Julia A. Conover
Vice President and General Counsel
Pennsylvania

ORIGINAL

verizon

1717 Arch Street, 32N
Philadelphia, PA 19103

Tel: (215) 963-6001
Fax: (215) 563-2658
Julia.A.Conover@Verizon.com

January 2, 2004

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

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:

I enclose for filing the original and nine copies of the Petition of Verizon Pennsylvania Inc. for Reconsideration of the Commission's December 18th Order, in the above-referenced matter.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Julia A. Conover

Julia A. Conover

cc: Via E-Mail and UPS Overnight Delivery
Maryanne Reynolds Martin, Esquire
Attached Service List

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

VERIZON PENNSYLVANIA INC.'S
PETITION FOR RECONSIDERATION

Verizon Pennsylvania Inc. ("Verizon PA") respectfully requests that the Pennsylvania Public Utility Commission ("Commission") reconsider that section of its December 18, 2003 *Order* that addresses the "[c]ontinuing [o]bligations of Verizon Pennsylvania Inc." *Order* at 14-17. This portion of the *Order*, which is unrelated to the issue before the Commission in this docket – whether the Commission should petition the Federal Communications Commission ("FCC") for a waiver from the FCC's national finding of no impairment for enterprise switching – could be read as imposing unlawful obligations on Verizon PA that directly conflict with the FCC's findings. Specifically, the *Order* appears to suggest (1) that Verizon PA has a separate and continuing additional unbundling obligation under the Commission's *Global Order* to provide unbundled switching and UNE-P to enterprise customers– a conclusion directly at odds with the 1996 Act, binding case law, and the FCC's express conclusions; and (2), that the TELRIC rates that apply to network elements unbundled pursuant to section 251 of the 1996 Act must also be applied to network elements unbundled pursuant only to section 271 – an assumption expressly and unambiguously rejected by the FCC, which has controlling authority over this question.

These suggestions, if intended to have binding effect, would completely nullify the Commission's correct conclusion that it has no basis to request a waiver of the FCC's binding national "no impairment" finding eliminating TELRIC-priced unbundling of switching and UNE-P for enterprise customers, and would thereby create an actual conflict with the FCC's binding unbundling determinations regarding enterprise switching.

In order to allow the orderly 90-day transition away from section 251 enterprise switching mandated by the *Triennial Review Order*, the Commission must promptly clarify that its *Order* fully conforms with the 1996 Act and the FCC's regulations and must eliminate any potential conflict with those standards. It must do so by expressly stating that there is no "independent," additional Pennsylvania-specific unbundling obligation for switching for enterprise customers, much less a UNE-P obligation, and that the TELRIC rates that apply to unbundling based on section 251 of the 1996 Act do not apply to network elements unbundled pursuant to section 271 of the Act. Verizon respectfully requests that the Commission clarify its *Order* within 30 days from the date of this filing. If the Commission declines to do so, Verizon will have to seek a declaratory ruling from the FCC or relief from an appropriate Federal district court in time to implement the elimination of the enterprise switching UNE within the 90-day transition period established in the *Triennial Review Order*.

In support of its Petition, Verizon states the following:

BACKGROUND

1) On October 3, 2003, the Commission tentatively adopted the FCC's national finding that CLECs are not impaired without unbundled access to local switching to serve enterprise customers. The Commission also established a procedure to provide interested parties with the opportunity to convince the Commission that it should petition the FCC for a waiver from this national finding of no impairment. *Order* at 2.

2) Six carriers unsuccessfully attempted to make this showing; the Commission properly concluded that based on the record presented by these carriers, it did "not find any compelling justification to petition the FCC for a waiver of no impairment for local switching to the enterprise market." *Order* at 2 & 13.

3) However, instead of closing the docket with this conclusion – the only proper consideration before it – in its *Order* the Commission went on to suggest that Verizon PA [1] "has a continuing obligation to provide requesting carriers with access to local circuit switching" in part, according to the Commission, because of the Commission's *Global Order*. *Order* at 13. The *Order* also could be read to suggest that the *Global Order* independently imposes an ongoing obligation on Verizon PA to provide UNE-P. *Id.* The effect of this suggestion, if intended to be binding, would be to require Verizon PA to continue to provide local circuit switching and UNE-P to enterprise customers,

[1] As the Commission acknowledged, *Order* at 13, any section 271 obligations do not apply to former GTE territories, and so Verizon North Inc. is exempt from these requirements. *See* 47 U.S.C. § 153(4) (BOC defined as 20 specifically identified entities, including any successors or assigns that provide wireline service, but does not include an affiliate of any such company); Memorandum and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc, and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, ¶ 8 (Rel. Sept. 19, 2001) ("We also note that the Act does not require Verizon to make a showing of checklist compliance with respect to the former GTE operating company it acquired .... Section 271(c) applies only to BOCs themselves, and not to BOC affiliates. ... Although the former GTE operating company became an affiliate of Verizon as a result of the parent company merger, it is neither a BOC nor a successor or assign of Verizon. Thus, we find that Verizon is not required to show checklist compliance for GTE North, the former GTE LEC, to receive section 271 authorization for the state of Pennsylvania.").

independently of any federal obligations imposed by section 271, in direct conflict with the FCC's now binding national finding of "no impairment" for enterprise switching.

4) The Commission also indicated that the rate Verizon PA should charge for enterprise switching pursuant to section 271 is the same TELRIC-based rate that would apply if Verizon PA were still obligated to provide enterprise switching pursuant to section 251. According to the Commission, Verizon PA must charge this "tariff rate for access to its network as long as the *Global Order* requirement remains in place." *Id.*

5) In addition to being unnecessary dicta that address issues beyond the scope of the task the FCC has assigned to the Commission, both of these conclusions are clear errors – they are directly at odds with the 1996 Act, binding case law, and mandatory conclusions of the FCC. These extra conclusions would, if effective, completely nullify the FCC's determinations that enterprise switching need not be unbundled except pursuant to section 271 and that the pricing of section 271 unbundled elements is the exclusive province of the FCC. Verizon PA respectfully requests that the *Order* be clarified to remove any suggestion that the Commission may be seeking to impose unlawful restrictions on Verizon PA.

ARGUMENT

A. The Commission should clarify that inconsistent Pennsylvania-specific unbundling obligations cannot exist, and that the scope of any unbundling obligations are determined by the 1996 Act.

6) The last portion of the *Order* asserts that despite the Commission's conclusion that there is no evidence to support a challenge to the FCC's national finding of no impairment for enterprise switching, Verizon PA nonetheless has a "continuing obligation" to provide this switching pursuant to section 271 and the Commission's

Global Order. The Commission then appears to agree that a state unbundling requirement that "conflicts with" or "substantially prevents the implementation of the federal regime" could not stand, but finds that there is "uncertainty as to an actual conflict" here. *Order* at 15. There is no such "uncertainty."

7) As a preliminary matter, neither section 271 of the 1996 Act nor the Commission's *Global Order* provides *this Commission* with a legal basis to order additional unbundling. Any "continuing obligation" that Verizon PA might have pursuant to section 271 is within the exclusive jurisdiction of the FCC, and any additional, inconsistent unbundling obligation that might have existed under the *Global Order* has been preempted by the 1996 Act and the FCC's *Triennial Review Order.*[2]

8) *Section 271*: As the Commission is aware, the scope and meaning of a BOC's section 271 obligations are determined solely by the FCC. *See* 47 U.S.C. § 271(d)(2)(B); *see also, Order Closing Investigation,* Commonwealth of Massachusetts Department of Telecommunications and Energy, *Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops,* (D.T.E. 03-59) (November 25, 2003) (*"Massachusetts Enterprise Switching Order")* at 19 ("The Department . . . does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271."). It is for this reason the Commission itself did not determine whether Verizon PA had satisfied its section 271 obligations in the Commonwealth, but instead provided the FCC with a consultative report

[2] *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause) (*cited with approval by the FCC at Triennial Review Order* ¶ 192, n. 612).

to aid that commission in its determination of this point.[3] The Commission does not dispute its own lack of jurisdiction over section 271 determinations.

9) In its *Triennial Review Order,* the FCC concluded that "BOC obligations under section 271 are not necessarily relieved based on any determination we [the FCC] make under the section 251 unbundling analysis."[4] However, as the Commission acknowledges, Verizon has filed a forbearance request to be relieved of certain section 271 obligations. *Order* at 16, n. 12. And while the FCC has currently concluded that section 271 obligations are "not necessarily relieved" based on section 251 determinations, the FCC also concluded that it was "declin[ing] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." *Triennial Review Order* ¶ 655, n. 1989.

10) Thus, based on the FCC's current conclusions regarding the independent unbundling obligations of section 271, Verizon PA will continue to provide unbundled switching pursuant to section 271 at the terms and conditions set out by the FCC, subject to the outcomes of pending appeals on this issue. But section 271 provides no independent basis for this Commission to require Verizon PA to continue to provide unbundled switching.

11) <u>*The Global Order*</u>: The *Order* also states that "[i]n the *Global Order*, we invited VZ-PA to demonstrate that UNE-P would not be necessary to serve [business customers with total billed revenues at or below $80,000 annually] after December 31,

---

[3] *See* Consultative Report of the Pennsylvania Public Utility Commission, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc, and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania* (CC Docket No. 01-138) (filed June 25, 2001).

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338 (Rel. August 21, 2003) ("*Triennial Review Order*"), ¶ 655.

2003. VZ-PA has not made a filing to date, therefore, the obligation continues." *Order* at 15 (citation omitted). To the extent that this language can be read to suggest that there remains any separate, additional, Pennsylvania-specific unbundling obligation apart from the obligations that arise out of the 1996 Act, this assertion is a legal error; the Commission should clarify that it is not asserting an independent and additional unbundling requirement, which would be unlawful.

12) In drafting the 1996 Act, the United States Congress expressly assigned to the FCC the task of making unbundling determinations. Section 251(d)(2) explicitly states that "in determining what network elements should be made available" for unbundling, "*the Commission* [FCC] shall complete all actions necessary to establish regulations to implement the requirements" for unbundled access."[5] As the FCC itself has emphasized, "[t]he Communications Act assigns the Commission [FCC] the responsibility for establishing a framework to implement the unbundling requirements of section 251(d)(2)." *Triennial Review Order* ¶ 186.

13) The 1996 Act's express grant to the FCC of the authority and power to make these unbundling determinations nullifies any additional state unbundling obligations. As the United States Supreme Court concluded, "[t]he question . . . is not whether the Federal Government has taken regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."[6] By passing the 1996 Act, "Congress has broadly extended its law into the field of

---

[5] *See* 47 U.S.C. § 251(d)(2) (*emphasis added*); *see also* 47 U.S.C. § 252(c)(1) (requiring state commissions to resolve arbitration disputes consistent with the "regulations prescribed by the Commission pursuant to section 251."); *USTA v. FCC*, 290 F. 3d 415, 417-18 (D.C. Cir. 2002) (stating that section 251 of the 1996 Act "requires that ILECs 'unbundle' their network elements – that is, provide them on an individual basis to competitive providers *on terms prescribed by the Commission.*") (*emphasis added*).

[6] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999).

intrastate telecommunications . . . ."[7] And "[t]he Telecommunications Act of 1996 . . . fundamentally restructures the local exchange markets. States may no longer enforce laws that impede competition . . . ."[8] Any attempt to impose unbundling pursuant to a state-specific order, independent of and inconsistent with the FCC's determinations, would be precisely the kind of impediment to competition that is prohibited by the 1996 Act.

14) In its *Triennial Review Order,* the FCC itself has emphasized this same point: "We . . . do not agree with those that argue that states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Triennial Review Order* ¶ 192. As the FCC observed, such an approach "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy." *Id.* (footnote omitted).

15) Furthermore, the FCC has expressly stated that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations" and where "existing state requirements" are not "consistent" with the FCC's unbundling framework, "[i]t will be necessary . . . for the subject states to amend their rules and to alter their decisions to conform to our [the FCC's] rules." *Triennial Review Order* ¶¶ 187 & 195.

16) For these reasons, the Commission's *Global Order* does not establish a separate legal basis for greater unbundling in light of the *TRO*, as the *Order* could be read

[7] *Id.* at 387 n. 10.
[8] *Id.* at 371.

to suggest, and there is thus no additional unbundling obligation that "continues" pursuant solely to the *Global Order.*

17) While the Commission concedes that this argument "is not without force," it nevertheless claims "that the language in the *TRO* is not clear," and that the record in this case is not adequate to determine if there exists an "actual conflict" with the FCC's national no-impairment finding in the enterprise switching market. *Order* at 15. However, there is plainly an actual conflict here. The Commission's reading of the *Global Order* as imposing a continuing obligation to provide unbundled local switching ***directly conflicts with the FCC's national finding of non-impairment for enterprise switching.*** Simply put, a state conclusion that "yes, an ILEC is required to unbundle " actually and directly conflicts with the federal conclusion that "no, the ILEC does not have to unbundle."[9] The Commission's interpretation of the *Global Order* would therefore prevent Verizon PA from implementing the FCC's binding determinations under the 1996 Act.

18) Moreover, the language from the *Triennial Review Order* cited above is unambiguous – inconsistent state requirements cannot stand and must be "altered" and "amended." And in fact, the language of the *Triennial Review Order* was clear enough for this Commission and other state commissions to appeal the *Triennial Review Order* on this very point – a fact that the Commission concedes in a footnote. *Order* at 15, n. 11. Thus, the Commission's own actions illustrate what cannot be reasonably disputed:

[9] In its brief on appeal to United States Court of Appeals for the District of Columbia Circuit earlier this week, the FCC explained that "a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption." Brief for Respondents at 92-93, *USTA v. FCC*, No. 00-0012 (DC Cir., filed Dec. 31, 2003) (citation and footnote omitted).

The 1996 Act expressly assigns to the FCC the task of making unbundling determinations, and the FCC has concluded that that it alone has the authority to determine the scope of unbundling obligations; absent a reversal of this position on appeal, it is binding on the Commission. And absent a stay pending appeal – which was not even requested – the FCC's conclusion is binding while that appeal runs its course.

19) In addition, the *Order* not only contains language that could be read to suggest that there is an independent, Pennsylvania-specific unbundling obligation, but also that as part of this independent, Pennsylvania-specific obligation, it is the obligation of Verizon PA. to rebut a presumption in favor of UNE-P before UNE-P can be eliminated in its territory. *Order* at 15.

20) This implication is also inaccurate and must be clarified. Not only does the Commission have no independent basis to order additional unbundling, but even the unbundling that may be legally imposed by the FCC pursuant to the 1996 Act cannot be premised on a presumption in favor of UNE-P, but instead must apply the "necessary" and "impair" standards contained the 1996 Act. As the United States Supreme Court has concluded, the 1996 Act "does not authorize the . . . [FCC] to create isolated exemptions from some underlying duty to make all network elements available. It requires the . . . [FCC] to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[10]

21) The FCC has itself conceded this point, and instead claimed in its *Triennial Review Order* that it was following "Congress's direction for us [the FCC] to make specific, affirmative findings that *elements* should or should not be unbundled."

[10] *Id.* at 389.

Triennial Review Order ¶ 71 (emphasis added). In fact, the FCC asserted that it was focused not on preserving the UNE Platform, but "on opening . . . bottleneck markets." *Id.* ¶ 141. And in making these determinations, the FCC acknowledged that "unbundling is one of the most intrusive forms of economic regulation – and one of the most difficult to administer," and therefore concluded that "it is unlikely that Congress intended to apply unbundling more generally absent an unambiguous mandate." *Id.*

22) For all of these reasons, any purported additional unbundling obligation found in the Commission's *Global Order* is no longer viable, and thus there is no independent need for Verizon PA to demonstrate pursuant to that order that UNE-P would not be necessary to serve end-user customers. Once there is a finding of non-impairment under the standards contained in 1996 Act and the *Triennial Order*, as there now is in the enterprise switching market, Verizon PA has no obligation to make any additional showing under the *Global Order.* The Commission should eliminate any confusion on this point by clarifying that unbundling determinations must be consistent with the standards set forth by the 1996 Act and applied in the *Triennial Review Order* – not those contained in the *Global Order.*

B. The Commission should clarify that TELRIC rates do not apply to network elements unbundled solely by virtue of section 271

23) In the *Order,* the Commission asserted that the rate to be charged for enterprise switching unbundled pursuant only to Verizon Pa's section 271 obligations "is a more complicated question," one that the Commission was "declin[ing] to embroil" itself in at this time. *Order* at 16-17. Unfortunately, the *Order* appears to have done just that, by suggesting an outcome directly at odds with express and binding language from the *Triennial Review Order.*

24) Specifically, the *Order* states that Verizon Pa "shall charge the tariff rate for access to its network as long as the *Global Order* requirement remains in place." *Order* at 17. But in reaching this conclusion, the Commission appears to have overlooked the FCC's express and binding language that TELRIC-based rates do *not* apply for network elements unbundled pursuant to section 271, and erroneously to have concluded that this point was only an argument offered by Verizon. *See Order* at 16 ("Verizon argues that the FCC has exclusive jurisdiction to review pricing under Section 271, apparently asserting that Verizon sets the rate in the first instance subject to review by the FCC in an enforcement proceeding under 47 U.S.C. § 271(d)(6)."). However, as set forth below, this point is not Verizon's opinion, but the binding conclusion of the FCC.

25) Contrary to the *Order's* suggestion, the FCC explicitly concluded that "section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, ***but does not require TELRIC pricing***." *Triennial Review Order* ¶ 659 (*emphasis added*).

26) In fact, the FCC expressly rejected the position that the Commission appears to adopt here. "Contrary to the claims of some commenters, TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 *where impairment is found to exist.*" *Id.* ¶ 656. For this reason, "section 271 requires these elements to be unbundled, ***but not using the statutorily mandated rate under section 252***." *Id. (emphasis added).*

27) Instead of applying TELRIC rates for network elements unbundled solely by virtue of section 271, the FCC has concluded that the applicable rates are market-based ones that satisfy *the FCC's* "just and reasonable" requirement of sections 201 and 202. *Triennial Review Order* ¶¶ 662-64. Whether a market-based rate satisfies the FCC's "just and reasonable" pricing standard "is a fact-specific inquiry *that the Commission [FCC] will undertake* in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(b)(6)." *Id.* ¶ 664 (*emphasis added).*

28) The *Order's* suggestion that these "just and reasonable" rates must be identical to TELRIC-based rates such as those contained in Tariff No. 216 is simply incorrect. *Order* at 17. The FCC was explicit on this point, both in rejecting arguments that TELRIC rates should apply to network elements unbundled by virtue of section 271, and also by emphasizing that "just and reasonable" rates may be demonstrated by market-based activity. *See Triennial Review Order* ¶ 664 (stating that a BOC can demonstrate a rate for a section 271 network element is "just and reasonable" if the rate "is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff" or "by showing that it [the BOC] has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate."); *see also Massachusetts Enterprise Switching Order* at 19 (holding that the "proper pricing" for "just and reasonable" rates for network elements unbundled pursuant to section 271 is "market-driven.").

29) The *Order's* suggestion that the same TELRIC-based rates that apply to network elements for which there has been a finding of impairment should also apply to

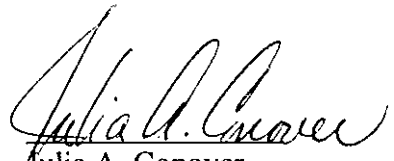
those network elements for which there has been a finding of *no impairment* would be an improper attempt, in the words of the FCC, to "gratuitously reimpose" on the basis of section 271 "the very same requirements that another provision (section 251) has eliminated." *Triennial Review Order* ¶ 659.

30) For all of these reasons, the Commission should clarify that the rate to be charged for unbundled enterprise switching is not the TELRIC-based tariff rate, but a market-based rate contemplated by the FCC. It should also clarify that any objections to this rate should be addressed the FCC, the entity that has jurisdiction over this pricing issue.

CONCLUSION

Verizon PA therefore respectfully requests that the Commission reconsider its December 18, 2003 Order to clarify 1) that there is no "independent," additional Pennsylvania-specific unbundling obligation for switching for enterprise customers, much less a UNE-P obligation, and 2) that the TELRIC rates that apply to unbundling based on section 251 of the 1996 Act do not apply to network elements unbundled pursuant to section 271 of the Act. Verizon PA further respectfully requests that this Commission act on this Petition within thirty days, in sufficient in time for Verizon PA to implement the elimination of the enterprise switching UNE within the 90-day transition period established in the *Triennial Review Order*.

Respectfully submitted,



Julia A. Conover
William B. Petersen
Suzan DeBusk Paiva
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6001
fax (215) 563-2658
e-mail: Julia.a.conover@verizon.com
William.b.petersen@verizon.com
Suzan.d.paiva@verizon.com

Counsel for Verizon Pennsylvania Inc.

January 2, 2004

ORIGINAL

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a copy of Verizon Pennsylvania Inc.'s Petition for Reconsideration, 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 2nd day of January, 2004.

VIA E-MAIL AND UPS OVERNIGHT DELIVERY

Patricia Armstrong, Esquire
Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
& Niesen
212 Locust Street, Suite 500
Harrisburg, PA 17108

Ross Buntrock, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036

Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116

Angela Jones, Esquire
Office of Small Business Advocate
Commerce Building – Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Michelle Painter, Esquire
MCI WorldCom Communications, Inc.
1133 19th Street, NW
Washington, DC 20036

Norman Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
Harrisburg, PA 17101

Alan Kohler, Esquire
Wolf, Block, Schorr & Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101-1236

Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place – 5th Floor
Harrisburg, PA 17101-1923

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

COMMONWEALTH OF PENNSYLVANIA

DATE: January 6, 2004

SUBJECT: I-00030100

TO: Office of Special Assistants

FROM: James J. McNulty, Secretary

Incumbent Local Exchange Carriers

Attached is a copy of a Petition for Reconsideration of the December 18, 2003 Order, filed by Verizon Pennsylvania Inc. in connection with the above docketed proceeding.

This matter is assigned to your Office for appropriate action.

Attachment

was

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036

(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE: (202) 887-1284
EMAIL: hhendrickson@kelleydrye.com

ORIGINAL

M-00031754
I-00030100
I-00030099

January 8, 2004

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

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

Re: ***Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundled Local Circuit Switching for the Enterprise Market, Investigation into the Obligations of Incumbent Local Exchange Carriers Unbundle Network Elements, and Development of an Efficient Loop Migration Process,*** **Procedural Order**

Executed Confidentiality Agreements

Dear Secretary McNulty:

Enclosed please find the executed confidentiality agreement for the above listed dockets for the following employees of Broadview Networks, Inc.: Timothy J. Bell, Seong Kim, James Lennon, Sean P. Lynch, John F. Raigosa and JoAnn Wight. Please feel free to contact the undersigned counsel at 202-887-1284 if you have any questions regarding this filing.

Respectfully submitted,

Heather T. Hendrickson

Enclosures
cc: Service List (via first class and electronic mail)

APPENDIX A-1

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Director, Financial Reporting of Broadview Networks, Inc. (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 11/24/03

Signature

SEONG KIM
Print Name

Employee
Status relative to Retaining Party

BROADVIEWNETWORKS
Employer

45-18 CT SQ SUITE 300
Address

APPENDIX A-1

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Managing Director - Vendor Management of Broadview Networks (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 12/8/03

Signature

James Lennon
Print Name

Employee
Status relative to Retaining Party

Broadview Networks
Employer

744 Broad Street
Address

Newark NJ 07102

APPENDIX A-1

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Director, Network Capacity of Broadview Networks, Inc. (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 11/21/03

Signature

SEAN P LYNCH
Print Name

EMPLOYEE
Status relative to Retaining Party

BROADVIEW NETWORKS
Employer

37-18 NORTHERN BLVD LIC NY 11101
Address

APPENDIX A-1

RECEIVED

JAN 09 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

DOCKETED

FEB 06 2004

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the an employee of Broadview Networks, Inc (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 12-16-03

Signature

JOHN F. RAGOSA
Print Name

Employee
Status relative to Retaining Party

BROADVIEW NETWORKS
Employer

37-18 NORTHERN BLVD
Address

LONG ISLAND CITY, NY
11101

DOCUMENT

APPENDIX A-1

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Director, Operations Support of Broadview Networks, Inc. (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 12/3/03

JoAnn Wight
Signature

JoAnn Wight
Print Name

Dir. Operations Support
Status relative to Retaining Party

Broadview Networks
Employer

400 Horsham Rd, Ste 130
Address

Horsham, PA 19044

Wolf Block

212 Locust Street, Suite 300, Harrisburg, Pennsylvania 17101
Tel: (717) 237-7160 □ Fax: (717) 237-7161 □ www.WolfBlock.com

Alan C. Kohler
Direct Dial: (717) 237-7172
Direct Fax: (717) 237-2752
E-mail: akohler@wolfblock.com

ORIGINAL

January 12, 2003

VIA HAND DELIVERY
James McNulty
Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg., 2nd
Floor, 400 North Street P.O. Box 3265
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"), please be advised that the parties have reached an agreement that Answers to Verizon Pennsylvania, Inc.'s January 2, 2004 Petition for Reconsideration will be due on or before January 13, 2004.

Thank you for your consideration of this matter.

Respectfully submitted,

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

ACK/smw
cc: Parties of Record
Maryanne Martin

DSH:39408.1/FUL022-216383

60

Wolf Block

212 Locust Street, Suite 300, Harrisburg, Pennsylvania 17101
Tel: (717) 237-7160 □ Fax: (717) 237-7161 □ www.WolfBlock.com

ORIGINAL

Alan C. Kohler
Direct Dial: (717) 237-7172
Direct Fax: (717) 237-2752
E-mail: akohler@wolfblock.com

January 13, 2003

VIA HAND DELIVERY
James McNulty
Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg., 2nd
Floor, 400 North Street P.O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT

RECEIVED
2004 JAN 13 PM 3:15
SECRETARY'S BUREAU

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"), enclosed please find an original and three (3) copies of its Answer to Verizon's Petition for Reconsideration in the above-referenced matter. All parties of record have been served as evidenced by the attached Certificate of Service.

Thank you for your consideration of this matter.

Respectfully submitted,

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

ACK/smw
cc: Parties of Record
The Honorable Michael J. Schnierle
Maryanne Martin

40

DSH:39408.1/FUL022-216383

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

PENNSYLVANIA CARRIER'S COALITION'S ANSWER TO VERIZON'S PETITION FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

The Pennsylvania Carriers' Coalition ("PCC")[1] submits this Answer to the Petition filed by Verizon Pennsylvania, Inc. ("Verizon") on January 2, 2004 seeking reconsideration of the Commission's December 18, 2003 Order in the above-captioned matter. In the Order ("*Enterprise Switching Order*"), although the Commission found that there was not "any compelling justification to petition the [Federal Communications Commission ("FCC")] for a waiver of no impairment for local switching in the enterprise market," the Commission did determine as a legal matter that: 1) under federal law, local circuit switching must continue to be unbundled by Verizon under Section 271 of the Telecommunications Act of 1996;[2] 2) separately under state law and the Commission's *Global Order*[3], that the Unbundled Network Element Platform ("UNE-P") must continue to be offered by Verizon to CLECs to serve all customers with annual Total Billed Revenue ("TBR") at or under $80,000; and 3) that Verizon must

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 47 U.S.C. § 271.

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

continue to offer UNE-P to CLECs at the current rates contained in Verizon Tariff 216 – Verizon's wholesale tariff for "other telephone companies."

Verizon's Petition is nothing more than a request for the Commission to change its mind pertaining to the conclusions cited above – a request which fails miserably under the Commission's long-established standards for reconsideration.[4] The positions advanced by Verizon in its Petition are the exact positions that it advanced and that the Commission rejected in the underlying case and those positions have no more merit now. Verizon has not even attempted to demonstrate a change of circumstances or anything new and novel which is required for the Commission to reconsider an Order under the *Duick* standard.[5] Accordingly, its petition must be denied.

Furthermore, even if the Commission's were to revisit its conclusions in the *Enterprise Switching Order*, it would find that, if anything, its conclusions have been strengthened since issuance of the Order. Verizon bases its claims that the Commission's conclusions were improper on two views that it boldly attributes to the FCC: 1) that through the *Triennial Review Order*,[6] the FCC has unequivocally preempted any state action which does not mirror Verizon's

---

4 *See Duick v. Pennsylvania Gas & Water Company*, 56 Pa. P.U.C. 553 (1982), under which the Commission will only consider reconsideration requests that raise "new and novel arguments, not previously heard, or considerations which appear to be overlooked or not addressed by the Commission." Specifically, under the *Duick* standard, reconsideration petitions which raise the same questions as raised previously are improper.

5 Although Verizon is well aware that *Duick* governs all petitions for reconsideration submitted to the Commission, Verizon does not even mention *Duick* or the *Duick* standard is its Petition. This is not surprising and merely reflects the fact that Verizon knows it cannot meet the *Duick* standard here.

6 *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*").

interpretation of that *Order* (under either authority of state or federal law);[7] and 2) that the Commission has no authority to establish rates or unbundling requirements as a condition of Verizon's provision of in-region, interLATA service under either Section 271 or residual state authority. However, it was clear from the *TRO* and has now been further clarified that the FCC does not share Verizon's view and that the federal agency's views are in fact closely aligned with the Commission's underlying rationale in the *Enterprise Switching Order*.

In the FCC's brief to the D.C. Circuit Court of Appeals,[8] filed since the issuance of the Commission's Order, the FCC argued that: 1) the preemption issue was not ripe for judicial review because ". . . the [*TRO*] *Order* did *not* preempt states from adding to the unbundling requirements that the FCC adopted. In the *Order*, the Commission [FCC] simply observed that section 251(d)(3) 'preserves states authority to impose unbundling obligations . . . *only* if such obligations are 'consistent with the Act' and do 'not substantially prevent the implementation' of the federal regime;"[9] and 2) while the federal agency believed that Congress intended to give it "primary authority" to establish obligations under 47 U.S.C. §271, the FCC did not intend to be "usurping state authority" in the Section 271 area.[10] Accordingly, the FCC's views of its own Order matches this Commission's view that there is no inflexible, overriding preemptive rule in these areas of unbundling or pricing of network elements under either Section 251 or Section 271, as Verizon so aggressively claims.

---

7 As specifically set forth below, this position is completely inconsistent with Verizon's position before the federal courts which assert a claim that the state commissions have far-reaching unbundling authority under the *TRO*.

8 Brief for Respondents, *USTA v. FCC*, Nos. 00-0012 (D.C. Cir., filed December 31, 2003).

9 Brief at 91.citing to ¶193 of the *TRO*.

10 Brief at 90.

Furthermore, the *Global Order* requirements are consistent with the 1996 Act and the federal unbundling regime. In fact, like the TRO, the procedures and standards under the *Global Order* require a granular approach to determine if UNE-P should be maintained under the "necessary and impair" standard.[11]

The bottom line is that this Commission is free to and should continue its current policies originally established in the *Global Order* until a party, including Verizon, convinces this Commission that the policies should be changed.[12] Consistent with the FCC's brief to the D.C. Circuit, it is only after this Commission considers such a request and establishes a state-specific requirement that an evaluation of whether the state-specific requirement is consistent with the Telecommunications Act and the federal regime will be possible or appropriate – and only then through a declaratory order petition to the FCC.[13]

It is important to remember that this Commission's *Global Order* policies, underlying the rules governing unbundling and network element pricing, were unanimously affirmed by the Commonwealth Court as both consistent with state law and the Telecommunications Act,

---

11 In addressing its claims, Verizon apparently forgets (or hopes the Commission forgets) that Verizon must continue to unbundle local circuit switching as a basic service function -- the equivalent of an unbundled network element -- under its Commission-approved alternative regulation plan since its services to customers with over $10,000 in TBR have been designated as "competitive." In fact, before Verizon attempts to eliminate its unbundling obligation for CLECs to serve these customers, it should be required to forfeit the "competitive" classifications of these retail services.

12 Verizon's claim that no state unbundling authority remains after the *TRO* is completely inconsistent with the *TRO* itself which provides that the Telecommunications Act "preserves the states' authority to establish unbundling requirements pursuant to state law . . .". *TRO* at ¶ 191.

13 In the *TRO*, the FCC specifically established a declaratory order procedure for such an evaluation. *TRO* at ¶ 195.

including both Section 251 and Section 271.[14] Accordingly, the Commission should stay the course and should reject Verizon's attempts to undermine its *Global Order* policies which were developed to protect Pennsylvania's consumers and business and the overriding public interest, not Verizon. Moreover, the Commission should be vigilant in prosecuting any Verizon attempts to ignore lawful and enforceable state laws, regulations and orders as Verizon has threatened to ignore those laws in its petition if Verizon (and not an appropriate authority) deems them not in accordance with the federal regime.

II. SPECIFIC RESPONSES

In specific response to Verizon's specific allegations, the PCC states as follows:

A. Background

1. The PCC agrees that on October 3, 2003, the Commission issued its *Procedural Order* governing all *TRO* related proceedings and that in that *Order*, the Commission provided for a "*90 Day Proceeding*" to conduct an on-the-record review of whether CLECs were impaired without local circuit switching to serve enterprise customers under the *TRO* standards. The PCC was an active party in the *90 Day Proceeding* and provided testimony (and later a brief) advancing its claim that the Commission should continue to require Verizon to make UNE-P available to CLECs at existing Tariff 216 rates under federal law (both Section 251 and Section 271) and state law in order to advance competition in Pennsylvania's businesses market which would be harmed by any Commission action negatively impacting the availability of UNE-P.

---

[14] *Bell Atlantic Pennsylvania, Inc., et al. v. Pennsylvania Public Utility Commission*, 763 A.2d 440 (Pa.Cmwlth. 2000). ("With the availability of network elements as the general rule, and no record or statutory basis for making an exception, the PUC's action as to these elements here is clearly in accordance with the federal requirements as well as state law.") 763 A.2d at 512-513.

It is noteworthy that shortly after submission of the PCC's testimony in the *90 Day Proceeding*, on October 24, 2003, Verizon filed a Motion requesting the Commission to strike the portions of the testimony and the underlying petition of the PCC (and other parties) which related to state law and Section 271 issues. In that Motion, Verizon made virtually identical arguments that it makes now through its reconsideration petition.[15] Furthermore, Verizon repeated these arguments in its brief submitted in the *90 Day Proceeding* on November 17, 2003.[16]

Accordingly, Verizon's reconsideration petition fails under the *Duick Standard*. As the Commission established in *Duick*:

> A petition for Reconsideration, under the provisions of 66 Pa.C.S. 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part.
>
> In this regard, we agree with the court in the Pennsylvania Railroad Company case, wherein it was said that:
>
> > Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions, which were specifically decided against them.
>
> What we expect to see raised in such petitions are new and novel arguments not previously heard or considerations which appear to have been overlooked by the Commission

56 Pa. P.U.C. at 559.

Because Verizon has not raised any new or novel arguments not previously heard or considerations which were overlooked, its Petition must fail. Here, Verizon's Petition raises the same questions based on the same arguments and is improper for reconsideration under *Duick*.

---

15 *See* Verizon Motion to Dismiss or Strike at 12-14, 21-23, 31-36.

16 Verizon Brief at 27-33.

2. The PCC disputes Verizon's characterization that because the Commission determined not to petition the FCC for a waiver, the Commission found that there is non-impairment throughout Pennsylvania for local circuit switching to serve the enterprise market. That is simply not the case. All the Order concludes is that based on the record, the Commission did not find compelling justification to seek a waiver. However, this is only part of the story.

3. Starting on page 13 of the Order, the Commission indicated that in 1999, through the *Global Order*, the Commission determined (based on probably the largest evidentiary record in Commission history) that Verizon be required to make UNE-P available to CLECs to serve all residential customers and business customers with TBR from local services and intraLATA toll services at or below $80,000 annually -- at least until December 31, 2003. As to the period after December 31, 2003, the Commission directed that UNE-P continue to be offered under the same terms and conditions "except where BA-PA can demonstrate to the Commission, by a preponderance of evidence" that switched-based service by a CLEC "represents a valid reasonable economic alternative to the provision of UNE-P" in the area served by a given central office so that UNE-P "would not be necessary at that office and the provision of service is not impaired under this circumstance."[17]

---

[17] *Global Order* at 90. Specifically, the Commission established the following standard for evaluating whether UNE-P under the $80,000 TBR benchmark should be continued:

> Thereafter, UNE-P and EELS will continue to be offered to CLECs, except where BA-PA can demonstrate to the Commission, by a preponderance of the evidence, that collocation space is available that it can be provisioned in a timely manner, and that considerations of the number of customers and revenues from the customers served by the CLEC from a collocation in that central office represents a valid reasonable economic alternative to the provision of UNE-P and/or EELS to the CLEC. By meeting this evidentiary burden, BA-PA will establish that UNE-P or EELS would not be necessary at that office and the provision of service is not impaired under this circumstance.

In the *Enterprise Switching Order*, the Commission restated Verizon's obligations as to UNE-P, reminded Verizon of the procedural requirements mandated to seek elimination of UNE-P on a granular basis post-December 31, 2003, and properly concluded that the *Global Order* requirements would continue until Verizon fulfilled the directives of this Commission as to how Verizon's UNE-P obligations could be modified. The Commission went on to as much as welcome Verizon to file a request for relief under the *Global Order's* standards. In classic Verizon fashion, it has "thumbed its nose" at the Commission and instead has decided to tell the Commission why the Commission is wrong and why Verizon knows better.

4. The PCC agrees that in the *Enterprise Switching Order*, the Commission went on to require Verizon to continue to charge CLECs serving business customers (with under $80,000 TBR) through UNE-P at Verizon's rates in Tariff 216, "as long as the *Global Order* requirements remain in place." In reaching its decision, the Commission noted that under Section 271 of the Telecommunications Act, network elements must be priced at "just, and reasonable" rates.[18] While the Commission did not reach specific standards or parameters as to what might be considered "just and reasonable," it is not surprising that it recognized Verizon's existing wholesale rates, since those rates have been adjudicated "just and reasonable" by the Commission previously.[19]

5. These conclusions are far from dicta as Verizon claims. In fact, they represent the entire outcome of this case. Furthermore, the conclusions are not erroneous as Verizon claims, but are fully consistent with the proper interplay between state and federal law. As the FCC

---

[18] It should be noted that there is an additional crucial requirement applicable to Section 271 pricing – that being that the wholesale rates must be non-discriminatory.

[19] In fact, as the Commission is well aware, it cannot approve rates of any kind under any circumstances unless those rates are "just, reasonable and non-discriminatory." 66 Pa. C.S. §§ 1301, 1304.

indicated in Paragraph 193 of the *TRO* and its brief to the D.C. Circuit, state authority is preserved as to unbundling as long as it is consistent with the Telecommunications Act and the federal unbundling regime. In reviewing the *Global Order*, the Commission's oversight court, the Commonwealth Court, specifically affirmed the portions of the *Global Order* pertaining to UNE-P on the specific grounds that the Commission's determinations were consistent with state law, the Telecommunications Act and the federal regime.[20] While the PCC believes this

---

[20] The Court specifically examined the portion of the *Global Order* which is now at issue for compliance with both state and federal law, including the "necessary and impair" standard. As the Court concluded in affirming the Commission's decision:

> Moreover, as the PUC points out, 47 U.S.C. § 251(d)(2), setting the standards for making access available as when access is "necessary" and when refusal of access would "impair" the ability of a carrier to provides services, also, in the same subsection, at § 251(d)(3), provides that a state commission is not precluded from enforcing any regulation, order or policy that:
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.
>
> Thus the federal law and regulation does not bar the PUC from concluding that its requirement that Bell sell access to these elements is "necessary" with respect to proprietary elements and that barring CLECs from unbundled access to such elements would, in the context of this state's development, "impair" (as distinguished from "negate") CLEC participation in the Chapter 30 goals of our law.
>
> With availability of the network elements as the general rule, and no record or statutory basis for making an exception, the PUC's action as to these elements here is clearly in accordance with the federal requirements as well as state law.

763 A.2d at 513.

continues to be the case, any claim that is not, must be brought before the Commission consistent with the procedures established in the *Global Order* and affirmed by the Court. If Verizon seeks such relief under the *Global Order* to modify its UNE-P obligations, any party may challenge the result of that future proceeding through appeal or through a declaratory order procedure at the FCC at that time – but as the FCC's brief to the Third Circuit makes clear, not before.[21]

As to Section 271, nowhere has the FCC or the appellate courts preempted state pricing authority under Section 271 or rescinded state authority or placed it within the exclusive province of the FCC as Verizon claims. Instead, while the FCC may believe it has primary authority over Section 271 pricing (and only time will tell on this issue), even the FCC has indicated it has no intention to usurp state authority in this area.

B. Commission Unbundling Authority

6. The PCC agrees with Verizon's characterization of the Commission's *Enterprise Switching Order* in paragraph 6 of its Petition. It is true that the Order imposes a continuing obligation on Verizon to provide enterprise switching pursuant to Section 271 and the *Global Order*. It is also true that the Commission recognized the need for compliance with the Telecommunications Act and general consistency with the federal regime. However, the Commission, not Verizon, is correct that it is far from certain that the maintenance of the enterprise switching obligation is preempted by the FCC. The FCC itself has indicated that the intent of the TRO was to preserve state authority to impose unbundling obligations. Accordingly, not only is in unclear, but it is incorrect that any state imposed unbundling

---

[21] The PCC cites with some authority to the FCC's brief because in footnote 11 of the *Enterprise Switching Order*, the Commission references the pending federal appellate litigation addressing the preemption issue and looks to that proceeding for further information on the FCC's interpretation of the *TRO*.

obligation is preempted – only Verizon advances this view, not the FCC or this Commission.[22] In fact, while the PCC believes it is clear that the *Global Order* standards under which the Commission will review the continued availability of enterprise circuit switching and UNE-P, and under which the Commission will determine, on a granular basis, whether switch-based service is an adequate replacement for UNE-P, is fully consistent with the Act and the federal regime – as the Commonwealth Court found in affirming the *Global Order*.

7. For reasons already stated, the PCC emphatically disputes Verizon's view that the Commission has no basis for imposing unbundling obligations. As the FCC has already stated in the *TRO* and to the appellate courts, Section 251 "preserves" state unbundling authority. Likewise, no one but Verizon (and possibly one other state Commission in Massachusetts) has determined that Section 271 is within the exclusive jurisdiction of the FCC and, in fact, the FCC's position is that while the agency believes it has primary jurisdiction, state authority under Section 271 has not been usurped.

C. Section 271

---

22 And Verizon only asserts this claim in certain contexts. In fact in the federal appellate courts, Verizon sings a much different tune regarding the scope of state unbundling authority provided the state commission under the *TRO*. For example, in pleadings in support of a Petition for Mandamus filed in federal court, Verizon, along with other ILECs, describes the TRO as "delegating the ultimate determinations [concerning unbundling requirements] entirely to the states, guided only by a laundry list of open-ended factors . . . ." *United States Telecom Association v. FCC*, Nos. 00-1012, 00-1015 et al., Reply Brief in Support of Petitions for a Writ of Mandamus to Enforce the Mandate of This Court (D.C. Cir. Oct. 16, 2003), at 6. Verizon also described the "competitive triggers" as leaving the states "to their own judgment in deciding the central issue of market definition." *Id.* at 9. And specifically with respect to the switching trigger, Verizon noted that the TRO "unquestionably" required that a state commission's determination to overturn the FCC's presumption of impairment must be based on a determination that "a market is already fully competitive before providing relief . . .". *Id.* at 11.

8. Verizon's opening proposition in paragraph 8 of its Petition is clearly erroneous.[23] No one but Verizon (and of course other ILECs and possibly one other state commission) believes that the scope and meaning of the BOC's Section 271 obligations are determined solely by the FCC.[24]

Verizon's reference to the Commission's consultative report to the FCC in its Section 271 in-region, interLATA entry proceeding does not help its cause. No one, including the Commission, disputes that it is the FCC, in consultation with the state commission, which was assigned statutory responsibility to make the final determination of whether a BOC had met the requirements of the competitive checklist necessary for initial approval to commence in-region, interLATA service. However, this specific and discrete assignment of statutory responsibility in the initial approval process cannot be reasonably expanded to an overriding assignment of exclusive jurisdiction of all aspects of Section 271 implementation and compliance (particularly since as this Commission will remember well, state commissions served the primary fact finding

---

23 Verizon states, "[a]s the Commission is aware, the scope and meaning of a BOC's Section 271 obligations are determined solely by the FCC." Someone should inform Verizon of the obvious. If the Commission shared Verizon's view on this issue it would not have relied on the opposite view – that it has authority under Section 271 and residual state authority – in issuing the *Enterprise Switching Order*. Furthermore, it would not have filed a brief with the D.C. Circuit opposing the exact view that Verizon espouses.

24 Verizon does cite to a decision by the Massachusetts Commission who apparently believes that it does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. However, the scope of the Massachusetts Commission's jurisdiction has no bearing on this Commission, because given the differences in enabling statutes, the scope of this Commission's jurisdiction is unique. For example, as the Commission is well aware, the Virginia Corporation Commission has determined that it has far more restrictive jurisdiction in these areas than most other state commissions – and far more restrictive jurisdiction than that provided by the General Assembly to this Commission.

role even in the initial approval process),[25] and a far-reaching preemption of all residual state authority over Verizon's post interLATA entry activity, as Verizon apparently believes.

9. This Commission and the FCC have made it abundantly clear that Verizon's unbundling obligations remain intact under Section 271 – even if those unbundling obligations are eliminated under Section 251 and/or state law.[26] Verizon cites to an isolated passage from the *TRO* in an attempt to make the Commission believe that the maintenance of the Section 271 unbundling obligations are somehow tentative. However, make no mistake about it, the FCC and the Commission have unequivocally determined that Verizon's unbundling obligations remain in full force and effect under Section 271.[27] Verizon brings to this Commission's attention that it has filed a Section 271 forbearance petition with the FCC, apparently hoping the Commission will back off based on the mere fact that Verizon has filed a pleading before the federal agency. However, the Commission knows better, since it has first hand experience regarding the extreme nature of many of Verizon's requests for regulatory relief and its pending federal pleading should be given no weight.

---

25 As Verizon will vividly remember, a significant portion of the Commission's review of Verizon's Section 271 Application pertained to whether Verizon was complying with its obligations under the same *Global Order* (e.g., Commission Code of Conduct) that Verizon is now claiming should be ignored.

26 *Enterprise Switching Order* at 16; *TRO* at ¶ 653.

27 In paragraph 653 of the *TRO*, the FCC reached the following conclusion on this issue:

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

Finally, Verizon cites to a footnote in the *TRO*[28] to advance its claim that it cannot be required to offer combinations of network elements under Section 271. However, while it may be true that the FCC, in a new position for the agency, currently holds the view that it will not require combinations of network elements under Section 271, it cannot be reasonably suggested that through a footnote in the TRO the FCC has assigned exclusive jurisdiction over the combinations issue to itself or outright preempted state action on this issue. In any case, the FCC has no such intent since as it told the D.C. Circuit it was not usurping state authority in the Section 271 area.

10. It is good to hear, as Verizon states in paragraph 10 of its Petition, that Verizon will continue to offer unbundled switching under Section 271 subject to the outcome of pending appeals, since the Company's compliance with the applicable law cannot always be presumed. However, it is not so clear from Verizon's statements whether it intends to comply with this Commission's binding orders, including the requirements of the *Enterprise Switching Order.* Accordingly, the Commission should monitor Verizon's compliance closely to assure that, once again, it does not ignore this Commission's requirements in instances when they do not match its corporate agenda.

D. <u>The Global Order</u>

11. In paragraph 11 of its Petition, Verizon moves on to an attack on the Commission's discussion in its *Enterprise Switching Order* of the landmark *Global Order.* First, after referring to the Commission's invitation to Verizon to follow *Global Order* procedures and parameters in seeking modification of the *Global Order's* UNE-P requirements, Verizon actually states, "to the extent that this language can be read to suggest that there remains any separate"

---

[28] While Verizon's cite is to footnote 1989, the quote from the *TRO* it cites appears in footnote 1990.

obligation under state law apart from the 1996 Act, it is unlawful.[29] There are several problems with Verizon's viewpoint. First, the Commission's directive in the *Enterprise Switching Order* clearly and unequivocally requires that Verizon continue to provide UNE-P to CLECs to serve business customers with under $80,000 in TBR. The question is not whether the obligation was imposed – no reader of the Order could conclude otherwise – the only question is whether Verizon's obligation is consistent with the Act and the federal regime, which, for the reasons stated above, it is. In fact, Verizon's bold assertions are somewhat amazing when one considers Congress's preservation of state authority in Section 251(d)(3) of the Telecommunications Act which provides as follows:

> **(3) Preservation of State access regulations**: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that
>
> > (A) establishes access and interconnection obligations or local exchange carriers;
> >
> > (B) is consistent with the requirements of this section; and
> >
> > (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.
>
> 47 U.S.C. § 251(d)(3)(1996).

Accordingly, the only legitimate question in evaluating the *Global Order's* requirements as to UNE-P is whether the requirements are consistent with the other provisions of Section 251 and whether the requirements substantially prevent implementation of that Section and the rest of the Act. As indicated previously, the Commonwealth Court has already put this issue to bed in affirming the *Global Order*, in part based on a determination that the *Global Order's* unbundling

---

[29] Verizon Petition at 7.

requirements were fully consistent with Section 251, including the " necessary and impair" standard.

12. Along the same lines, Verizon's claim as to the extent of the FCC's responsibility in the unbundling area is overstated. While no one would deny that the FCC has a critical role in this area, so do the state commissions as Section 251(d)(3) and other provisions of Section 251 and Section 252 assigning state commissions responsibility for mediating and arbitrating unbundling disputes make abundantly clear. It is this cooperative interplay between state and federal government which is the crux of the issue. While Verizon would have this Commission believe that the state commissions have been manhandled into irrelevance, such a view is distorted and ignores the proper intergovernmental scheme established by the 1996 Act.

13. In making its argument that the *Global Order*'s unbundling scheme is no longer valid, Verizon relies on a decision by the United States Supreme Court which was actually issued in January of 1999, nine months before this Commission issued its *Global Order*.[30] Verizon cites to isolated passages from that decision for the proposition that the federal government has entered the field of regulating local telephone competition, which, or course, it unquestionably has.[31] However, Verizon than goes on to make the amazing statement that "any attempt to impose unbundling pursuant to a state specific Order, independent and inconsistent with the FCC's determinations, would be precisely the kind of impediment to competition that is prohibited by the 1996 Act."[32]

---

30 *AT&T Corp. et al v. Iowa Utilities Board et al.*, 525 US 366 (1999). The case is the first of two decisions issued by the Court pertaining to the unbundling and pricing of network elements under the Telecommunications Act of 1996.

31 Verizon Petition at 8, citing to 525 US at 378.

32 Verizon Petition at 8.

First, the Commission's granular approach for determining post-December 31, 2003 unbundling is not inconsistent with the FCC's determinations in that it provides for granular review of UNE-P availability in the business market. Second, to suggest that maintaining a wholesale service arrangement which is actively being used by CLECs to provide reduced rates and advanced services to Pennsylvania businesses, as the record reflects in this proceeding, can hardly be considered an impediment to competition -- except within the realm of Verizon's monopolistic world.

As the Commission is fully aware, regardless of the outcome of this preemption issue, state commissions routinely have and will continue to issue orders which impose unbundling through review of interconnection agreements and the conduct of interconnection mediations and arbitrations. To suggest that states have been rendered completely powerless in the unbundling area, as Verizon advances, is an extreme legal view that is unreasonable and unsupportable. In fact, it is unfortunate that Verizon fails to disclose to the Commission that the FCC outright rejected this extreme position.[33] As the FCC stated in paragraph 191 of the *TRO* in expressly determining that states can continue to impose unbundling obligations under state law:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list. (footnotes omitted).

---

33 *TRO* at ¶ 192. ("We do not agree with incumbent LECs that argue that the states are preempted from regulating in this [unbundling] area as a matter of law. If Congress attempted to preempt this field, Congress would not have included Section 251(d)(3) in the 1996 Act." (footnote omitted.)

Further, as the Supreme Court stated in deciding the interplay between state and federal government in its more recent review of the 1996 Act pertaining to the proprietary of the Total Element Long Run Incremental Cost or TELRIC ratemaking methodology, "The approach was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic default methodology for use in setting rates when carriers fail to agree, but leaving to state utility commissions to set the actual rates."[34] Of course, this interplay between the state and federal government under the 1996 Act applies equally in the unbundling area.

14. In fact, in paragraph 14 of its Petition, Verizon undermines its own preemption argument and seems to admit that states may establish an unbundling regime under state law as long as it is not inconsistent with the federal policy – which clearly the Commission's unbundling framework is not.

15. The PCC does not dispute that the Commission's unbundling regime established under state law must be generally consistent with the federal framework. The Commission's *Global Order's* unbundling requirements must be consistent with the federal framework, and they are.

16. Verizon has done nothing in its Petition to undermine the Commission's decision in the *Enterprise Switching Order* that Verizon must continue to follow the unbundling and UNE-P availability requirements of the *Global Order*. This should not be surprising since Verizon essentially made the same arguments in its motion to strike and briefs in the underlying case – arguments which the Commission has already rejected – and it has not raised anything new which could possibly justify reconsideration under *Duick*.

---

[34] *Verizon Communications, Inc. et al, v. Federal Communications Commission et.* al, 535 U.S. 467, 489 (2002).

17. In paragraph 17 of the Petition, Verizon attempts to simplify its argument that the *Global Order* requirements for enterprise switching are inconsistent with the federal policy.[35] However, its attempt at simplification distorts the entire issue. As the Commission clearly stated in its *Enterprise Switching Order*, it has a well-established procedure under the *Global Order* to review, on a granular basis, whether an unbundling obligation should be eliminated under the federal "necessary and impair" standard. It is this process which is to be utilized to determine whether UNE-P availability should be modified. The fact that Verizon refuses to use the prescribed process does not create a conflict under federal law, federal policy or the federal framework. It only creates a conflict with Verizon's preferred course which is intended to eliminate, not promote, local competition in Pennsylvania.

18. The PCC does not dispute that the *TRO* provides that state requirements which are in clear conflict with federal law, federal policy or the federal framework must be "altered" or "amended." However, this, of course, begs the question as to whether a clear conflict exists. In paragraph 18 of its Petition, Verizon again returns to its foundational argument that only the FCC can determine the scope of unbundling obligations. However, as set forth above, this is not only inconsistent with the Commission's determinations, but the FCC's own view of its order as expressly set forth in paragraph 191 of the *TRO* and its recent brief to the D.C. Circuit.

19. Verizon is correct when it recognizes in paragraph 19 of its Petition that under *Global Order* requirements, Verizon bears the burden of seeking modifications of its UNE-P availability obligations.

---

35 As Verizon states: "Simply put, a state conclusion that 'yes an ILEC is required to unbundle' actually and directly conflicts with the federal conclusion that 'no the ILEC does not have to unbundle'"

20. While Verizon's statements in paragraph 20 of its Petition are confusing, its apparent claim that the *Global Order* ignores the "necessary and impair" standard is wrong. In establishing its post-December 31, 2003 review procedures for UNE-P availability, the Commission expressly assured that the focus of the review would be consistent with the "necessary and impair" standard.[36] Indeed, as explained previously, the Commonwealth Court affirmed this portion of the *Global Order* on this specific basis in expressly determining that the *Global Order's* unbundling regime was consistent with the 1996 Act and the underlying federal framework.[37] Certainly, Verizon can not reasonably claim that the Commission is creating an actual conflict with the federal law, federal policy or the federal framework through the assignment of the burden of proof on this issue.

21. While not supportive of its arguments, Verizon's true feelings about unbundling come out in paragraph 21 of its Petition. The paragraph points out that Verizon despises unbundling because it is the only means by which CLECs can compete in any meaningful fashion. Of course, Verizon conveniently forgets that Verizon agreed to unbundle its network as a condition of providing in-region, interLATA service.

22. Given the foregoing, the Commission should stay the course and aggressively pursue the unbundling regime established in its *Global Order*. Hindsight has revealed that the *Global Order's* determination on unbundling and UNE-P and its reliance on a specific granular review of "necessary and impair" issues post-December 31, 2003 was 20/20 at the time and

---

[36] *Global Order* at 90. ("By meeting this evidentiary burden, BA-PA will establish that UNE-P or EELs would not be necessary at that [central] office and that the provision of service is not impaired under that circumstance." (Emphasis added.))

[37] 763 A.2d at 512-513.

remains 20/20 to this day. No other result is consistent with the interests of promoting competition and the underlying interests of Pennsylvania's consumers and businesses.

E. Section 271 Ratemaking

23. Moving on to ratemaking issues,[38] in the *Enterprise Switching Order*, the Commission required Verizon to continue to charge its Tariff 216 rates for network elements to CLECs to serve enterprise customers. It is true, as Verizon claims, that the Commission indicated that it was not going to finally resolve Section 271 pricing issues at this time. However, it is not true as Verizon claims, that the Order reached an outcome at odds with the *TRO*.

24. As Verizon properly cites, after discussing the "joint and reasonable" rate standard which applies under Section 271 unbundling after a network element is no longer considered a UNE, the Commission stated that Verizon "shall charge the tariff rate for access to its network as long as the *Global Order* requirement remains in place."[39] It is true, and as the Commission is fully aware, under the *TRO,* use of the TELRIC rate methodology is only mandated by federal law for UNEs under 47 U.S.C. §§ 251 and 252. In addressing this issue, the Commission recognized that as to Section 271 pricing, the rates must meet a "just and reasonable" standard under both state and federal law,[40] that the FCC recognized that the state and federal standards were analogous, and that since the Tariff 216 rates had already been

---

38 Because this is a responsive proceeding, the Answer responds on a paragraph by paragraph basis to the arguments raised by Verizon, as required by Commission regulations. Accordingly, like Verizon's petition, PCC's response moves back and forth between subject to some extent. For example, in Verizon's petition, its section on the *Global Order* is sandwiched between its section on Section 271 unbundling and its section on Section 271 pricing and this Answer follows that format.

39 *Enterprise Switching Order* at 17.

40 47 U.S.C. § 201; 66 Pa. C.S. § 1301.

adjudicated "just and reasonable" under Section 1301 of the Public Utility Code, it was reasonable to expect that they would also meet the "just and reasonable" rate standard under federal law.[41] While the Commission's logic is completely sound and reasonable, its outcome was merely to maintain the status quo by recognizing the maintenance of Verizon's Tariff 216 rates at least until any enterprise switching disputes under the *Global Order* were fully resolved and not necessarily involving Section 271 pricing issues at all. This approach is completely consistent with all applicable law and the *TRO*.

25. The PCC agrees that the *TRO* indicates that TELRIC pricing is not mandatory under Section 271. However, the fact that the pricing methodology is not mandatory does not resolve the issue of what is either proper or acceptable pricing under Section 271's just and reasonable standard as Verizon seems to think. More specifically, Verizon's apparent belief that "just and reasonable" rates must be higher than TELRIC rates is neither reasonable nor supportable.

26. In paragraph 26 of its Petition, Verizon appears to again be arguing that, by at least implication, Section 271 "just and reasonable" rates must be higher than TELRIC rates. However, nowhere in the *TRO*, including in the provisions cited by Verizon, does the FCC reach such a conclusion, and indeed, the FCC's language only stands for the proposition that TELRIC pricing is not statutorily mandated by Section 271.

As the FCC stated in paragraph 656 of the *TRO*, "As set forth below, we find that the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards

---

41 *Enterprise Switching Order* at 16-17. In this discussion, the Commission also states what it understands to be Verizon's position on its issue – that being that Verizon sets rates under Section 271, subject only to review by the FCC.

set forth in Section 201 and 202."[42] Despite Verizon's implications to the contrary, the FCC has not provided any additional requirements as to what wholesale rates for network elements would satisfy Sections 201 and 202 or Section 271.

27. Verizon claims that in paragraphs 662-664 of the TRO, "the FCC has concluded that the applicable [Section 271] rates are market-based ones . . ." . Nowhere does such a conclusion appear in those paragraphs or in any other part of the TRO.[43] To the extent that in paragraph 27 of its Petition Verizon is asserting a claim that the FCC has preempted state authority in the Section 271 pricing area, as indicated previously, the FCC has clarified in its brief to the D.C. Circuit that it did not intend to usurp state authority in this area, as Verizon contends.

28. In paragraph 28 of its Petition, Verizon frames the issue improperly. The issue is not whether "the 'just and reasonable' rates must be identical to TELRIC-based rates," the issue is whether Verizon's existing wholesale rates can be considered compliant with the "just and reasonable" rate standard if the underlying facts in a particular state support such a result. As explained previously, Verizon's claim that the FCC has mandated "market-based" rates has been created by Verizon's imagination. The FCC has done nothing more than discuss some possibilities for Section 271 ratemaking. It has not mandated any approaches, nor eliminated any approaches.

---

42 In describing the ratemaking standard in 47 U.S.C. §§ 201 and 202 (and 66 Pa. C.S. § 1301), as the "just and reasonable" rate standard, parties frequently forget that there is a third prong to the standard – that being that the rates not be discriminatory.

43 While in paragraph 664 of the TRO, the FCC identified a couple of possible options which BOCs might propose as being Section 271 compliant (options which Verizon apparently believes involve what it calls market-based pricing), nowhere does the FCC reach a conclusion or reach a presumption on what might be the menu of acceptable approaches.

29. In paragraph 29 of its Petition, Verizon attempts to bolster its claim by citing to select portions of a passage from paragraph 659 of the *TRO* that it delivers out of context. In that paragraph, the FCC was doing nothing more than explaining why it believed the TELRIC ratemaking methodology was not mandated by statute under Section 271. Verizon's attempt to infer what might or might not be compliant under a Section 271 just and reasonable rate standard given the facts of an individual case is not supportable and should be rejected.

30. For all the reasons set forth above, Verizon's claims that only a market-based rate is acceptable under Section 271 and that only the FCC can establish such a rate should be outright rejected. Furthermore, these claims completely miss the point. In the *Enterprise Switching Order*, the Commission maintained the availability of Tariff 216 rates to serve enterprise customers, not in reliance upon Section 271, but instead in order to maintain the status quo pending review of enterprise UNE-P issues under the *Global Order's* procedures and standards. Accordingly as the Commission is fully aware, it does not need to resolve Section 271 pricing issues in order to address and deny Verizon's reconsideration petition.

WHEREFORE, for all the foregoing reasons, the PCC respectfully requests that Verizon's instant reconsideration petition be denied.

Daniel Clearfield
Alan Kohler
WOLF, BLOCK, SCHORR and SOLIS-COHEN, LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101
(717) 237-7160
akohler@wolfblock.com

Counsel for Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI").

Date: January 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant).

VIA EMAIL AND FIRST CLASS MAIL

Julia A. Conover, Esq.
William Peterson, Esq.
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Ross A. Buntrock
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036

Norman Kennard
Hawke McKeon Sniscak & Kennard LLP
Harrisburg Energy Center
100 North Tenth Street P. O. Box 1778
Harrisburg, PA 17108

Russell M. Blau
Philip Macres
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Patricia Armstrong
Thomas, Thomas, Armstrong & Niesen
212 Locust St., Suite 500
PO Box 9500
Harrisburg, PA 17108-9500

Kandace F. Melillo
Office of Trial Staff
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Maryanne R. Martin
PA Public Utility Commission
400 North Street
Harrisburg, PA 17101

Angela Jones, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Barrett Sheridan, Esq.
Office of Consumer Advocate
5th Floor, Forum Place Bldg.
555 Walnut Street
Harrisburg, PA 17101-1921

Date: January 13, 2004

Alan Kohler, Esq.

ORIGINAL

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 955-9792
www.kelleydrye.com

ROSS A. BUNTROCK
DIRECT LINE: (202) 887-1248
EMAIL: rbuntrock@kelleydrye.com

January 13, 2004

VIA UPS OVERNIGHT DELIVERY

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

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

Dear Secretary McNulty:

Enclosed please find an original and nine copies of the Answer of ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Telecommunications Corporation of PA, Inc. to Verizon Pennsylvania's Petition for Reconsideration in this proceeding. Please date stamp the enclosed duplicate and return it in the provided envelope. Please contact the undersigned counsel at (202) 887-1248 if you have any questions regarding this transmittal.

Respectfully submitted,

Ross A Buntrock

Ross A. Buntrock (*admitted pro hac vice*)

cc: Via Email and UPS Overnight Delivery
ALJ Michael C. Schnierle and ALJ Susan D. Colwell
Maryanne Martin
Attached Service List

29

DC01/BUNTR/215141.1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF ARC NETWORKS, INC. D/B/A INFOHIGHWAY COMMUNICATIONS CORP. AND METROPOLITAN TELECOMMUNICATIONS CORPORATION OF PA, INC. TO VERIZON PENNSYLVANIA'S PETITION FOR RECONSIDERATION

Genevieve Morelli
Ross A. Buntrock
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
gmorelli@kelleydrye.com
rbuntrock@kelleydrye.com
hhendrickson@kelleydrye.com

Counsel to ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Communications of PA, Inc.

January 13, 2004

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

ANSWER OF ARC NETWORKS, INC. D/B/A INFOHIGHWAY COMMUNICATIONS CORP. AND METROPOLITAN TELECOMMUNICATIONS CORPORATION OF PA, INC. TO VERIZON PENNSYLVANIA'S PETITION FOR RECONSIDERATION

I. INTRODUCTION

ARC Networks, Inc. d/b/a InfoHighway Communications Corp. ("InfoHighway") and Metropolitan Telecommunications Corporation of PA ("MetTel") by their undersigned counsel, submit their Answer to the Petition for Reconsideration ("Petition") of the Pennsylvania Public Utility Commission's ("Commission's") December 18, 2003 order ("DS1 Order") filed by Verizon Pennsylvania Inc. ("Verizon PA" or "Verizon") in the above referenced docket on January 2, 2004.[1]

[1] InfoHighway and MetTel filed a Joint Petition to Initiate Proceedings on October 17, 2003. MetTel did not join in the Opposition to Verizon's Motion to Dismiss and Motion to Strike, filed by InfoHighway on October 31, 2003 in light of the then pending stay of the enterprise market aspects of the Federal Communications Commission's ("FCC's") Triennial Review Order and its pending motion for clarification of that stay. *See* Letter to James J. McNulty, Secretary, Pennsylvania Public Utility Commission, from Metropolitan Telecommunications Corp. of PA, Docket No. I-00030100 (filed Oct. 31, 2003). The stay was lifted by the Second Circuit on November 3, 2003 and transferred to the United States Court of Appeals for the D.C. Circuit, and accordingly, MetTel joined InfoHighway in all subsequent pleadings in the underlying proceeding.

As set forth below, the Commission should reject Verizon PA's request that the Commission reconsider its decision to require Verizon PA to continue to provide unbundled local switching to CLECs to serve all customers with annual Total Billed Revenue ("TBR") at $80,000 or less; and to continue to provide local switching to CLECs at the current rates contained in Verizon Tariff 216.

Verizon broadly claims first that this Commission has been completely preempted from taking any state action that does not mirror the FCC's unbundling rules; and second, that the Commission is precluded from establishing rates for unbundled local switching provided pursuant to section 271 of the 1996 Act.[2] The arguments articulated by Verizon as justification for reconsideration of the Commission's decision are legally incorrect. Therefore, the Commission must reject Verizon PA's Petition and reaffirm its DS1 Order.

Contrary to Verizon's contention, the Commission has ample authority, pursuant to both federal and state law to establish unbundling obligations. As the Commission itself recently noted in its brief to the D.C. Circuit Court of Appeals in the TRO appeal,[3] and as the FCC itself has acknowledged in the same proceeding,[4] state actions consistent with the Communications Act cannot be preempted. Accordingly, independent unbundling obligations established by this Commission in the Global Order which are consistent with the pro-competitive goals of the Communications Act are appropriate, and as this Commission has found, necessary to further legitimate public purposes in the Commonwealth of Pennsylvania.

---

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, ("1996 Act") amending the Communications Act of 1934, 47 U.S.C. § 151 et seq., referred to herein collectively as the "Communications Act" or the "Act."

3 Brief for State Petitioners and Intervenors, *USTA v. FCC*, Nos. 00-0012 (D.C. Cir., filed Dec. 1, 2003) ("States Brief").

4 Brief for Respondents, *USTA v. FCC*, Nos. 00-0012 (D.C. Cir., filed Dec. 31, 2003) ("FCC Brief").

II. Verizon's Argument That Any Pennsylvania-Specific Unbundling Obligation is Automatically Preempted by the FCC is Incorrect

A. Pennsylvania-Specific Unbundling Obligations That Are Consistent with the Telecommunications Act of 1996 are Presumptively Valid

1. Verizon argues that the Commission's DS1 Order is inherently inconsistent with both the 1996 Act and the Triennial Review Order ("TRO"),[5] and that the FCC has unequivocally preempted any state action which does not exactly follow the conclusions regarding unbundling reached in the TRO. Petition at 5. Further, Verizon argues that the "scope and meaning of a BOC's section 271 obligations are determined solely by the FCC" and not subject to Commission interpretation. Petition at 5.

2. Verizon asks the Commission to clarify that to the extent the DS1 Order imposes a Pennsylvania-specific unbundling obligation, it is not doing so based on "an independent and additional unbundling requirement, which would be unlawful" in light of the 1996 Act's "express grant to the FCC of the authority and power to make ...unbundling determinations" and nullify any additional state unbundling obligations. Petition at 7. Verizon's interpretation of 1996 Act in this respect is flatly incorrect. The Commission clearly has the authority to take the actions it took in the DS1 Order, and the conclusions the Commission reached in the DS1 Order are fully consistent with the 1996 Act.

---

5 *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*").

1. The Plain Language Of Section 251(d)(3) Preserves State Authority To Impose Unbundling Provisions and Precludes FCC Preemption Of State Unbundling Regulations That Are Neither Inconsistent With Nor Substantially Prevent Implementation Of Section 251's Requirements.

3. Contrary to Verizon's argument, the 1996 Act's language and overall structure clearly demonstrate that Congress reserved for the states a clear and undeniable role in promoting local telecommunications competition. *See e.g.* §§152(b), 251(d)(3), 252(e)(3), 253(b), 254(i), 261(b)&(c), 153(41), 601(c), and 706(c).

4. Section 251 (d) (3) states as follows:

> **(3) Preservation of State access regulations:** In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part. 47 U.S.C. § 251 (d) (3) (1996).

5. This section plainly preserves the authority of all state commissions to establish unbundling regulations or policies that neither conflict with, nor substantially prevent implementation of, the 1996 Act's pro competitive goals. Even the FCC, in its brief to the D.C. Circuit defending its TRO decision admits that". . . the [*TRO*] *Order* did *not* preempt states from adding to the unbundling requirements that the FCC adopted. In the *Order*, the Commission [FCC] simply observed that section 251(d)(3) 'preserves states authority to impose unbundling obligations . . . *only* if such obligations are 'consistent with

the Act' and do 'not substantially prevent the implementation' of the federal regime;"[6]

6. The requirements imposed upon Verizon PA by this Commission in the Global Order are entirely consistent with the 1996 Act. Section 251(d)(3) does not preclude states from modifying the federal unbundling regime, as Verizon suggests, but rather, it bars only measures that require incumbents to violate the Act or preclude competitors from using elements to provide competing services. It does not prevent measures that support the Act's goals of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises . . . ", , and "giv[ing] aspiring competitors every incentive to enter local retail telephone markets, short of confiscating the incumbents' property."[7]

7. Accordingly, Verizon's argument that the Commission's Global Order is inherently in conflict with the 1996 Act to the extent it provides an independent unbundling obligation upon Verizon is incorrect. Besides misinterpreting the 1996 Act, Verizon's argument ultimately relies upon an incorrect interpretation of the Supreme Court's opinion in the Iowa Utilities Board case.[8] Verizon twists the words of that decision, and argues, in effect, that the federal government has entered the field of regulating local telephone competition to the absolute exclusion the states.[9] Verizon further suggests that "any attempt to impose unbundling pursuant to a state specific Order, independent and inconsistent with the FCC's determinations, would be precisely the kind of impediment to competition that is

---

6 FCC Brief at 91 citing to ¶ 193 of the *TRO*.

7 *Verizon Communications v. FCC*, 535 U.S. 467, 476, 498 (2002).

8 *AT&T Corp., et al v. Iowa Utilities Board, et al.* 525 US 366 (1999)("Iowa Utilities Board").

9 Verizon Petition at 8, citing to 525 U.S. at 378.

prohibited by the 1996 Act."[10]

8. At bottom, the Supreme Court ruled that while the FCC may *guide* state commissions' implementation of the 1996 Act's market-opening provisions by providing standards or a methodology for state commissions to apply,[11] the Act does not demand that state rules mirror exactly the FCC's regulations. Section 251(d)(3) of the Act clearly contemplates that the states will co-administer Section 251's market-opening mechanisms.

9. Although states commissions may not thwart Congress' goal of opening local markets to competition, where states have acted consistently with the pro-competitive goals and purposes of the 1996 Act, as the Commission has with the Global Order, the FCC may not preempt the Commission's rulings. It is wrong to argue, as Verizon does, that the state commissions are now completely irrelevant. Accordingly, the Commission should reject Verizon's reconsideration petition on that basis.

B. Verizon Has a Clear Obligation to Provide Unbundled Switching Pursuant to Section 271 and the Commission May Rely Upon It In Its DS1 Order.

10. Verizon argues that the Commission erred in relying, in part, upon Section 271(c)(2)(B)(vi) in requiring Verizion to maintain its obligation to provide unbundled local switching. Verizon Petition at 5-6. Verizon argues that "section 271 obligations are determined solely by the FCC" and therefore "section 271 provides no independent basis for this Commission to require Verizon PA to continue to provide unbundled switching." *Id.* In

---

10 Verizon Petition at 8.

11 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999) (holding §252 of the Act allows the FCC to prescribe a UNE pricing methodology for States to implement).

support of this contention, Verizon references the fact that it has "filed a forbearance request to be relieved of certain section 271 obligations." *Id.* at 6. With respect to its 271 unbundling argument, Verzion is clearly mistaken and the Commission should reject Verizon's reconsideration petition on this point.

11. The FCC specifically held in the TRO that "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[12] Regardless of the existence of Verizon's pending forbearance petition, the Commission and the FCC have unequivocally determined that Verizon's Section 271 unbundling obligations remain in full force and effect regardless of any change in the Section 251 regime. Verizon's argument that this Commission in its DS1 Order may not even acknowledge, much less rely upon, the existence of Verizon's Section 271 unbundling obligation is a red herring and the Commission should treat it as such. The Commission clearly has the authority to acknowledge and rely upon Verizon's section 271 obligation to provide unbundled switching in its DS1 Order.

C. The Commission Has the Authority to Determine In the Interim that Tariff 216 Rates are "Just and Reasonable" In Compliance with Sections 201, 202 and 271 of the Communications Act.

12. In its DS1 Order the Commission held that Verizon should continue to charge CLECs serving business customers at the rates set forth in Verizon's Tariff 216. In its Petition Verzion argues that this holding violates the TRO because "TELRIC rates do *not* apply for network elements unbundled pursuant to section 271..."[13] In the DS1 Order, the

---

12 TRO at ¶ 653.

13 Petition at 12 (emphasis provided).

Commission recognized that with respect to pricing for UNEs required to be provided pursuant to Section 271, the rates must meet a "just and reasonable" standard under both state and federal law.[14] The Commission took notice of the FCC's holding in the TRO that the state and federal standards for what constitutes a "just and reasonable" rate are similar. Since the Commission had already ruled that the Tariff 216 rates were "just and reasonable" under Section 1301 of the Public Utility Code, the Commission concluded that those rates meet the "just and reasonable" rate standard.

13. Verizon twists the words and the logic of the Commission's DS1 Order when it suggests that what the DS1 Order really requires is that the "'just and reasonable' rates [for Section 271 elements] must be identical to TELRIC-based rates contained in Tariff no. 216." Verizon Petition at 13. That is not even close to what the Commission held in its DS1 Order. The Commission merely held that, in the interim, the Tariff 216 rates satisfy the "just and reasonable" pricing requirements contained in the TRO. But at bottom, even if one accepts as true Verizon's argument that only the FCC may determine if a BOCs' rates are compliant with the just and reasonable standards of Sections 201 and 202 of the Act, the FCC has already previously made such a determination with respect to the Tariff 216 rates. In approving Verizon PA's application for Section 271 relief, the FCC specifically concluded that the rates "Verizon charges for UNEs made available in Pennsylvania to other telecommunications carriers are just, reasonable, and nondiscriminatory in compliance with

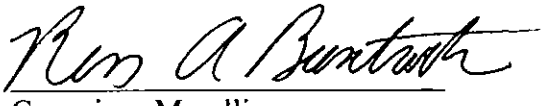
[14] *See* DS1 Order at 16: "The Tariff No. 216 rates are 'just and reasonable. 66 Pa. C.S. § 1301. Under Section 271, the rate to be charged must also be 'just and reasonable'"47 U.S.C. § 201; TRO ¶¶ 662, 665."

checklist item 2." [15] Therefore, the FCC has already approved most of the rates in Tariff 216 as just and reasonable.

III. CONCLUSION

14. For the foregoing reasons, the Commission should reject Verizon's Petition.

Respectfully submitted,



Genevieve Morelli
Ross A. Buntrock
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
gmorelli@kelleydrye.com
rbuntrock@kelleydrye.com
hhendrickson@kelleydrye.com

Counsel to ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Communications of PA, Inc.

January 13, 2004

[15] *See Application of Verizon Pennsylvania Inc Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket 01-138, FCC 01-269, ¶ 55 (Sept. 19, 2001).

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements	)))	Docket No. I-00030100

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of January 2004, served a true copy of the foregoing Answer of ARC Networks, Inc., d/b/a InfoHighway Communications Corp. and Metropolitan Telecommunications Corporation of PA, Inc. to Verizon Pennsylvania's Petition for Reconsideration upon the persons below via electronic and overnight delivery, in accordance with the requirements of 52 Pa. Code §1.54:

Carol Pennington, Acting Director
Angela Jones, Esquire
Office of Small Business Advocate
300 North Second Street
Commerce Building, Suite 1102
Harrisburg, PA 17101

Patricia Armstrong, Esquire
D. Thomas, Esquire
R. L. Matz, Esquire
Thomas, Thomas, Armstrong and Neisen
212 Locust Street, Suite 500
Harrisburg, PA 17101

Kandace Melillo, Esquire
Charles Hoffman, Esquire
Pennsylvania Public Utility Commission
Office of Trial Staff
400 North Street
Harrisburg, PA 17120

Alan Kohler, Esquire
Daniel Clearfield, Esquire
Wolf, Block, Schorr and Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101

Maryanne Martin, Esquire
Kimberly A. Joyce, Esquire
Pennsylvania Public Utility Commission
Law Bureau
400 North Street, 3rd Floor
Harrisburg, PA 17120

Michelle Painter, Esquire
MCI WorldCom, Inc.
1133 19th Street, NW
Washington, DC 20036

Norm Kennard, Esquire
Hawke, McKeon, Sniscak and Kennard, LLP
100 North Tenth Street
Harrisburg, PA 17101

Irwin A. Popowsky, Esquire
Barrett Sheridan, Esquire
Phil McClelland, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1923

Philip Macres, Esquire
T. E. Finn, Esquire
R. M. Blau, Esquire
Swidler Berlin Shereff Friedmann
3000 K Street, N.W.
Washington, D.C. 20007

Julia Conover
William Petersen
Suzan DeBusk Paiva
Stephen I. Bachman
Verizon
1717 Arch Street, 32N
Philadelphia, PA 19103

Ross A. Buntrock, Esquire
Kelley Drye & Warren LLP
1200 – 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600
Fax: (202) 955-9792
E-Mail: rbuntrock@kelleydrye.com

Michelle Painter, Senior Attorney
Law and Public Policy
1133 19th Street, NW
Washington, DC 20036
Telephone 202 736 6204

ORIGINAL

January 13, 2004

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 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

48

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 PETITION FOR RECONSIDERATION

Verizon Pennsylvania, Inc. ("Verizon"), through its Petition for Reconsideration in the above-captioned case, is attempting to pull a fast one on the entire competitive industry by eliminating a long standing Pennsylvania Commission decision regarding unbundling requirements. The Commission absolutely should not allow Verizon to use this proceeding, especially through a back-door Petition for Reconsideration, to alter such a critical issue for the entire competitive industry.

I. THE COMMISSION SHOULD NOT ISSUE A DECISION ON THE ISSUES RAISED IN VERIZON'S PETITION FOR RECONSIDERATION IN THIS CASE

This case is about Verizon's obligation to provide unbundled switching for the enterprise market. Many competitive local exchange carriers ("CLECs"), including MCI, did not participate in this case. In fact, many CLECs are not even on the service list and therefore are probably not even aware of Verizon's Petition for Reconsideration. Given the fact that many CLECs have been swamped with testimony due dates for the nine-month Triennial Review case

at Docket I-00030099, it is unlikely that those CLECs would have had a chance to keep track of all filings in this docket to know that this critical issue has been raised by Verizon.

The issues raised in Verizon's Petition do not relate solely to enterprise customers, but involve the *Global Order's* requirement of unbundling network elements for all types of consumers. Thus, the issues impact not only the enterprise customers that are the subject of this case, but all customers and competitors in Pennsylvania. For that reason alone, the Commission cannot issue a decision on these matters and cannot reverse a long-standing Commission decision through this back-door filing.

This proceeding 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."[1] 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.[2]

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

[1] Opinion and Order at pg. 15.

requirements.[3] That decision was issued on August 13, 2003, which was well after the FCC announced its decision in the Triennial Review matter.

Verizon cannot unilaterally decide that the Commission's findings in the Global Order are no longer in effect, yet that is exactly what Verizon's Petition for Reconsideration is attempting to do. The Commission specifically permitted Verizon to separately petition for removal of the unbundling requirements that were laid out in the Global Order.[4] 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.

II. VERIZON'S PETITION DOES NOT MEET THE *DUICK* STANDARD

Verizon has not met the standard to have the Commission reconsider its Order in this case. To justify reconsideration of a final Commission decision, a petition for reconsideration must offer "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission."[5] A party may not obtain reconsideration merely by raising "the same questions which were specifically considered and decided against" the petitioner.[6]

It is clear just from the Commission's Order in this matter that the Commission has already considered and rejected the same arguments Verizon makes in its reconsideration

---

[2] *Id.* at 15-16.

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

[4] Opinion and Order at 15-16.

[5] *Duick v. Pa. Gas and Water Co.*, 56 Pa. PUC 553, 559 (Dec. 17, 1985).

[6] *Id.*

petition. Specifically, the Commission stated in its Order that "Verizon argues that our *Global Order* requirement is inconsistent with the FCC's new framework set forth in the *TRO*, frustrates its implementation, and therefore, cannot stand under preemption principles. VZ Br. at 29-33."[7] Similarly, the Commission cited to Verizon's brief regarding Verizon's positions on the Section 271 pricing issues.[8] Thus, contrary to Verizon's claim in its reconsideration petition, the Commission has already considered and rejected the exact same arguments that Verizon is making in its reconsideration petition. Verizon cannot be allowed to re-argue its positions just because it does not like the outcome.

III. VERIZON'S PETITION MUST FAIL ON THE MERITS

MCI has not had a chance to fully develop its positions in response to the extremely critical and complex issues raised in Verizon's Petition for Reconsideration. That is because MCI was only generally monitoring this case and was not an active participant. Verizon's Petition was filed on Friday, January 2, 2004. During the entire week of January 5, 2004, MCI was completely occupied with the nine month Triennial Review case at Docket No. I-00030099 as MCI's testimony was due on January 9, 2004. For those reasons, MCI is not fully articulating all of its arguments in response to Verizon's Petition.

As noted above, Verizon's Petition does not meet the standards for reconsideration petitions, and the record is not sufficiently developed to resolve such significant issues, so the Commission should reject Verizon's Petition on those bases alone. With respect to the merits,

---

7 Commission Order at pg. 15.

8 *Id.* at 16-17.

for the most part, MCI supports the arguments raised by the Pennsylvania Carrier Coalition ("PCC") in its Answer to Verizon's Petition for Reconsideration.[9]

Verizon interprets the Act to preclude *any* unbundling requirements beyond those required by FCC rules. But as this state and others explained in their Triennial Appeal, such a reading "ignores Congress' plain and unambiguous expression of intent" in section 251(d)(3) "to permit States to establish ILEC network access regulations that are consistent with and do not substantially prevent implementation of §251." State Triennial Br. at 5. Indeed, as the states further explained (*id.*), §251(d)(3) "at most . . . bars only measures that require incumbents to violate the Act or preclude competitors from using elements to provide competing services. It does not prevent measures that support the Act's goals of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises . . . ", *Verizon Communications v. FCC*, 535 U.S. 467, 476 (2002), and "giv[ing] aspiring competitors every incentive to enter local retail telephone markets, short of confiscating the incumbents' property," *Id.* at 498. In fact, the Supreme Court emphasized again today that the 1996 Act "attempts *to eliminate the monopolies* enjoyed by the inheritors of AT&T's local franchises." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. ___ (quotation omitted) (emphasis in original). Unless Verizon can show that the Global Order impedes that purpose, a showing it does not even attempt, the Order's requirements are not preempted.

Verizon nonetheless suggests that the FCC has now preempted all state unbundling requirements that go beyond those required under FCC rules. In its brief in the Triennial appeal proceedings, the FCC argued that challenges to the FCC's interpretation of its preemption

[9] To the extent that the PCC cites to the Commonwealth Court regarding pricing issues, MCI disagrees that the Commonwealth Court had the authority or jurisdiction to decide issues related to pricing under the federal Telecommunications Act.

authority were unripe precisely because the "Order did *not* preempt states from adding to the unbundling requirements that the FCC adopted." FCC Br. at 91. It had instead merely "expressed its willingness to consider on an individualized basis whether any state rule" was preempted. *Id.* (internal quotation omitted). The FCC thus said that if a party believed that a particular state unbundling requirement exceeded the limits of state authority, it could petition the FCC for a declaratory ruling. *Id.* If Verizon believes the requirements of the Global Order are preempted, that is the course it should pursue.

Section 271 also authorizes the Commission's conclusions in this case. Although the FCC decided that Section 271 does not on its face require ILECs to combine network elements or provide such elements at TELRIC rates, it also recognized that ILECs must provide the elements on the 271 checklist even if not required to do so under Section 251. The exact parameters under which they have to do so – whether they have to combine the elements, and whether they have to provide them at cost-based rates – remain up in the air. In fact, the FCC determined that with respect to rates, the just and reasonable standard of sections 201 and 202 applies, and this "may well reflect some cost-based methodology, since that is the easiest way for a carrier to justify its rates under the traditional test." FCC Triennial Br. at 90 n. 40.

As for Verizon's claim, that only the FCC can determine the scope and meaning of a Bell Operating Company's ("BOC") Section 271 obligations – that is wrong. Although the FCC has the ultimate authority to determine whether a BOC has satisfied the conditions for initial long-distance entry, even this is done in consultation with state commissions. Moreover, the FCC's own judgment is based in part on pricing determinations made by the states. Until now, at least, since the checklist items of Section 271 also had to be unbundled under Section 251, the pricing

standard for unbundling was set under Sections 251 and 252 under which states had a critical role.

We are now in a world of double uncertainty. Some of the elements that must be provided under Section 271 no longer have to be provided under Section 251, and Verizon has already been authorized to provide long-distance service. In such circumstances, the exact parameters of state and federal roles in setting prices have not been established. What is clear, however, is that the states must have some role to play in establishing rates for elements provided under Section 271. The Act struck a careful balance in ensuring that states played a continued role in pricing what are, after all, often intrastate elements, and Congress surely did not intend to eliminate that state role when elements were provided under Section 271.[10] Certainly in the absence of specific FCC action establishing a pricing methodology under Section 271, the Commission is free to interpret Section 271's requirements as best it can. At this time, there is nothing that prohibits a state from implementing TELRIC rates, or continuing to impose TELRIC rates as just and reasonable rates.

IV. CONCLUSION

Verizon has not raised any new or novel issues in its Petition for Reconsideration. Contrary to Verizon's claim, the Commission did not overlook or fail to consider these significant issues in its Order rendered in this case. To the contrary, the Commission properly concluded that this docket is not the case to decide these issues, which would disrupt the status

[10] Moreover, as this state explained in its Triennial Appeal Brief, "Rates for elements, whether provided pursuant to §251 or §271, are provided in *interconnection agreements*. Congress intended the §271 checklist to include "what must, at a minimum, be provided by a [BOC] in any interconnection agreement approved under section 251." S. Rep. 104-23, 104th Cong., 1st Sess. 43 (1995). Section 252 provides that States arbitrate disputes over rates and establish those rates when the parties cannot agree." State Br. at 13.

quo in Pennsylvania and would reverse long standing Commission orders and policies. 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. If Verizon wants to challenge the legality of interconnection agreements, tariffs or Commission orders, it should follow the proper Commission procedures to do so in order to ensure that all participants have the opportunity to be involved in such important decisions.

Moreover, Verizon's petition must fail on the merits because Verizon is incorrect on its interpretations of preemption of state law, and its interpretation of the state's role in Section 271 matters. For all of the reasons discussed herein and in PCC's Answer, the Commission must deny Verizon's Petition for Reconsideration.

Respectfully submitted,

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036
(202) 736-6204
Facsimile: (202) 736-6242
E-mail: Michelle.Painter@mci.com

Dated: January 13, 2004

SERVICE LIST

I hereby certify that I have this day caused a true copy of MCI's Answer to Petition for Reconsideration to be served upon the parties of record in Docket Nos. I-00030099 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 13, 2004

VIA OVERNIGHT DELIVERY

Suzan Paiva
Verizon
1717 Arch Street, 32N
Philadelphia, PA 19103

Patricia Armstrong
Thomas Thomas Armstrong & Niesen
212 Locust St, Suite 500
Harrisburg, PA

Kandace F. Melillo
Pennsylvania Public Utility Commission
Office of Trial Staff – 2nd Floor
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Angela Jones
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Alan Kohler
Wolf Block Schorr and Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17108

Robert C. Barber
AT&T
3033 Chain Bridge Road
Oakton, VA 22185

Barrett Sheridan
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101

Norman Kennard
Hawke McKeon Sniscak & Kennard
100 North Tenth St
Harrisburg, PA 17101

Philip Macres
Swidler Berlin Shereff Friedmann
3000 K Street, NW
Washington, DC 20007

Ross Buntrock
Kelley Drye & Warren
1200 19th Street, NW, Suite 500
Washington, DC 20036

Michelle Painter

Suzan DeBusk Paiva
Assistant General Counsel
Law Department

verizon

ORIGINAL

Verizon Pennsylvania Inc.
1717 Arch Street, 32NW
Philadelphia, PA 19103

Tel: (215) 963-6068
Fax: (215) 563-2658
Suzan.D.Paiva@Verizon.com

January 14, 2004

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

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:

I enclose for filing the original and three copies of the Motion of Verizon Pennsylvania Inc. to Strike the Answer of MCI WorldCom Network Services, Inc. to the Petition For Reconsideration of the Commission's December 18th Order, in the above-referenced matter.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Suzan D. Paiva

cc: Via E-Mail and UPS Overnight Delivery
Maryanne Reynolds Martin, Esquire
Attached Service List

73

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

Verizon Pennsylvania Inc. ("Verizon") moves pursuant to 52 Pa. Code § 5.101 to strike the Answer to Verizon's Petition for Reconsideration filed by MCI WorldCom Network Services, Inc. ("MCI") on January 13, 2004. In support of this motion, Verizon states as follows:

1. On January 2, 2004, Verizon filed a Petition for Reconsideration of that portion of this Commission's December 18, 2003 Order in this docket that addresses the "[c]ontinuing [o]bligations of Verizon Pennsylvania Inc." *December 18 Order* at 14-17. Verizon sought reconsideration because those statements were unnecessary to decide the very limited issue before the Commission in this docket – whether the Commission should petition the Federal Communications Commission ("FCC") for a waiver from the FCC's national finding of no impairment for enterprise switching – and could be read as imposing unlawful obligations on Verizon that directly conflict with the FCC's findings and are preempted.

2. On January 13, 2004, MCI filed an "Answer" to Verizon's Petition for Reconsideration.[1]

3. MCI was not one of the Petitioners in this case and has never filed a Petition to Intervene in this proceeding. MCI therefore is not a "party" or "participant" in this docket, as those terms are used in the Commission's regulations. See 52 Pa. Code § 5.71-5.76 (regarding requirements for intervention); 52 Pa. Code § 1.8 (defining "party" and "participant").

4. Because MCI had stated its desire to "monitor" this case and asked to receive copies of documents, MCI had, as a courtesy, been placed on the parties' service lists. Such a request is insufficient under the rules to make MCI a "party" or "participant" in this docket in the absence of a properly filed and granted Petition to Intervene.

5. MCI therefore is not eligible to file an answer to Verizon's Petition for Reconsideration under 52 Pa. Code § 5.572 because MCI is not a "party" or "participant" in this docket. Accordingly, MCI's pleading must be stricken as improper.

6. In any event, the essence of MCI's "answer" is its claim that other CLECs have not been actively monitoring this case and so MCI contends the Commission should alter nothing in its original order because "the issues impact not only the enterprise customers that are the subject of this case, but all customers and competitors in Pennsylvania."

7. MCI is incorrect. Verizon's Petition for Reconsideration simply asks this Commission to confine its original order to the only issue that was properly before it – the correct conclusion that this Commission has no basis to request a waiver of the FCC's

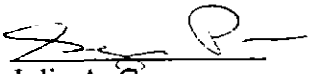
[1] Verizon had consented to an extension to January 13 for "parties" to answer the petition. Given that MCI is not a "party," and therefore not subject to the extension, its answer should be stricken on the alternative basis that it is untimely.

binding national "no impairment" finding eliminating TELRIC-priced unbundling of switching and UNE-P for enterprise customers. Verizon's petition further asks the Commission to eliminate the confusion caused by its unnecessary dicta regarding continuing obligations, which currently create an actual conflict with the FCC's binding unbundling determinations regarding enterprise switching. Such clarification would not affect "all customers and competitors," because Verizon is asking the Commission to clarify that there is no "independent," additional Pennsylvania-specific unbundling obligation for switching ***for enterprise customers***, much less a UNE-P obligation, and that the TELRIC rates that apply to unbundling based on section 251 of the 1996 Act do not apply to network elements unbundled pursuant to section 271 of the Act – the specific element before the Commission being unbundled switching for enterprise customers.

8. Indeed, if the Commission's intended its dicta to apply to anything other than the enterprise switching that is before it in this case, then MCI is correct that it is improper to interject more generally applicable issues into this limited case, and that is yet another reason why the Commission should reconsider and strike its discussion of the extraneous matters. MCI's erroneous suggestion that the Commission's statements might have a broader impact beyond the issues that were before it in this case is yet more evidence that the December 18 Order is causing confusion and must be reconsidered as Verizon has set forth in its Petition.

WHEREFORE, for the foregoing reasons MCI's Answer to Verizon's Petition for Reconsideration should be stricken and the Commission should not consider this pleading in ruling on Verizon's Petition.

Respectfully submitted,



Julia A. Conover
William B. Petersen
Suzan DeBusk Paiva
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6001
fax (215) 563-2658
e-mail: Julia.a.conover@verizon.com
William.b.petersen@verizon.com
Suzan.d.paiva@verizon.com

Counsel for Verizon Pennsylvania Inc.

January 14, 2004

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of the Motion of Verizon Pennsylvania Inc. to Strike the Answer of MCI WorldCom Network Services, Inc. to the Petition for Reconsideration, 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 14th day of January, 2004.

VIA E-MAIL AND UPS OVERNIGHT DELIVERY

Patricia Armstrong, Esquire
Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
& Niesen
212 Locust Street, Suite 500
Harrisburg, PA 17108

Ross Buntrock, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036

Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116

Angela Jones, Esquire
Office of Small Business Advocate
Commerce Building – Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Michelle Painter, Esquire
MCI WorldCom Communications, Inc.
1133 19th Street, NW
Washington, DC 20036

Norman Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
Harrisburg, PA 17101

Alan Kohler, Esquire
Wolf, Block, Schorr & Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101-1236

Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place – 5th Floor
Harrisburg, PA 17101-1923

Kandace Melillo, Esquire
Office of Trial Staff
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Suzan D. Paiva
Verizon Pennsylvania Inc.
1717 Arch Street, 32W
Philadelphia, PA 19103
(215) 963-6068