

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 06-020

VERIZON NEW HAMPSHIRE

Supplemental Wire Center Investigation

Order on Motion for Rehearing

ORDER NO. 24,778

July 12, 2007

I. INTRODUCTION

This proceeding concerns the extent to which incumbent local exchange carrier Verizon New Hampshire (Verizon) remains obligated to make certain of its facilities available on an unbundled basis, and at cost-based rates, to competitive local exchange carriers (CLECs) in New Hampshire pursuant to Section 251 of the federal Telecommunications Act of 1996 and the Federal Communication Commission's (FCC's) *Triennial Review Remand Order* (TRRO), 20 F.C.C.R. 2533 (Feb. 4, 2005). Under Section 251 as applied by the TRRO, Verizon's obligation as to certain facilities is determined on a wire-center-by-wire-center basis. *See* Order No. 24,598 (March 10, 2006) (making rulings as to Concord, Dover and Salem wire centers). On January 5, 2007, the Commission issued Order No. 24,723 in this docket, resolving all issues in the case.

Now pending is the joint motion of two CLECs, BayRing and segTEL, for rehearing of Order No. 24,723. The CLECs filed their motion on February 5, 2007. Verizon submitted an objection on February 12, 2007.

BayRing and segTEL do not challenge aspects of Order No. 24,723 that involve the terms of a settlement agreement to which the two CLECs were signatories. These issues concern the revised classification of the Concord wire center for purposes of section 251

provisioning obligations, a requirement that Verizon file an appropriately revised tariff page for retroactive effect to February 15, 2006, and a requirement that Verizon refund certain sums to CLECs in light of the agreement not to reclassify the Dover and Salem wire centers. *See* Order No. 24,723, slip op. at 12. The concerns BayRing and segTEL seek to vindicate in their rehearing motion concern the determinations in Order No. 24,723 that relate to the legal practical implications for the CLECs of Verizon's section 251 unbundling obligations having been reduced in light of the TRRO.

II. POSITIONS OF THE PARTIES

A. BayRing and segTEL

BayRing and segTEL contend that the Commission mistakenly conceived the CLECs' duties under the TRRO and erred as a matter of law when it determined that the CLECs have a certain burden to be aware of the current state of competition and that CLECs should expect to take some responsibility for keeping abreast of the competitive status of the market in which they undertake operations.¹ This is so, according to BayRing and segTel, because Verizon is in sole possession of the information required by the FCC to determine whether CLECs are no longer impaired without access to particular Section 251 unbundled network elements (UNEs) in a given wire center. BayRing and segTEL consequently ask that the Commission to revise Order No. 24,723 so as to provide a correct description of a CLEC's duties under the TRRO.

BayRing and segTEL further argue that the transition periods established by the

¹ The level of competition, whether at the statewide level or as ascertained by particular wire center, as appropriate under the TRRO, is relevant because section 251 pegs ILEC unbundling obligations to what is commonly referred to as the "impairment" standard – i.e., whether "the failure to provide access to [the] network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B). The FCC and the courts have, as a general proposition, deemed the level of competition to be highly relevant to the question of whether section 251 impairment exists in a given location.

Commission are unreasonably short because they overlook both the feasibility of and realistic timeframes for self-deployment or procurement of alternatives to purchasing UNEs from Verizon's wholesale tariff applicable in New Hampshire, known as Tariff 84.² The companies argue that self-deployment, establishment of new collocations, purchasing from competitive providers or from other Verizon tariffs are not necessarily available options. The companies further argue that it is unreasonable to find that a commercial arrangement can be negotiated with Verizon within a seven-month period, and that Verizon imposes certain unreasonable prerequisites for negotiation pertaining to non-disclosure agreements. As a result, the companies request that the Commission establish transition periods of at least 12 months for high capacity loops and transport and 18 months for dark fiber.

BayRing and segTEL further argue that the Commission overlooked and failed to articulate Verizon's obligations under section 271 of the Telecommunications Act as alternatives for CLECs gaining access to delisted section 251 UNEs. The companies therefore ask that the Commission recognize and detail Verizon New Hampshire's ongoing responsibilities under section 271, which is the statute under which Verizon obtained FCC authority to provide certain long distance service in New Hampshire in exchange for meeting the so-called "competitive checklist" in the statute.

Finally, BayRing and segTEL argue that to the extent the Commission's order authorizes Verizon to disconnect UNEs, it overlooks that the issue of disconnection is the subject of another

² "Transition periods" here refers to the fact that the TRRO acknowledges that it would be inimical to the purposes of section 251 simply to authorize an ILEC to discontinue summarily the provisioning to CLECs of a network element the ILEC is no longer required to offer under the impairment standard. Instead, section 251 is understood to require a transition period to give CLECs a reasonable opportunity to make alternative arrangements.

docket which has not yet been adjudicated. The companies ask the Commission to prohibit Verizon New Hampshire from disconnecting any delisted UNEs unless and until such authority is established after adjudication or other resolution of the matters raised in Docket No. DT 06-124.³ The petitioners also request that the Commission adjudicate the matters raised in Docket No. DT 06-124, stay the effectiveness of Order No. 24,273 until such time as the matters raised in Docket DT 06-124 have been finally resolved, and grant such further relief as deemed appropriate.

B. Verizon

Verizon objects to the motion filed by BayRing and segTEL, contending that they have merely reasserted prior arguments and requested a different outcome. According to Verizon, the CLECs' assertion that the Commission unreasonably and unlawfully imposed a requirement on the CLECs to be aware of the current state of competition is unsupported, incorrect and of no legal significance to the Commission's holding, that the Commission's finding simply reiterates the FCC's direction to CLECs to conduct reasonable due diligence.

With regard to the length of transition periods, Verizon contends that BayRing and segTEL's arguments are based solely on information that is outside the evidentiary record, and that it is inappropriate for the CLECs to unilaterally reopen the record and introduce information they had ample opportunity to present earlier in the case. Verizon further contends that the

³ Docket No. DT 06-124 comprises an effort by BayRing, segTEL and a third CLEC to cause the Commission to move forward with requiring Verizon to continue provisioning certain network elements on the theory that Section 271, as distinct from Section 251, requires Verizon to do so. Prior to the advent of that docket, Verizon instituted civil proceedings against the Commission in U.S. District Court for the District of New Hampshire and succeeded in gaining a summary judgment there to the effect that the Commission was without authority to impose such a requirement. The Commission appealed and the matter is now under advisement at the U.S. Court of Appeals for the First Circuit. Neither court stayed the effectiveness of the Commission orders whose validity Verizon challenged, however.

Commission need not consider evidence of wholesale alternative providers, as BayRing and segTEL suggest, that a prudent competitor should have considered long ago where it can obtain alternative transport facilities to continue to serve its customers, and that the CLEC complaint about alternative providers has no relevance to the reasonableness or lawfulness of the Commission's order. Finally, Verizon asserts that the issues of Verizon New Hampshire's section 271 obligations and the availability of commercial agreements are not properly before the Commission.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. The petitioner for such relief must explain why new evidence could not have been presented in the underlying proceeding. *O'Loughlin v. N.H. Personnel Comm'n* (1977) 117 N.H. 999, 380 A.2d 1094. Good reason also may be shown by identifying specific matters that were either "overlooked or mistakenly conceived" by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 3286 A.2d 1269 (1978). A successful motion does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, 88 NH PUC 355, 356 (203).⁴

A careful review of the BayRing/segTEL motion leads us to conclude that the arguments raised in support of rehearing and reconsideration have been previously raised and addressed in Order No. 24,723, or are mere reformulations of previous arguments with no new, previously unavailable evidence proffered.

a. State of Competition

The movants misread our analysis when they contend that we unlawfully imposed a requirement on the CLECs to be aware of the current state of competition in the areas in which they operate. We observed that there is “a certain burden imposed on the CLECs to be aware of the current state of competition in the areas in which they choose to operate.” *Id.* at 13. This was intended to express our understanding of the factors underlying the FCC’s directive that adequate transition periods be provided for alternative arrangements to be made once Verizon is relieved of certain unbundling obligations in wire centers found to be non-impaired. Order No. 24,723 at 13. We conclude that it is in the CLECs’ business interest to be aware of the state of competition in their relevant markets, and that such awareness is an underlying assumption of the reasonable due diligence expected of CLECs by the FCC in its TRRO.

b. Transition Periods

The argument that the established transition periods are unreasonably short and do not take into consideration the feasibility and reality of CLEC efforts to find alternative solutions was raised and addressed in the underlying order. Parties provided written comments on the issue of transition periods in the underlying proceeding. We specifically noted that “wire center reclassification may or may not reflect the existence of competitive alternatives” that “several different transport products may be required to replace a single dark fiber transport service,” requiring, as a result, either self-deployment or new collocations, and that new collocations would be required to replace direct transport with routing through an intermediary wire center. Order No. 24,723, slip op. at 12. We find that there was adequate opportunity to argue the issue of transition period lengths and that rehearing or reconsideration on that point is not warranted.

⁴ To the extent that parties have styled their requests as seeking reconsideration or modification as opposed to

c. Disconnection of Delisted UNEs and 271 Obligations

Finally, BayRing and segTEL suggest that it is unjust and unreasonable for the Commission to address the issue of disconnection in the instant proceeding without considering Verizon's ongoing section 271 obligations. To the extent that BayRing and segTEL seek to prevent Verizon from possibly disconnecting UNEs, pending the final resolution of all outstanding matters relating to the delisting of section 251 UNEs, Order No. 24,723 adequately considered and addressed, through the findings related to transition periods and notice requirements, the disconnection-related arguments within the scope of this proceeding.

IV. CONCLUSION

The arguments raised in BayRing and segTEL's rehearing motion have either been previously raised and addressed in the *Concord Wire Center Order* or are mere reformulations of previous arguments with no new, previously unavailable evidence proffered. Therefore, we deny the rehearing request.

Based upon the foregoing, it is hereby

ORDERED, that the motion for rehearing is denied.

rehearing, we apply the same standard, on the assumption that all issues raised here are ones the parties may wish to preserve for appeal. *See* RSA 541:4 (requiring preservation of appellate issues by seeking RSA 541:3 rehearing).

By order of the Public Utilities Commission of New Hampshire this twelfth day of July,
2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary