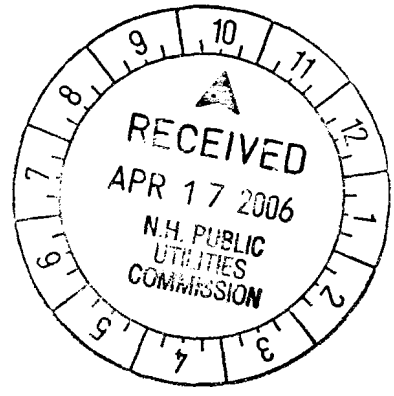
Conversent
Communications



Via Overnight Mail & Electronic Mail

April 14, 2006

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: Verizon New Hampshire Wire Center Investigation, DT 05-083

Dear Ms. Howland:

An Opposition to Verizon New Hampshire's Motion for Motion for Reconsideration, Rehearing and/or Clarification, filed on behalf of Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Broadview Networks, Inc., is enclosed.

This opposition is being served by electronic and first-class mail to the service list.

Thank you. Please contact CTC's David Berndt (603-314-2360, dberndt@ctcnet.com), Broadview's Charles Hunter (914-468-8214, chunter@broadviewnet.com) or Rebecca Sommi (215-293-8715, rsommi@broadviewnet.com), or myself (401-834-3326, gkennan@conversent.com), if you have any questions.

Very truly yours,

Gregory M. Kennan
Director, Regulatory Affairs and Counsel

Cc: Service List

STATE OF NEW HAMPSHIRE
Before the
PUBLIC UTILITIES COMMISSION

Verizon New Hampshire — Wire Center Investigation	**DT 05-083**

OPPOSITION TO VERIZON NEW HAMPSHIRE'S MOTION FOR RECONSIDERATION, REHEARING AND/OR CLARIFICATION

Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Broadview Networks, Inc. (the "CLEC Parties") oppose Verizon New Hampshire's April 4, 2006 motion for reconsideration, rehearing and/or clarification ("Verizon Motion") of the Order Classifying Wire Centers and Addressing Related Matters (Order No. 24,598, March 10, 2006) ("Wire Center Order"), as set forth below.

Specifically, the CLEC Parties oppose the portions of Verizon's Motion that seek:

- Reconsideration of the Commission's ruling that a CLEC that obtains individual dark fiber strands from a competitive fiber provider is not a fiber-based collocator. Verizon Motion, Issue No. 1 on p. 1, and the discussion in Part II.C.2, pp. 8-12.

- Clarification that Verizon's November 2005 proposal to reclassify certain wire centers should not be subject to the Commission's ruling that the effective date of such reclassifications shall be the effective date of corresponding amendments to Tariff No. 84. Verizon Motion, Issue No. 3 on p. 2, and the discussion in Part II.C, pp. 15-16.

For the reasons set forth below, the Commission should deny these portions of Verizon's motion.[1]

[1] Verizon also moved for a clarification stating that it does not concur that dark fiber loops or dark fiber dedicated transport facilities are "§ 271 elements." Verizon Motion, Part II.D, at 16. The CLEC Parties understand that Verizon is requesting a limited clarification in which the Commission would merely state Verizon's position in a

Discussion

The Commission may grant rehearing if "good reason" exists to consider an order either unlawful or unreasonable. RSA 541:3, 541:4; *In re Investigation as to Whether Certain Calls Are Local,* DT 00-223, DT 00-054, Order Denying Verizon New Hampshire's Petition for Rehearing of Order Approving Agreements, Order No. 24,266, at 2 ((May 13, 2005); *In re Global NAPs — Petition for an Order Directing Verizon to Comply with Its Interconnection Agreement,* DT 01-127, Order Denying Motion for Reconsideration, Order No. 24,367, at 5 (Sept. 2, 2004). Good reason includes matters that were either "overlooked or mistakenly conceived." *In re Verizon New Hampshire — Investigation of Verizon New Hampshire's Treatment of Yellow Pages Revenues,* DT 02-165, Order on Motion for Rehearing and/or Reconsideration, Order No. 24,385, at 14 (Oct. 19, 2004).

On the other hand, the Commission need not grant rehearing so that a party may have a second chance to present material it could have presented earlier. *Investigation as to Whether Certain Calls Are Local,* Order No. 24,266, at 3. Also, good reason for rehearing "must be more than merely reasserting prior arguments and requesting a different outcome." *Investigation of Verizon New Hampshire's Treatment of Yellow Pages Revenues* at 14; *see* Verizon Motion at 17 (falsely criticizing the CLEC Parties' reconsideration motion[2]).

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way that Verizon believes more accurate. The CLEC Parties do not oppose such a limited clarification, provided that it is only a statement of Verizon's position. The CLEC Parties would, however, oppose the motion if it is construed as a request for a substantive determination that dark fiber loops and transport facilities are not § 271 elements. In such event, the CLEC Parties respectfully would request to be heard on the issue.

[2] Contrary to Verizon's claim, the CLECs Parties' reconsideration motion dated March 29, 2006 does not merely repeat prior arguments. The CLEC Parties' Motion points out internal contradictions in the Wire Center Order — arguments that were impossible to make prior to the Order's issuance. In our reconsideration motion, the CLEC Parties noted that the Commission *correctly* ruled that the FCC's definition "sets out a requirement that a fiber based collocator maintain a collocation with active power." CLECs' Motion at 4, *quoting* Wire Center Order at 35; *see also* Wire Center Order at 41. The CLECs also noted that the Commission found, on the basis of undisputed facts, that "[a] CATT does not include an active power supply *per se* because one is not needed for the proper functioning of the CATT, which serves as a termination and splice case for the CLEC operating a fiber optic cable leaving the wire center." CLEC Parties' Motion at 5, *quoting* Wire Center Order at 40. The CLEC Parties then showed that

I. The Commission Should Reject Verizon's Motion to Reconsider the Ruling that Individual Dark Fiber Strands Do Not Constitute a "Fiber Optic Cable" for Purposes of the Definition of Fiber-Based Collocator.

The Commission should not reconsider its ruling that the definition of "fiber-based collocator" in 47 C.F.R. § 51.5 requires that the carrier operate the entire fiber optic cable, not just individual fiber-optic strands.

The Commission's ruling is the product of two independent, subsidiary determinations. First, the Commission ruled that the plain meaning of the term "fiber-optic cable" means fiber strands within a sheath. "The FCC could easily have specified 'fiber-optic strands' or 'fiber-optic facilities' in its rule, but it did not." Wire Center Order at 37. Second, though the Commission did not say so explicitly, the conclusion that a "fiber-optic cable" means the entire cable necessarily follows from the Commission's determination that to "operate" a fiber-optic cable requires control over the physical cable itself.

> In our view, the plain meaning of "operate" in the context of Rule 51.5 requires the transitive sense of the verb, as well as a definition that indicates some level of control over the functioning of the property in question. We find that to operate a cable, a CLEC must be able to control not only the lighting of the fiber within it, but a broader range of functions, such as the placement, capacity and configuration of the cable itself.

Id. A CLEC with access to only several strands within the cable is not able to control the placement, capacity, and configuration of the cable.

Previously in this proceeding, Verizon asserted that the correct way to interpret FCC regulations is to apply the "plain meaning" rule. "[T]he appropriate rule of decision when interpreting an FCC rule is to look first at the plain language of the actual rule to determine what it requires. In the absence of any ambiguity, the Commission must apply the rule as written."

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the Commission's conclusion that a stand-alone CATT qualified as a fiber-based collocation was directly contradictory to these findings, and therefore legally arbitrary. CLEC Parties' Motion at 5. It was impossible for the CLEC Parties to demonstrate self-contradiction in the Wire Center Order before the Order was issued.

Comments of Verizon New Hampshire, Feb. 17, 2006, at 12. That is what the Commission did when it found that the plain meaning of the term "fiber optic cable" meant the entire cable, not individual strands within it.

Verizon does not claim that the term "fiber-optic cable" is ambiguous. Instead, it quotes two definitions from a United States Government publication in an attempt to show that "the appropriate definition of fiber-optic cable includes fiber strands." Verizon Motion at 10. The definitions that Verizon provides are as follows:

[A] fiber optic cable is defined as:

> A telecommunications cable in which *one or more optical fibers are used as the propagation medium. Note 1:* The optical fibers are surrounded by buffers, strength members, and jackets for protection, stiffness, and strength. *Note 2:* A fiber-optic cable may be an all-fiber cable, or contain both optical fibers and metallic conductors. [Emphasis added [by Verizon].]

A "cable" in turn is defined as:

> An assembly of one or more insulated conductors, or optical fibers, or a combination of both, with an enveloping jacket: *a cable is constructed so that the* conductors or *fibers may be used singly* or in groups. [Emphasis added [by Verizon].]

Id. (quoting United States Federal Standard 1037C *Telecommunications: Glossary of Telecommunication Terms (2000)* issued by the General Services Administration Information Technology Service).

These definitions do not help Verizon's cause. To the contrary, they support the Commission's interpretation. The first definition draws a clear distinction between the "cable" and the "optical fibers" within it. The reference to "one or more optical fibers" merely means that a cable *may* contain only one optical fiber. Also, as the definition suggests, a fiber optic cable may have one fiber strand along with metallic conductors. This does not mean, however,

that when a cable has more than one fiber, each fiber itself is a cable. If each fiber were a cable, then it makes no sense for the definition to state that a cable may have more than one fiber.

The second definition states that a cable is an "assembly" of fibers (or metal conductors, or a combination of both) "with an enveloping jacket." That is exactly what the Commission determined — that the cable comprised the sheath and the strands within it. Verizon attempts to find significance in the phrases it emphasized, that the cable is constructed so the fibers may be used singly or in groups. There can be little argument that the fiber strands within the cable may be "used" individually. But, again, that does not transform the individual strands into the "cable" itself. Like the first Verizon definition, this definition also is perfectly consistent with the Commission's determination that CLECs that use individual fiber-optic strands within the cable (or groups of strands constituting some fraction of all strands within the cable) do not operate the cable.

Thus, the Commission was correct that the plain meaning of the term "fiber optic cable" in the FCC regulation — under Verizon's own dictionary definitions — is the entire cable, not individual strands within it. Since the FCC rule is unambiguous, under the interpretive rule that Verizon agrees is appropriate, the Commission need look no further.[3]

In any event, the Commission should reject Verizon's motion as untimely. Verizon was on notice of the opportunity to brief the issue whether a "fiber optic cable" under the FCC's definition meant the entire cable or merely individual strands. The Staff specifically invited the parties to brief the issue:

> Staff wishes to point out a provision in the applicable rules that may require clarification by the parties and, ultimately, the Commission. The rule states that a CLEC must "operate a fiber-optic cable" in order to be a fiber-based

[3] Specifically, the Commission should disregard Verizon's argument on pp. 11-12 regarding what the FCC's intentions were in using the fiber-based collocator test. Verizon's argument is irrelevant under the "plain meaning" rule that Verizon agrees is the appropriate rule of interpretation.

> colocator at the wire centers at issue in this docket. Our query is whether the FCC meant that such a fiber-optic cable must consist of the complete bundle of fiber-optic strands, as opposed to something less than that. Again, our purpose in bringing this to your attention is to invite you to consider discussing this issue in the upcoming briefs.

E-mail from Kath Mullholand of the Commission Staff to the service list, dated February 13, 2006 (copy attached). Verizon chose not to brief the issue.[4] Now, unhappy with the Commission's decision, Verizon seeks to argue the point for the first time on reconsideration. This is an inappropriate ground for reconsideration. *Investigation as to Whether Certain Calls Are Local,* Order No. 24,266, at 3. The Commission should deny this part of Verizon's motion.

II. Verizon's November 2005 Supplemental List Should Not Be an Exception to the Commission's Ruling That Wire Center Reclassifications Become Effective When Amendments to Tariff No. 84 Become Effective.

The Commission should deny Verizon's request to for special treatment of its proposed reclassification of wire centers announced in November 2005 (Verizon Motion, Part II.C, at pp. 15-16). There is no reason why the November 2005 "Supplemental List" should be an exception to the rule that wire center reclassifications are effective when proposed amendments to Verizon's Tariff No. 84 become effective.

In the Wire Center Order, the Commission set forth a sensible and simple rule for determining when wire center reclassifications should become effective: "[T]he reclassification of any wire center shall be effective on the date the Tariff 84 revisions reflecting such reclassification are approved by this Commission." Wire Center Order at 48.

Verizon takes no issue with this rule as applied to wire center reclassifications other than the November 2005 proposal. With respect to the November 2005 Supplemental List, however,

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[4] At least two parties, BayRing and SegTEL, filed comments. Wire Center Order at 37.

Verizon claims that because it announced the proposal prior to the Commission's ruling in the Wire Center Order, the ruling should not apply. Verizon Motion at 15-16.

The Commission should deny Verizon's motion and should apply the Commission's ruling regarding the effective date to the Supplemental List. Verizon offers no substantive distinction between the Supplemental List wire centers and other wire centers that might be reclassified in the future. The only difference is that of timing. Because there is no substantive distinction, the Commission should not treat the Supplemental List differently than the way it has determined to treat other proposed wire center reclassifications.

It is important that the Commission have the opportunity to review proposed wire center reclassifications before they become effective. In ruling that future changes to the wire center list should become effective when corresponding amendments to Tariff 84 become effective, the Commission adopted Conversent's suggestion:

> Conversent asserts that a wire center impairment determination is effective on the date this Commission approves or allows the relevant amendment to Tariff 84 to go into effect. In Conversent's view, the tariff process provides an efficient mechanism for the Commission to oversee this and future amendments to the wire center list. It is a desirable goal, claims Conversent[,] for there to be a unitary list of wire centers to which all interested persons have access. Conversent further notes that this docket will set ground rules for future determinations, ensuring that the process to amend the tariff in the future can be limited to thirty days.

Wire Center Order at 12-13.

All of those considerations apply with equal force to the November 2005 reclassification proposal and to other reclassification proposals that Verizon might make in the future. As this proceeding demonstrated, there can be substantial differences between the wire centers that Verizon claims satisfy the FCC non-impairment criteria, and the wire centers that the Commission finds actually satisfy those criteria. This proceeding demonstrates clearly the need for Commission scrutiny of Verizon's non-impaired wire center list.

To exempt the November 2005 reclassification proposal from the general effective date determination would insulate that proposal from Commission scrutiny. As Verizon points out, the effective date that Verizon unilaterally imposed upon the November proposal was February 15, 2006 for new orders and March 11, 2006 for the embedded base of transport routes affected by the notice. Obviously, those dates are past. If Verizon's effective dates stand, CLECs' ability to place new orders for affected UNEs at the affected wire centers was cut off after February 15. If the Commission ultimately determines in Docket 06-020 that Verizon improperly reclassified some or all of the November wire centers — a likely outcome, given the errors that the Commission found in Verizon's initial wire center classifications — the Commission cannot then turn back the clock to permit CLECs to order UNEs from those wire centers. The opportunity will have been lost.

Further, to exempt the November 2005 Supplemental List from the effective date rule would violate that part of the Wire Center Order in which the Commission reserved for future consideration the issue of the appropriate transition period for subsequent wire center reclassifications. Although the parties briefed this issue in response to the Staff's January 31, 2006 outline of briefing issues (Issue # I.A.1), the Commission declined to rule on the question and expressly reserved it for another day. Wire Center Order at 47. The Commission's reservation of this issue expressly included wire enters on which a determination was pending: "For wire centers not yet classified, *and for those pending a determination by this Commission,* we defer consideration of any future transition period until such time as there may be a need to determine one." *Id.* (emphasis added). Verizon filed a proposed amendment to Tariff No. 84 regarding the Supplemental List wire centers on January 20, 2006. Clearly, those tariff amendments were "pending a determination" when the Commission issued the Wire Center

Order. To allow the November 2005 Supplemental List — including Verizon's unilaterally-imposed transition periods — to become effective without prospective Commission scrutiny would deprive the Commission of the opportunity to determine the appropriate transition periods for the UNEs affected by the Supplemental List.

The Commission also should deny Verizon's motion on this issue because Verizon "merely reasserts prior arguments seeking a different conclusion." *See* Verizon Motion at 17. In the comments that it filed on February 17, 2006, Verizon specifically discussed the effective date of the November proposed reclassification. Verizon's Feb. 17, 2006 Comments at 4-6. The Commission should reject Verizon's attempt to reargue the same points it made in its prior comments.

Conclusion

For the reasons stated above, the Commission should deny the portions of Verizon's Motion that seek:

- Reconsideration of the Commission's ruling that a CLEC that obtains individual dark fiber strands from a competitive fiber provider is not a fiber-based collocator. Verizon Motion, Issue No. 1 on p. 1, and the discussion in Part II.C.2, pp. 8-12.

- Clarification that Verizon's November 2005 proposal to reclassify certain wire centers should not be subject to the Commission's ruling that the effective date of such reclassifications shall be the effective date of corresponding amendments to Tariff No. 84. Verizon Motion, Issue No. 3 on p. 2, and the discussion in Part II.C, pp. 15-16.

April 14, 2006

Respectfully Submitted,

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Gregory Kennan

From: Mullholand, Kath [Kath.Mullholand@puc.nh.gov]
Sent: Monday, February 13, 2006 4:40 PM
To: Kreis, Donald
Subject: 05-083 wire centers additional topics

To the Service list in 05-083

Two things have come to our attention that Staff wanted parties to have the opportunity to address in their briefs.

First, in an email to Staff, Verizon stated that its position on MCI is as follows:

On Wed 2/8/2006 1:50 PM, Bob Meehan wrote:
>As to paras 24 & 35 [of Staff's affidavit], Verizon, in fact, identified [an
>additional fiber based collocator, which included MCI, in certain] wire centers.
>Verizon's merger commitment to the FCC was to update the non-impaired wire
>center lists within 30 days of the merger closing to remove MCI on a
>prospective basis. Thus, MCI was properly counted during the period March
>11, 2005 and February 3, 2006 as to new orders for delisted UNEs and the
>embedded base of delisted UNEs even though one or more of the UNEs that
>were delisted as of March 11, 2005 theoretically could become Section 251
>UNEs post February 3, 2006. This issue should be left for comment by the
>parties in their filings and not appear to be resolved by virtue of its inclusion in
>the uncontested facts of the affidavit.

Since the foregoing reflects a position that Verizon had not previously articulated, Staff wanted all parties to be aware of it prior to the filing of briefs.

Second, Staff wishes to point out a provision in the applicable rules that may require clarification by the parties and, ultimately, the Commission. The rule states that a CLEC must "operate a fiber-optic cable" in order to be a fiber-based colocator at the wire centers at issue in this docket. Our query is whether the FCC meant that such a fiber-optic cable must consist of the complete bundle of fiber-optic strands, as opposed to something less than that. Again, our purpose in bringing this to your attention is to invite you to consider discussing this issue in the upcoming briefs.

Please let me know if you have any questions or concerns regarding either of these issues.

kath.

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