

DT 01-006

VERIZON NEW HAMPSHIRE

Petition to Approve Carrier to Carrier Performance Guidelines
and Performance Assessment Plan

Order Regarding Motion for Reconsideration,
Rehearing and/or Clarification

O R D E R N O. 23,976

May 24, 2002

I. INTRODUCTION

Verizon New Hampshire (Verizon) filed its original Petition for Approval of Proposed Carrier to Carrier (C2C) Guidelines with the Commission on October 19, 2000, and in later filings in this docket Verizon updated the metrics, and proposed a Verizon Performance Assurance Plan (NHPAP). As used in this context, a Performance Assurance Plan (PAP) is intended to achieve and maintain high quality wholesale service to Verizon's competitive local exchange carrier (CLEC) customers, particularly after Verizon is permitted to enter the long-distance market. In this way, a PAP is intended to prevent the incumbent from "backsliding" in its provisioning of service to competitors, once it has achieved the right to fully enter the long-distance market.

The scope of the C2C metrics docket included consideration of (1) what metrics should be used to measure the quality of Verizon's service to its competitive local exchange company customers, and (2) what performance measurement plan should be adopted by the Commission to measure Verizon's compliance with the metrics, to ensure Verizon's quality of wholesale service to its local exchange competitors.

After extensive proceedings, on March 29, 2002, the Commission issued Order No. 23,940 in this docket, in which the Commission determined that Verizon's proposed Performance Assurance Plan (NHPAP), "when adjusted to incorporate evolutionary adjustments and considered within the context of our statutory authority" to prescribe additional standards and associated penalties, "does constitute a satisfactory performance plan." Order No. 23,940, at 83. The Commission approved the Verizon NHPAP conditioned on inclusion of certain evolutionary adjustments, and determined to open further proceedings regarding the violations and associated penalties to be used in enforcing the additional standards discussed in the Staff proposed Bill Credit Table (Appendix A) and PAP alternative (PAPA). Order No. 23,940, at 86.

In a related case, the Commission has under consideration Verizon's request for a favorable recommendation to the Federal Communications Commission (FCC) under Section 271 of the Telecommunications Act of 1996 (TAct) for permission to enter the inter-LATA, out-of-region long distance market. For administrative convenience, Docket DT 01-151 was opened to consider most issues involved in Verizon's Section 271 recommendation request. On March 1, 2002, the Commission issued a letter in Docket DT 01-151 indicating to Verizon that the Commission would recommend favorable action on Verizon's Section 271 petition to the FCC, with certain conditions, covering the Section 271 14-Point Competitive Checklist, performance assurance, and rates for competitive entry under the Statement of Generally Available Terms and Conditions (SGAT) (March 1 letter). As part of that letter, the Commission noted that in an order to be issued shortly in the instant docket, DT 01-006, the Commission was "setting out the minimum requirements of a Performance Assurance Plan, necessary to prevent backsliding on Verizon's performance in provisioning service to its wholesale customers (CLECs)." March 1 letter at 3. We concluded that:

Our rulings on PAP, SGAT and the conditions we set out here should bring the Verizon petition in line with the public interest. In this way, consumers can enjoy the benefits of Verizon's entry into the long-

distance market, without facing adverse impacts such entry could have on Verizon's wholesale and local exchange customers. *Id.* at 4.

On March 15, 2002, Verizon replied to the Commission's March 1 letter, seeking, in essence, reconsideration of the conditions set out by the Commission (March 15 letter). Among other points, Verizon objected to the Commission's decisions in this docket, DT 01-006, as those had been announced at oral deliberations during the Commission's public meeting on March 1, 2002. On April 10, 2002, the Commission advised Verizon by letter that it had considered Verizon's concerns as expressed in its March 15 letter, and directed that Verizon, Staff and the parties, in whatever combinations they deemed appropriate, work together to develop clarifications, modifications or substitutions to the Commission's Section 271 conditions "that can bring this matter to a fair resolution." April 10 letter at 2. With respect to Verizon's concerns about the Commission's PAP deliberations, the Commission stated in its April 10 letter:

We are aware that the FCC has approved other versions of Verizon's PAP as probative evidence that the telecommunications market will remain open after Verizon obtains 271 approval. We anticipate that the FCC will find our approval of the NHPAP adequate for 271 purposes as well. In addition to approving the NHPAP, we found that exercise of our traditional statutory authority in conjunction with the NHPAP will best serve the interests of New Hampshire

consumers. *April 10 letter* at 2.

The Commission went on to say:

As we indicated in Order No. 23,940, the approach we have described, which constitutes no more than an application of our existing authority, will be detailed in a subsequent docket, *but the pendency of that docket is not intended to delay Verizon's application to the FCC. Id.* (emphasis added).

On April 26, 2002, Verizon filed a Motion for Reconsideration, Rehearing and/or Clarification (Motion) of certain portions of Order No. 23,940. Verizon advised the Commission that AT&T, WorldCom, the Joint CLECs (BayRing and CTC), and the OCA indicated that they oppose the motion. Staff filed a Response to Verizon's Motion on May 3, 2002, supporting Verizon's request for clarification, and opposing Verizon's request for reconsideration or rehearing. AT&T filed a letter on May 7, 2002, opposing Verizon's Motion.

II. PARTIES' POSITIONS

In its Motion, Verizon asks that the Commission:

1. Clarify that the statements in the Commission's April 10, 2002 letter that Verizon's NHPAP is sufficient for purposes of a Section 271 application supersede any inconsistent statements in Order No. 23,940.
2. Reconsider the decisions to impose additional remedial measures upon Verizon, including but not limited to the decisions to adopt the Staff Appendix A thresholds and PAPA, and to make PAP, state law and interconnection agreement remedies cumulative.

With respect to the first request, Verizon gathered together all references in the Order to potential deficiencies in the Verizon NHPAP. With respect to the second request, Verizon suggested that the Commission had not heard or understood the company's arguments and evidence, that the Commission's findings on the statistical basis for various PAP alternatives were incorrect, that the Commission's legal analysis concerning its authority was not well-grounded, and overall that it was premature to be applying tougher standards for Verizon's treatment of its competitors than those applied in neighboring states. Verizon also sought to introduce new evidence, some of which was not available during the hearings in this matter.

With respect to Verizon's first request, Staff averred in its Response that it is of the opinion that Order No. 23,940 is consistent with the April 10 letter, and thus requires no clarification. However, Staff supports Verizon's request for such clarification, in order to leave no doubt as to the Commission's meaning, and proposes specific language for this purpose.

Staff opposes Verizon's request for reconsideration or rehearing of the Commission's decision regarding revised Appendix A thresholds or the PAPA overlay pursuant to its New Hampshire state authority. Staff argues that the Commission correctly understood the evidence and Verizon's arguments, that the Commission should not "merely rubberstamp another state's conclusions," that the Commission carefully and soundly weighed the arguments for and against the Verizon NHPAP, and that "including statutory penalties in no way detracts from the effectiveness of the NHPAP." Response at 5-6. Staff points out that "if the NHPAP is entirely effective, as Verizon argues...then the statutory penalties will not come into play..." *Id.* at 6. Finally, Staff notes that the Commission decision regarding the Appendix A Bill Credit Table and the PAPA overlay on the NHPAP "does not appear to be final" because the Commission indicated in the Order that Verizon may challenge the state law penalty proposals in the course of the proceedings to be opened under the Order to implement these arguments to the Verizon NHPAP. *Id.* at 8.

AT&T submits that the Commission should not modify its PAP Order as requested by Verizon, stating that "[t]he fact is, the Commission has approved the remedy plan proposed by Verizon." AT&T Letter at 2. AT&T states that the

Commission "essentially tells Verizon that it can make its 271 filing with the FCC and represent that Verizon's remedy plan has been approved by the NH Commission." *Id.* at 3. With respect to the state law augments to the NHPAP, AT&T notes that the FCC has acknowledged that further development of an incumbent's PAP is entirely appropriate. AT&T quotes the FCC's decision approving the Verizon Pennsylvania, Inc. bid to enter the long distance market, as an explicit recognition that state commission development and approval of remedy plans is not intended by the FCC to be a "rubber stamp" operation, i.e.

...states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement..."

AT&T Letter at 3, citing *Application of Verizon, Pennsylvania, Inc. to Provide In-Region InterLATA Services in Pennsylvania*, FCC 01-269, CC Docket No. 01-138 (issued September 19, 2000), ¶128.

With respect to the technical issues raised by Verizon regarding Staff's Appendix A Bill Credit Table, AT&T submits that it is not necessary to reach these questions at this juncture, as there will be ample opportunity for interested parties to address such issues in the Commission's upcoming docket. AT&T Letter at 5.

III. COMMISSION ANALYSIS

Motions for rehearing and/or reconsideration of a Commission order are governed by RSA 541. RSA 541:3 directs that the Commission may grant a motion for rehearing "if in its opinion good reason for the rehearing is stated in the motion." Pursuant to New Hampshire case law, "good reason" is shown, for example, when a party explains that new evidence exists that was unavailable at the original hearing. *Dumais v. State*, 118 NH 309, 386 A.2d 1269 (1978); *Appeal of Gas Service Inc.*, 121 NH 797, 475 A.2d 126 (1981); *Re Consumers New Hampshire Water Company, Inc.*, 80 NH PUC 666 (1995). As stated in *Dumais*, 118 NH at 312, the purpose of a rehearing is to provide consideration of matters that were either overlooked or "mistakenly conceived" in the original decision. In reviewing any motion for rehearing, the Commission analyzes each and every ground that is claimed to be unlawful or unreasonable to determine if there are grounds to grant the request, *i.e.*, if there is good reason shown. *In re Wilton Telephone Company and Hollis Telephone Company*, NH PUC Order No. 23,790 (dated September 28, 2001).

Motions for clarification have been granted where the Commission's intent has not been made sufficiently clear in the order subject to the motion for clarification, and not

otherwise. See, e.g., Order On Motions for Clarification and Other Pending Motions, Docket No. 96-150, April 3, 2002, Order No. 23,945, at 20, 23.

We see no basis to reconsider or rehear our determinations in Order No. 23,940 as argued by Verizon. We fully considered the arguments raised by Verizon during the hearings in this docket, including the similarities and differences between New Hampshire and other states where Verizon has sought and won Section 271 approval, and the evidence concerning the statistical bases for the various PAPs before us, in arriving at our decision in Order No. 23,940. We extensively considered the statutory basis for identifying separate violations and penalties under New Hampshire law.

We see no reason to reject the Appendix A or PAPA concepts out of hand. Nor do we see a reason, based on the record in this docket or arguments in Verizon's Motion, to abjure our authority to implement Appendix A or the PAPA should conditions warrant. We note that, as the specific state law basis for augmenting the NHPAP had not been debated exhaustively on the record, we determined not to impose either the Appendix A or PAPA augments outright in our Order in this docket. Rather, we determined to initiate further proceedings, in part in order to provide Verizon with an

opportunity to make the very arguments it has raised in its Motion, in the context of a proceeding focused on those particular issues. We continue to believe, as well, that the very prospect of action based on state law incents appropriate performance by Verizon.

With respect to Verizon's request for clarification, Verizon's apparent position that the existing order somehow prevents it from proceeding to the FCC is unsupported by recent FCC decisions. For example, the FCC approved Verizon's Section 271 application for the State of Vermont despite that state's reservations and expressed intent to revisit the VTPAP and make future changes to the plan's approach to small sample size. See, Vermont Public Service Board Comments in CC Docket No. 02-7; and *Verizon Vermont Order*, FCC 02-118. Similarly, the FCC made clear in its *BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶294, issued May 15, 2002, that a PAP is a process that "requires changes to both measures and remedies over time." In fact, the FCC noted that both the Georgia and Louisiana Commissions anticipated modifications to the plan in their respective planned six-month reviews. *Id.*

In addition, arguments suggesting that we should evaluate the NHPAP as if state law did not exist are mere casuistry. Nonetheless, as we have noted elsewhere, it was

not our intent to prevent Verizon from filing its §271 application with the FCC. More importantly, since we can address Verizon's concerns in a manner that is in the public interest and consistent with our previous decision, we clarify the Order as follows. We approve the NHPAP subject to the evolutionary changes¹ set forth in Order No. 23,940 and as clarified herein. With this approval, Verizon will have a performance plan in place that the FCC has found satisfactory for meeting the requirements of Section 271.

Furthermore, there is merit to clarifying the nature of the proceedings we intend to pursue regarding state law remedies, which, to some extent, parallel the suggestion made by Verizon in its Motion for a deferral of the imposition of state law standards. With respect to the further proceedings on state law standards and penalties, we clarify Order No. 23,940 and direct Staff to undertake an analysis of the impact of various formulations of Appendix A and the PAPA standards

¹ The "evolutionary changes" are as follows: 1) The penalty cap in the NHPAP shall be increased from 36% to 39%; 2) Until it can uniquely identify credits attributable to a NHPAP payment on wholesale bills, Verizon-NH will make such payments to individual CLECs by check to the extent that the NHPAP payments exceed the unpaid portion of the CLEC's current bill (including any arrearage); 3) A conditional miss score of (-1) will be revised based on a look back to the previous two months; and 4) CLECs shall elect whether to receive penalty payments under the NHPAP or their interconnection agreements as provided in this Order *infra*.

to the actual reported Verizon service quality data supplied to the Commission under the C2C guidelines. This analysis will consider performance back to the date when such data was first available to the Commission, March 2001, and should continue for 6 months past the date when Verizon has received Section 271 authority for New Hampshire. To aid in the analysis, we will require Verizon to file NHPAP reports for monitoring and evaluation purposes beginning with January, 2002. We note that NHPAP penalties will not apply until after Verizon enters the long distance market. Upon completion of the analysis, Staff will share its findings with the Commission and parties to this docket, at which time we will open the proceeding to examine what state law remedies may be appropriate given Staff's analysis, any comments thereon, and the boundaries of our statutory penalty authority.

With respect to Verizon's request that we reconsider our determination that penalties should be cumulative under the NHPAP, interconnection agreements, and state law remedies, we particularly reject Verizon's request not to make the remedies under the NHPAP and state law cumulative, a request put forth after the close of the record without even acknowledging that the Motion constitutes a change of Verizon's position. Verizon Motion at 4. In response to

specific questions from the bench during the hearings in this docket, Verizon assured us that it was not asking the Commission to forgo its authority under state law. Transcript, February 6, 2002, p. 67. We do not accept Verizon's retraction of this acknowledgment of New Hampshire law in a post-Order motion, and we do not reconsider our decision that additional penalties, if imposed under augmented New Hampshire state law standards, would be cumulative with NHPAP penalties. We note that the Staff Appendix A and PAPA state law augments were designed to keep the maximum Verizon penalty within the cap on total penalties that is included in the NHPAP to prevent penalties from exceeding any reasonable level, regardless of the seriousness of the violations. Verizon would thus be protected from excessive penalties even if we were to implement the full extent of the NHPAP state law augments, and even if Verizon were to perform so poorly in serving its CLEC customers that the maximum penalties would be appropriate.

Also, as AT&T points out, the FCC does not expect state commissions to rubber-stamp an incumbent's particular PAP proposal, or to require a state to adopt whatever quality assurance plan a neighboring state happens to have approved. Nor has the FCC required that a state forgo use of any state

law quality of service tools it has at its disposal, as indeed it could not, under our federal system of government.

Accordingly, the NHPAP as proposed by Verizon is not and need not be an exclusive plan. The NHPAP exists within the universe of our traditional statutory authority, acceded to by Verizon, which acts as an insurance policy to deter backsliding by Verizon.

With respect to the issue of whether NHPAP penalties are to be cumulative with penalties contained in negotiated interconnection agreements (to the extent they have penalty provisions), we find it appropriate to clarify our order. CLECs that have such agreements should be able to obtain the benefit of their bargain with Verizon. Unlike the case of potential state law PAP augments, which would be subject to the overall cap on PAP penalties, Verizon and the CLECs bargained for the penalties under interconnection agreements, whatever they may be. We think it appropriate for a CLEC to elect to adhere to either its interconnection agreement penalty provisions or the PAP penalty provisions, but not both. If the negotiated penalties under some hypothetical interconnection agreement subject Verizon to penalties in excess of the 39% cap on NHPAP/state law PAP augments, we do not intend the CLECs to be required to amend their interconnection agreements to forgo such penalties.

CLECs electing to receive penalty payments under their interconnection agreements should so notify Verizon in writing at their earliest convenience. CLECs that have failed to provide this written notice prior to the first month in which PAP penalties are paid will be deemed to have elected to receive payment under the PAP rather than under their interconnection agreements.

Based on the foregoing, it is hereby

ORDERED, that the Motion of Verizon New Hampshire for reconsideration, rehearing and/or clarification dated April 26, 2002, is DENIED IN PART and APPROVED IN PART, as set forth above; and it is

FURTHER ORDERED, that the NHPAP, subject to the evolutionary changes described in Order No. 23,940, and as clarified herein, is adequate for Federal Communications Commission §271 purposes and is approved for use in New Hampshire; and it is

FURTHER ORDERED, that Verizon shall file NHPAP reports for each month commencing with January 2002 data; and it is

FURTHER ORDERED, that Competitive Local Exchange Carriers electing to receive penalty payments under their interconnection agreements should so notify Verizon in writing

at their earliest convenience.

By order of the Public Utilities Commission of New
Hampshire this twenty-fourth day of May, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary