDRAWAL OF APPEARANCE

DOCKETED
SEP 22 2004

TO THE SECRETARY:

The Office of Trial Staff (OTS) of the Pennsylvania Public Utility Commission (Commission), pursuant to 52 Pa. Code § 1.24, hereby withdraws the appearance of Kandace F. Melillo, as a counsel of record in the above-captioned proceeding. Please direct questions regarding this to the undersigned.

Johnnie E. Simms
Chief Prosecutor
Office of Trial Staff
Pa. Public Utility Commission

P. O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-6170

Dated: August 18, 2004

DOCUMENT
FOLDER

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Investigation Into The Obligation	:	
Of Incumbent Local Exchange Carriers	:	Docket No.
To Unbundle Network Elements	:	I-00030099
	:	
Re: Investigation Into The Obligation	:	
Of Incumbent Local Exchange Carriers	:	Docket No.
To Unbundle Local Circuit Switching	:	I-00030100
For The Enterprise Market	:	

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Notice of Appearance,** dated August 18, 2004, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below:

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Johnnie E. Simms
Chief Prosecutor
Office of Trial Staff
Pa. Public Utility Commission

Dated: August 18, 2004
Docket Nos. I-00030099
I-00030100