

COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION

ORIGINAL

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Verizon Pennsylvania Inc., et al. v.	:
One Communications Corp.;	:
Verizon Pennsylvania, Inc., et al. v.	:
CTC Communications Corp.;	:
Verizon Pennsylvania Inc., et al. v.	:
Conversent Communications of Pennsylvania,	:
LLC.; Verizon Pennsylvania, Inc., et al.	:
v. FiberNet Telecommunications of	:
Pennsylvania, LLC.; Verizon Pennsylvania,	:
Inc., et al. v. Lightship Telecom, LLC.;	:
and Verizon Pennsylvania, Inc., et al. v	:
Choice One Communications of Pennsylvania,	:
Inc.,	:
Initial Prehearing conference	:
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Pages 1 through 38

Hearing Room No. 3
Commonwealth Keystone Building
Harrisburg, Pennsylvania

DOCUMENT
FOLDER

Thursday, August 2, 2007

Met, pursuant to notice, at 10:05 a.m.

BEFORE:

LOUIS G. COCHERES, Administrative Law Judge

APPEARANCES:

SUZAN PAIVA, Esquire
1717 Arch Street, 10W
Philadelphia, Pennsylvania 19103
(For Verizon Companies)

JAMES G. PACHULSKI, Esquire
1100 New York Avenue, N.W., Suite 365
Washington, D.C. 20005-3934
(For Verizon Companies)

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

(717) 761-7150

1-800-334-1063

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APPEARANCES (Continued):

RENARDO L. HICKS, Esquire
Stevens & Lee

17 North Second Street, 16th Floor
Harrisburg, Pennsylvania 17101

(For One Communications Corp.; CTC Communications Corp.; Conversent Communications of Pennsylvania, LLC; FiberNet Telecommunications of Pennsylvania, LLC; Lightship Telecom, LLC; and Choice One Communications of Pennsylvania, Inc.)

Commonwealth Reporting Company, Inc.

700 Lisburn Road
Camp Hill, Pennsylvania 17011

(717) 761-7150

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WITNESS INDEX

WITNESSES

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(None.)

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FOIA

P R O C E E D I N G S

1
2 ADMINISTRATIVE LAW JUDGE LOUIS G. COCHERES: Good
3 morning, ladies and gentlemen. As you all pretty well know
4 by now, my name is Louis Cocheres, and I am the
5 Administrative Law Judge assigned to hear the matter of six
6 complaints brought by Verizon Pennsylvania, Incorporated,
7 Verizon North, Incorporated, and a group of very related
8 affiliated companies versus One Communications Corporation;
9 Choice One Communications of Pennsylvania, Incorporated; CTC
10 Communications Corporation; Conversent Communications of
11 Pennsylvania, LLC; FiberNet Telecommunications of
12 Pennsylvania, LLC; and Lightship Telecom, LLC; and these
13 cases are all filed in numerical sequence starting with
14 Docket No. C-20077671 going through 72, 73, 74, 75, and 76.

15 We're here today for a prehearing conference. I have
16 with me counsel representing Verizon and its many
17 complainant affiliates, and I have counsel representing One
18 Communications Corp, and all of the other named Respondents.

19 I think maybe we ought to do the easiest stuff first,
20 which has always been one of my hallmarks. I have motions
21 pro hac vice on behalf of Mr. Savage and Mr. Dodge, and I
22 have no Answers filed, and I assume there are no objections
23 to the admission of those gentlemen on behalf of the
24 Respondents.

25 MS. PAIVA: No objections.

1 JUDGE COCHERES: All right, fine. They are admitted.
2 Mr. Hicks, do you know if these gentlemen intend to play an
3 active role or whether you're going to be the representative
4 here in the courtroom?

5 MR. HICKS: I do know that they intend to play an
6 active role, Your Honor.

7 JUDGE COCHERES: Okay, fine. I think I'm going to
8 have to do at least one prehearing order in this case, and
9 when I start doing one or more, I will make sure that I
10 specifically note that they are admitted.

11 MR. HICKS: Thank you, Your Honor.

12 JUDGE COCHERES: Now, I have a pending Motion to
13 Dismiss from Lightship and Conversent. Is that right,
14 Mr. Hicks?

15 MR. HICKS: That is correct, Your Honor, and before
16 you actually address that, I wondered if I could at least
17 take a moment to clarify who my various clients are for the
18 record.

19 JUDGE COCHERES: That is a very good thing, because I
20 have to tell you from what I can see in the paperwork here
21 and a little bit of outside research, things aren't all that
22 clear to me.

23 MR. HICKS: Understood, Your Honor. Just by way of
24 background, One Communications Corporation is not a
25 Pennsylvania public utility certificated entity at all.

1 JUDGE COCHERES: It's not even a Pennsylvania
2 corporation, is it?

3 MR. HICKS: It is a fictitious name filed with the
4 Pennsylvania Department of State, Your Honor, on behalf of
5 all five of the companies I mentioned.

6 I have specifically identified the fictitious name
7 registration, Your Honor, which I don't have with me, but I
8 will certainly provide you.

9 JUDGE COCHERES: I already have it, thank you, and I
10 disagree with what you've just said.

11 MR. HICKS: That it is not a fictitious name,
12 registration?

13 JUDGE COCHERES: One Communications, not One
14 Communications Corporation, is, in fact, a fictitious name,
15 and it is according to the Department of State records owned
16 by Conversent Communications of Pennsylvania, LLC; CTC
17 Communications Corporation; Lightship Holdings,
18 Incorporated; Lightship Telecom, LLC; Choice One
19 Communications of Pennsylvania, Incorporated; and Conversent
20 Communications, LLC.

21 MR. HICKS: Actually, we do not disagree, Your Honor.
22 It is One Communications, and the word "corp" is not at the
23 end of that name filed as the fictitious name registry.

24 JUDGE COCHERES: However, One Communications is not a
25 named Respondent in this proceeding. One Communications

1 Corporation is, and they are something else.

2 Again, according to Department of State records, One
3 Communications Corporation is the current name for a company
4 previously known as Choice One Communications, Incorporated.

5 MR. HICKS: Okay.

6 JUDGE COCHERES: Which leads me to the question,
7 which I was going to get to a little further on, but we can
8 take care of all of this now.

9 Who are all these companies, some of whom don't
10 appear to be public utilities?

11 MR. HICKS: And those that are not, Your Honor, I
12 would move be dismissed from this complaint, because there
13 is no jurisdiction of the Public Utility Commission over
14 them.

15 JUDGE COCHERES: Ms. Paiva?

16 MS. PAIVA: Well, which company is not a public
17 utility?

18 MR. HICKS: As outlined by Your Honor, One
19 Communications Corporation is not. I'll stop there for that
20 basis, in particular.

21 MS. PAIVA: Is One Communications Corporation the
22 parent company of all these companies? What is the
23 corporate relationship? Because it seems from what the
24 Judge just said that it is Choice One.

25 MR. HICKS: One Communications without the corp on it

1 is, in fact, the fictitious name registered entity with the
2 Pennsylvania Department of State. It's a marketing
3 mechanism, for lack of a better word, for all of the five
4 Pennsylvania certificated utilities that own One
5 Communications itself.

6 So, One Communications Corp specifically is not a
7 public utility and for that reason should not be a party to
8 this proceeding.

9 MS. PAIVA: But Choice One is a public utility in
10 Pennsylvania, but the corporate entity is Choice One
11 Communications of Pennsylvania, Inc.; right?

12 MR. HICKS: The registered entity that you have
13 identified in this proceeding is the registered entity at
14 the Pennsylvania Public Utility Commission, Choice One.

15 MS. PAIVA: How is One Communications Corp related to
16 Choice One of Pennsylvania, Inc.?

17 MR. HICKS: Candidly, I don't know, but I know it is
18 not a public utility, and that's the basis on which I have
19 moved to strike or move to dismiss the complaint against One
20 Communications Corp.

21 JUDGE COCHERES: Ms. Paiva, I have a similar problem,
22 because One Communications Corporation was formerly known as
23 Choice One Communications, Incorporated, not Choice One
24 Communications of Pennsylvania, Incorporated. All right.
25 Similar names, different corporations, not a utility.

1 MS. PAIVA: Could I have a moment to speak with
2 Mr. Pachulski?

3 JUDGE COCHERES: Certainly. We'll be off the record.

4 (Discussion off the record.)

5 JUDGE COCHERES: Let's go back on the record.

6 Ms. Paiva, I understand that you and Mr. Hicks have
7 come to some agreement?

8 MS. PAIVA: Yes, Your Honor. Based on the
9 representation that One Communications Corp is not a
10 Pennsylvania public utility and that it does not have a
11 Pennsylvania switched access tariff, we would agree to
12 remove One Communications Corp as a Respondent from this
13 proceeding, which, I guess, eliminates its docket number,
14 too; right?

15 JUDGE COCHERES: Yes. Like I said, I'm going to have
16 to do kind of along prehearing order.

17 MR. HICKS: What docket number would that be, Your
18 Honor?

19 JUDGE COCHERES: That would be the first one, 7671.
20 All right. Now, I also note for the record that your
21 complaint really did not request a remedy or indicate in any
22 way, shape or form that they were anything other than a
23 utility holding company.

24 You didn't allege that you had paid them any money or
25 that you wanted any money back from them or anything else,

1 which brings me to One Communications. Is One
2 Communications a utility?

3 MS. PAIVA: One Communications?

4 JUDGE COCHERES: Yes.

5 MS. PAIVA: I thought we had just dismissed them.

6 JUDGE COCHERES: No; you dismissed One Communications
7 Corporation. One Communications is not named other than in
8 your complaint, paragraph 9. In paragraph 9, you name One
9 Communications, not One Communications Corp.

10 MS. PAIVA: We're not naming them as a Respondent.
11 We're just saying that they are a holding company. I'm just
12 seeing what the answer was, whether they admitted that or
13 denied that.

14 JUDGE COCHERES: They admitted it.

15 MS. PAIVA: Well, now I thought I heard Mr. Hicks say
16 before that One Communications was a fictitious name and not
17 a public utility.

18 JUDGE COCHERES: It certainly is. That's why I left
19 those pieces of paper on the desk in front of you. One of
20 those searches is for One Communications Corp, and the other
21 one is for One Communications, the fictitious name.

22 MS. PAIVA: Your Honor, in paragraph 9 when we say
23 One Communications, if you look at the beginning of the
24 complaint, we defined that as being the One Communications
25 Corp that we had named as a party, so I don't think we were

1 talking about the fictitious name. I mean, to a certain
2 extent, the convoluted corporate relationships among these
3 parties, we're not privy to all that information.

4 Are you suggesting that we should have named this
5 fictitious named entity as a party?

6 JUDGE COCHERES: Absolutely not. As a matter of
7 fact, I wanted to eliminate the possibility that we're going
8 to come back to the words "One Communications" in this case
9 at all.

10 MS. PAIVA: Right.

11 JUDGE COCHERES: But I would urge you to take yet
12 another look at the fictitious name for One Communications
13 and note that although it is a fictitious name owned by
14 certain entities, not all of those -- not all of the
15 Respondents in this case are entities which own One
16 Communications as a fictitious name. Among others, FiberNet
17 is missing.

18 MS. PAIVA: Just because they don't own the
19 fictitious name of One Communications, does that mean that
20 FiberNet should not be in the case if they have a switched
21 access tariff that doesn't comply, unless Mr. Hicks is
22 telling us that FiberNet is not affiliated with these
23 companies?

24 MR. HICKS: Mr. Hicks is not telling you that, but
25 Mr. Hicks has a separate basis for --

1 MS. PAIVA: And that's the one that we bried.

2 MR. HICKS: -- for advocating why FiberNet should not
3 be in this case. I think that we probably are not in
4 disagreement with regard to One Communications, the entity.
5 That, too, is not a Pennsylvania public utility. That, too,
6 does not have a switched access tariff in Pennsylvania, and
7 I am comfortable that One Communications, the name alone,
8 should not be a named party in the Pennsylvania Public
9 Utility Commission proceeding.

10 Its name has been used by me in my response as the
11 shorthand for the five public utilities that you have
12 identified; maybe not properly in every instance, but it was
13 intended to be used by me as the shorthand for the other
14 registered entities that you have identified in this
15 proceeding.

16 MS. PAIVA: And I think we've agreed to that, to
17 remove the One Communications entity from the proceeding. I
18 guess we could come up with another shorthand to refer to
19 the group, if we can agree to that.

20 JUDGE COCHERES: That's fine. I just wanted to put
21 it on the record now that there is, in fact, a fictitious
22 name that is owned by some of the Respondents in this case,
23 but not all; and if you want to continue to refer to them as
24 One Communications, I have no problem so long as you
25 understand it's some but not all.

1 MR. HICKS: That actually is my intent, Your Honor.
2 It is a shorthand as opposed to a longhand, and at the end
3 of today's discussion, we'll know precisely which number of
4 those entities it represents, but it is intended to
5 represent those entities who remain a part of this
6 proceeding, Your Honor.

7 JUDGE COCHERES: Yes; we certainly will. All right.
8 Now, I noticed in your complaint that you filed the
9 complaint against what is now five entities, and you've
10 alleged that you've paid money to some of them. All right?

11 Now, are you, in essence, telling me that if you have
12 failed to allege that you have paid money to all of them,
13 that you have then not paid any money to the ones that you
14 don't request any refund from?

15 MR. PACHULSKI: Your Honor, this is a little bit
16 tricky.

17 JUDGE COCHERES: Yeah.

18 MR. PACHULSKI: There is an entity that we are
19 alleging has a tariffed rate that exceeds what we consider
20 to be the cap in the statute, and we are paying switched
21 access charges to that company. However, what it is billing
22 us is something less than that tariffed rate.

23 JUDGE COCHERES: Less than? Don't you hate it when
24 that happens.

25 MR. PACHULSKI: So, it's not --

1 JUDGE COCHERES: Which one is that one?

2 MR. PACHULSKI: FiberNet.

3 JUDGE COCHERES: So, FiberNet is billing you less
4 than its tariff rate but more than the statutory cap. Is
5 that what you're telling me?

6 MR. PACHULSKI: No; less than the statutory cap, but
7 it has on file a tariff rate that exceeds the statutory cap.

8 JUDGE COCHERES: Well, I have to admit I didn't see
9 that allegation in there.

10 MR. PACHULSKI: We weren't quite sure how to make
11 that allegation, Your Honor.

12 JUDGE COCHERES: Well, you explained it fairly
13 succinctly. That leads to the question of how are you
14 harmed?

15 MR. PACHULSKI: Well, I guess we're at risk that we
16 will be back-billed at their tariff rate.

17 MR. HICKS: But that hasn't occurred, and in the
18 absence of that occurring, I still don't see harm or, for
19 that matter, do I see a violation of any law with respect to
20 what you have been charged.

21 MR. PACHULSKI: There is a violation with respect to
22 the tariff that is on the file and the tariff that you claim
23 you are allowed to bill under.

24 MR. HICKS: That raises another standing question,
25 Your Honor. The question then becomes whether or not they

1 have, in fact, standing to file for some amorphous
2 possibility in the future or to make corrective action on
3 behalf of the Public Utility Law; and as Your Honor is
4 aware, that's not really the Commission's standing analysis
5 or, for that matter, the State Supreme Court's analysis.

6 JUDGE COCHERES: I have to admit that I have trouble
7 with your complaint in those instances where you're not
8 alleging that you're paying the company anything; and, in
9 fact, the Answer to the complaint indicates that you're not
10 being charged anything. That's not the FiberNet category.
11 That's the existing motion that Mr. Hicks put on the table
12 dealing with Conversent, and is it Lightship? Yes,
13 Lightship.

14 MR. HICKS: Yes, Your Honor.

15 JUDGE COCHERES: I am concerned about this. The
16 statute is fairly brief, but I don't see that it creates a
17 cause of action if you haven't been harmed.

18 If you don't have any business dealings with the
19 company, the remedies you are suggesting that they reform
20 their tariff, you're not incurring any expenses, and they're
21 not charging you anything under that tariff, and withdrawing
22 their tariff is not particularly viable in my mind, because
23 they may have some other incumbent local exchange carrier
24 that they are charging. All I know is they're not charging
25 Verizon; that's all you've told me, and you're not paying

1 anything to them.

2 So, why don't you explain to me why I should keep
3 those two entities in this case?

4 MR. PACHULSKI: Your Honor, may we go off the record
5 and discuss it for one moment?

6 JUDGE COCHERES: Sure. We'll go off the record.

7 (Discussion off the record.)

8 JUDGE COCHERES: Back on the record.

9 When we went off the record, we were discussing
10 issues surrounding the challenge to standing for Verizon and
11 its affiliate complainants against Conversent and Lightship.

12 You have told me in your complaint, and there doesn't
13 seem to be any dispute of the facts, that neither company
14 has charged your client anything nor have you paid them
15 anything.

16 So, we're left with, for lack of a better way of
17 describing this, the resceit allegation that there is a
18 naked tariff out there and that the tariff creates the
19 potential for your client to be charged a rate higher than
20 you believe is legal. Am I correctly summarizing your
21 position?

22 MR. PACHULSKI: Yes, Your Honor.

23 JUDGE COCHERES: All right. That being said, can you
24 explain to me how under, what is it, the Pittsburgh Parking
25 Authority case? Is that the one -- William Penn Parking

1 Authority case handed down by the Pennsylvania Supreme
2 Court, how you meet the criteria for standing according to
3 that case?

4 (Pause.)

5 MR. PACHULSKI: Your Honor, I was going to propose a
6 potential solution here; that we be given the opportunity to
7 make one further check with our clients as to which entities
8 Verizon is paying switched access charges to in
9 Pennsylvania, and to the extent we are not doing so, that we
10 would voluntarily withdraw the complaint as to those
11 entities without prejudice.

12 MR. HICKS: Your Honor, I have discussed this matter
13 with my client. This issue was filed by us and responded to
14 by Verizon, and the facts are before you as averred by both
15 parties, and it's actually ripe for decision.

16 If at some future time there is a future basis for a
17 complaint, Verizon can file it, but there is no evidence of
18 record to support either of those two entities being parties
19 to this proceeding.

20 MS. PAIVA: Your Honor, just one more for
21 consideration. Even if you concluded that Verizon doesn't
22 have standing to challenge these tariffs because we're not
23 paying under it, the Commission on its own motion could
24 investigate these tariffs in light of the fact that there is
25 a statutory cap and on its face the tariffs exceed the

1 statutory cap, and one could read the statute to put the
2 burden on the CLEC to file a cost justification in order to
3 maintain a tariff.

4 So, even if you think they should not be a party to
5 this complaint, I don't think that precludes the Commission
6 from investigating these tariffs in some form.

7 MR. HICKS: Your Honor, I don't disagree, but I also
8 would add that's true about every company in the
9 Commonwealth of Pennsylvania. The Commission can initiate
10 an investigation of anything that it deems appropriate.

11 JUDGE COCHERES: All right. There is no reason to
12 disagree with you, Ms. Paiva. You're correct. The
13 Commission does have that authority and, goodness knows, I
14 don't know why they don't exercise it more often, but they
15 apparently don't.

16 Returning to Mr. Pachulski's suggestion, I do have
17 some concerns here, and the concern is basically that you
18 filed a verified complaint, you got a verified Answer, you
19 got a motion, you filed a response to that motion. It
20 should not have been news to you walking into this
21 prehearing conference that this issue would be brought up
22 today.

23 So, given that I have verified documents, what you've
24 asked me to do essentially is to go back and check for sure,
25 for sure, and I don't think we need to do that. I think

1 that when you filed your responsive pleadings and your
2 complaint, you were making representations about what your
3 client knew and did.

4 That being the case, I'm going to grant the motion to
5 dismiss Lightship and Conversent. Now -- and I will do
6 that, of course, by Initial Decision so that you will have
7 the opportunity to file exceptions and reply exceptions if
8 you so choose.

9 Now, let's talk about FiberNet, which was -- and I
10 appreciate your candor -- new information today. Mr. Hicks,
11 is there some reason why -- and I'm not particularly
12 inclined to do this, but is there some reason why you think
13 FiberNet ought to be dismissed at this point?

14 MR. HICKS: Yes, there is, Your Honor. With regard
15 to the standing analysis, the standard which you allude to
16 is one where the Supreme Court has required that the
17 interest in the matter litigated be direct, that the
18 interest must be substantial, and that the interest must be
19 immediate and not some kind of remote consequential
20 interest.

21 In defining substantial, they talk about an interest
22 in the outcome of the litigation that surpasses the common
23 interest of all citizens in procuring obedience to the law;
24 and with respect to Verizon and its relationship to
25 FiberNet, there is no interest that is immediate and direct.

1 What they're attempting to get the Commission to do
2 is to cause a change in the tariff that is much more akin to
3 an interest in procuring some obedience to the law. It is
4 not an interest in remedying a harm that they, in fact, have
5 suffered; and I, too, appreciate their candor in
6 acknowledging, but I must confess I did not know before
7 today that FiberNet is, in fact, charging less than the ILEC
8 rate to them.

9 As a result, I strongly move that FiberNet be
10 dismissed from this proceeding as well.

11 MS. PAIVA: Your Honor, may I respond?

12 JUDGE COCHERES: All right. I'll listen to you.

13 MS. PAIVA: I only wanted to state that, first of
14 all, FiberNet has the obligation under the Public Utility
15 Code to bill its tariffed rates and Verizon has the
16 obligation under the Public Utility to pay the tariffed
17 rates. So, if they're under-billing us, that doesn't mean
18 that they're not going to come back later and try to back-
19 bill us for the difference.

20 In addition to that, I feel that you're perhaps not
21 inclined to grant this motion, but if you were, I think a
22 condition of that would have to be that FiberNet waives its
23 right to back-bill Verizon for the difference between the
24 billed rates and the tariffed rates in the past and going
25 forward and that FiberNet agrees to conform its tariff to

1 what it's actually billing us. On those conditions, we
2 would agree to dismiss them.

3 JUDGE COCHERES: I'm not about to impose conditions
4 which you started out by explaining to me are illegal. If
5 they have a tariff, they're supposed to bill at that rate.
6 So, I couldn't possibly consider imposing conditions that
7 they waive billing what they're supposed to be billing.

8 MS. PAIVA: That's why I suggested they conform the
9 tariff to what they're billing us.

10 JUDGE COCHERES: Well, that might work on a going-
11 forward basis, but I certainly wouldn't make them waive
12 anything in the form of a back bill. In fact, I think that
13 somewhat undercuts your position, because if they waive the
14 back bill and on a going-forward basis were to conform to
15 what you believe the correct amount is, that case would be
16 over.

17 MS. PAIVA: They would essentially be giving us the
18 relief we asked for, Your Honor.

19 JUDGE COCHERES: Yeah, but I'm not biting on that one
20 either.

21 Okay. Mr. Hicks, I have no problem
22 dismissing the complaints against Conversent and Lightship.
23 However, FiberNet has the complication of money changing
24 hands, albeit at the wrong rate, and I'll be delighted as an
25 aside to figure out why that happened, but putting all that

1 aside, they are obligated to charge what their tariff says,
2 and I don't think that that is so remote and such a general
3 thing as conformity to the law that in this particular
4 instance I see a touchstone here that gives Verizon
5 standing.

6 So, I'm not particularly inclined to grant your
7 motion to dismiss.

8 MR. HICKS: Your Honor, I do understand your
9 conclusion, but I will note that that is a different cause
10 of action than what has been pled by Verizon.

11 If Verizon is asking that a company conform its
12 billings to the requirements of its tariff, that is not what
13 they have pled in this instance, and that's another basis on
14 which I would move to dismiss this complaint against
15 FiberNet.

16 JUDGE COCHERES: Well, since we're very early on in
17 this proceeding, we can remedy that by simply allowing them
18 to amend that portion of their complaint.

19 MR. HICKS: Understood. Your Honor, that raises the
20 question to the extent Verizon is able to advise us as to
21 whether or not the other two remaining companies are
22 charging at all, because it's unclear from their pleadings
23 who's charging and what, in fact, they are charging.

24 JUDGE COCHERES: Mr. Hicks -- oh, you're not talking
25 about Conversent and Lightship anymore, are you?

1 MR. HICKS: No, I'm not, Your Honor.

2 JUDGE COCHERES: Who's left now?

3 MR. HICKS: I'm talking about Choice One and CTC.

4 JUDGE COCHERES: Now, there are specific allegations
5 in the complaint, as I recall, about how much money is
6 involved in Choice One and CTC.

7 MR. PACHULSKI: Yes, Your Honor. We've alleged
8 specific damages as to Choice One, and we have indicated
9 with respect to CTC that the billings have been not more
10 than \$10,000 based upon what we have been able to discern,
11 but, interestingly, I guess it would be CTC denied that
12 allegation. So, we're left to wonder is it your belief that
13 you billed more than \$10,000?

14 MR. HICKS: It was our belief tjat that was an
15 inaccurate statement.

16 MR. PACHULSKI: That it was an inaccurate statement?

17 MR. HICKS: Yes.

18 MR. PACHULSKI: The statement is that we have not
19 been billed more than \$10,000 in access charges. So, if
20 it's not an accurate statement, you think you billed more
21 than \$10,000?

22 MR. HICKS: It means what I said. It means that the
23 statement was not accurate.

24 JUDGE COCHERES: Well, look, what you all are talking
25 about is a discovery issue.

1 MR. HICKS: That's correct, Your Honor.

2 JUDGE COCHERES: And that can be taken care of in
3 discovery. I don't particularly care how much money is
4 being billed. I am concerned about something else, and that
5 is the clear allegation in the complaint that albeit the
6 tariffed rate is set above that of the ILEC, that Verizon
7 and its affiliates have been taking the bills and paying
8 only the tariffed rate according to Verizon. Did I read
9 that correctly?

10 MR. PACHULSKI: With respect to certain Verizon
11 companies pursuant to an agreement reached with the
12 appropriate carrier, yes, Your Honor.

13 JUDGE COCHERES: Well, now, was that an oral
14 agreement or a written agreement?

15 MR. PACHULSKI: It was an exchange of e-mail
16 agreement.

17 JUDGE COCHERES: Well, I'm not particularly pleased
18 with that response either. Earlier, Ms. Paiva told me if
19 they have a tariffed rate, they're obligated to charge it,
20 and if they have a tariffed rate, Verizon is obligated to
21 pay it. So, it seems to me that, one, by private agreement,
22 you shouldn't be able to revise that without coming back to
23 the Commission; and, two, there shouldn't be any difference
24 between what is billed and what is paid, or am I missing
25 something here?

1 MR. PACHULSKI: Your Honor, it was pursuant to an
2 understanding that the tariffed rate was going to be
3 modified to the appropriate level, and it was in that
4 context that the understanding was reached that we would pay
5 the appropriate rate level.

6 MR. HICKS: Your Honor, I don't have background into
7 the matters that Verizon is describing, but I mentioned in a
8 side bar the concept of individual agreements or individual
9 case basis decisions between a carrier and a customer, and
10 that may or may not apply here, but in response to that, I
11 was advised that a company has a tariff and a company is
12 expected to file the tariff rate.

13 This is something of a have your cake and eat it,
14 too, view of Verizon where they have agreements to pay less
15 than the tariff rate, but also challenge that a tariff rate
16 exists that is higher than the rate that they are, in fact,
17 paying.

18 That, too, is more reason for me to reiterate my
19 motion to have FiberNet removed from this proceeding,
20 because, in fact, Verizon is not harmed perhaps even by
21 virtue of its agreement to accept a lower rate. Do you
22 understand what I mean, Your Honor?

23 JUDGE COCHERES: I think I understand that you're
24 bringing up another point on an issue I've closed.

25 MR. HICKS: That's true.

1 JUDGE COCHERES: I think what we're going to need is
2 a record, a real record with real witnesses explaining how
3 FiberNet is charging less than its tariff rate and less than
4 the rate per minute by the statute.

5 MR. HICKS: Understood, Your Honor.

6 JUDGE COCHERES: And how that all came about. I'm
7 not going to speculate about it today. We're just going to
8 hear about it later.

9 MR. HICKS: And I won't bring it up again, Your
10 Honor.

11 JUDGE COCHERES: That's all right. All right. Now,
12 going back to the point I raised about revisions to the
13 tariff, I think we're going to need to develop that on the
14 record as well, and it obviously is a disputed item. It's
15 something that when I read the complaint, I went "okay," and
16 then I read the Answer and I went "Umm," and I think what
17 we're going to need is testimony. If they're e-mails, then
18 they'll be exhibits and explaining how this all comes about
19 and just what is going on here.

20 I might add I'm going to give you the Judge
21 Weismandel pre-approved discussion on the burden of proof.
22 Obviously, the Complainants have the burden of proof.
23 However, as has been pointed out multiple times in both the
24 complaint and the Answer and the motions that have followed,
25 the initial burden for Verizon and its affiliates is to

1 demonstrate that they are doing business with entities,
2 CLECs that have tariffs higher than theirs for access
3 charges; and having established that, the burden of
4 persuasion, but not the burden of proof, shifts to the CLEC
5 to justify the rate that they're charging.

6 Now, it seems to me that there is clear admission in
7 the Answers that the tariffed rates for the CLECs are higher
8 than the Complainants' tariffed access charge rates.

9 MR. HICKS: We agree.

10 JUDGE COCHERES: So, I see that as a given. Having
11 said all that, there still has to be testimony from both
12 sides and a cost study from the CLECs to justify whatever it
13 is they're charging, and there is going to have to be some
14 explanation about how we're charging less and paying less.

15 Does anybody disagree with my understanding of the
16 burden of proof and the shifting burden of persuasion?

17 MS. PAIVA: No, Your Honor. Judge Weismandel
18 explained it in detail on the record in the PTI case, and I
19 believe we agree with his explanation.

20 MR. HICKS: Your Honor, I don't disagree either, but
21 I will add, and I don't mean to go over charted ground, but
22 that a company is, in fact, doing business with a company
23 who has access rates that are higher than the incumbent I
24 believe means that they're being charged those higher rates
25 as well, Your Honor. But that, too, will be a matter that

1 we will unravel during the course of this proceeding.

2 JUDGE COCHERES: Right. There's one more point that
3 I'm looking to find.

4 (Pause.)

5 JUDGE COCHERES: Whatever it is, it will come to me
6 about a day-and-a-half later. Thank you for your patience.
7 I notice that for the most part, according to the prehearing
8 memoranda that you submitted, you thoughtfully agreed on the
9 dates of hearing.

10 Unfortunately, what you couldn't have anticipated is
11 that I am not available.

12 MS. PAIVA: I thought that might be a possibility
13 given the time of the year.

14 JUDGE COCHERES: Why would you have said that? I'm
15 just curious, because you won't believe the reason I've got.

16 MS. PAIVA: Just because I found a lot of people
17 planning vacations around that time of the year with people
18 being home from college. That's not the reason?

19 JUDGE COCHERES: I would love to be able to plan it.
20 The reason is that I have the trifecta of rate base cases.
21 I have not one, not two, but three rate base cases -- base
22 rate cases -- I can't talk this morning -- base rate cases
23 that are already starting. One is a gas case. The other
24 two are electric. They are all owned by the same
25 partnership of two rural cooperatives, and together with the

1 hearings, the briefing, and the writing time necessary, my
2 calendar is filled from the middle of September to the end
3 of December. I truly wish I was on vacation.

4 The battle cry in my office is "settle these cases;"
5 not yours, but the base rate cases. If you can settle
6 yours, that's fine. They are just sitting on my calendar,
7 and I have literally two months of writing time.

8 It was initially requested that I try all three of
9 them together. I went, "No."

10 MS. PAIVA: How many days of hearing would that be?

11 JUDGE COCHERES: That would have probably been about
12 six, but the gas base rate case is on the earlier track.
13 It's running about one month ahead of the two electrics,
14 which I did consolidate, because basically due to their
15 common ownership, one of the threads that's going to run
16 through those cases is how management time is allocated by
17 the parent corporation to run the three subsidiaries. But
18 that doesn't mean that they aren't going to be a lot of work
19 if they go fully through litigation.

20 That being said, the first available sane hearing
21 time in my calendar is in mid January, and it's pretty
22 clear.

23 Let's go off the record to finish our discussion
24 about scheduling.

25 (Discussion off the record.)

1 JUDGE COCHERES: Let's go back on the record.

2 We covered a lot of topics while we were off the
3 record, but they all indicate we're making good progress.

4 The first thing we did was put together the
5 litigation schedule. Essentially, all written direct
6 testimony must be served on October 10th. Service on that
7 date can be electronic. I will remind the parties now that
8 my office uses the Word processing system. I would prefer
9 to get the documents in Word. If you cannot produce them in
10 Word, please tell me when you send them to me what system
11 you've used.

12 Having said that, just yesterday I had a small
13 problem dealing with electronic documents where the
14 testimony was in Word and the exhibits were not, and that's
15 not unusual; and the result was that initially I was served
16 electronically with a PDF file for each of the -- these are
17 the three rate cases again.

18 So, I had a total of 14 witnesses' testimony spread
19 over those three companies in PDF format, which, for all
20 practical purposes, crashed my in-box and totally overloaded
21 the circuitry, and we were picking them out of quarantine
22 and all that other fun stuff.

23 However, when the same testimony was sent to me again
24 in Word, I didn't realize having received it, that the
25 exhibits could not be attached because they were not in

1 Word.

2 So, I recognize that based on yesterday's experience
3 alone that we may have these issues. Just tell me what
4 you're using. If you or your administrative assistant is
5 going to send things to me electronically and if they're
6 going to have to be in PDF file format, I just caution you
7 to send the documents one at a time.

8 Now, cumulatively, they can, in fact, overload our
9 system, but if you try sending me like two sets of testimony
10 in PDF format, you may have done it all by itself. PDF
11 files are just large; that's all there is to it, and the
12 Commonwealth system apparently doesn't have the muscle to
13 carry them. But I have no problem receiving things in
14 electronic format so long as the paper documents arrive by
15 First Class mail as soon as possible thereafter. It doesn't
16 have to be on the next day, and that's particularly
17 important if you serve something on a Friday, because,
18 obviously, my offices are not open on Saturdays and mail
19 delivery to business offices is a little more difficult on
20 Saturdays, which brings me to the one modification that we
21 had -- well, let me finish the litigation schedule first.
22 We did digress.

23 So, written direct testimony will be due in-hand on
24 October 10th. Written rebuttal testimony will be due
25 in-hand on December 10th. Written surrebuttal, to the

1 extent that it is needed, and we're not sure at this point
2 it is, but if it is needed, it is due in-hand on January 4th
3 of '08. The hearings to be held in Harrisburg on January 16
4 and 17, '08.

5 There has been a little opening allowed here for the
6 parties to return to their offices and check with their
7 clients about witness availability in January of '08.

8 I am willing to consider other dates, but I think I'm
9 going to need answers in the next ten days, and I'm saying
10 ten days because I know that we're still at the height of
11 vacation season, and the bodies you may want to talk to may
12 not be available right away, plus the fact that we have
13 enough lead time that we can play with the January hearing
14 dates. But I'm sure the scheduling staff will want to know
15 as soon as possible to block out those dates on my calendar
16 and for a hearing room, not that I anticipate any of those
17 things are going to be an issue, but I just need a deadline
18 for you to get back to me.

19 MR. HICKS: Your Honor, is it okay that we only
20 respond if there is a problem?

21 JUDGE COCHERES: Yes; that's fine. Essentially, I'm
22 figuring Friday, August 10th, is the due date, today being
23 the 2nd. That's not quite ten days, but we'll use new math.

24 All right. As with all proceedings that go on in
25 front of me, when I say "in-hand," I mean in-hand on or

1 before 4:00 in the afternoon.

2 Electronic service on me is fine. We've already
3 covered that. We've also covered the idea that the paper
4 copy must be available by First Class mail as soon as
5 possible thereafter.

6 Okay. We did talk about slight modifications to the
7 discovery deadlines. Any discovery request that is received
8 before noon on a Friday or the day before a holiday will be
9 treated as though the response time starts on the next
10 business day, which is usually a Monday, but we do have some
11 holidays that are on Mondays, so that can be a Tuesday as
12 well.

13 Personally, I don't see that that is going to be as
14 much an issue in this case. There is no statutory deadline,
15 but it does make things a little easier to plan if you know
16 you have that little extra space and actually want to see
17 your family on the weekend or the holiday.

18 All right. The three remaining cases that we have
19 agreed upon are the Complainants versus Choice One
20 Communications of Pennsylvania, Incorporated. I think the
21 docket number for that one ends in 72. And also CTC
22 Communications Corporation. The docket number for that one
23 ends in 73. And the FiberNet Telecommunications of
24 Pennsylvania, LLC., and that should be a docket number that
25 ends in 75.

1 Those three cases are still viable and are the
2 subject of these proceedings. One of the things that I will
3 do with one of my prehearing orders will be to consolidate
4 those three docket numbers for hearing and decisional
5 purposes.

6 Now, I'm afraid I've missed something. We talked
7 about a variety of subjects. I made a couple notes, but did
8 I cover all the subjects that we covered off the record?

9 MR. HICKS: I think so, Your Honor.

10 MS. PAIVA: The Protective Order, we mentioned that
11 we would submit it later.

12 JUDGE COCHERES: Thankyou. Right. It had been an
13 item on my agenda. Initially, I had received a proposed
14 Protective Order from Verizon, and Mr. Hicks has indicated
15 he also produced a proposal which he gave to the Verizon
16 people today.

17 The bottom line here is that the parties have not
18 agreed on the terms of the Protective Order. I don't think
19 it will take much for them to agree. Frankly, you're all
20 experienced counsel. You know what you want to protect.

21 So, as soon as you have agreed on a Protective Order,
22 I urge you to forward it to me. If you want to forward it
23 in electronic format, that's probably best simply because I
24 usually read them before I sign them, and sometimes I have a
25 question or something I need to have resolved, and it's

1 better if I have the electronic copy.

2 I think I also reminded you that the rules permit you
3 to informally at least designate documents as proprietary
4 and to observe all the restrictions that are set forth in
5 the rules about doing that until I can get a written
6 Protective Order in place, but at least you have the
7 flexibility to do that informally among yourselves.

8 Now, did I miss anything or misstate anything?

9 MR. HICKS: It seems complete and accurate to me,
10 Your Honor.

11 MS. PATVA: Yes, Your Honor; it seems fine.

12 JUDGE COCHERES: I love it when the parties suck up.
13 All right. Is there anything else that I need to do?

14 (No response.)

15 JUDGE COCHERES: Okay. I'm taking away from this
16 meeting today that I do need to do an Initial Decision
17 noting that the Motion to Dismiss Conversent and Lightship
18 has been granted and that the action naming One
19 Communications Corporation has been withdrawn.

20 I think I will have the withdrawal processed
21 administratively. I will not do an Order. The fact that we
22 made a record of it should be sufficient.

23 I do need to go off the record for one more subject.

24 (Discussion off the record.)

25 JUDGE COCHERES: Back on the record.

C E R T I F I C A T E

I hereby certify, as the stenographic reporter, that the foregoing proceedings were taken stenographically by me, and thereafter reduced to typewriting by me or under my direction; and that this transcript is a true and accurate record to the best of my ability.

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