

DT 01-206

VERIZON NEW HAMPSHIRE

UNE REMAND

Order on Remand from the New Hampshire Supreme Court Regarding
the Issue of Access to Dark Fiber at Splice Points

O R D E R N O. 24,198

August 13, 2003

APPEARANCES: Victor D. Del Vecchio, Esq., for Verizon New Hampshire; Eugene F. Sullivan, Esq., of Ingersoll and Sullivan, PA, and Brian Susnock of The Desktek Group Inc., for Mr. Susnock and The Desktek Group Inc.; John Leslie for the New Hampshire Internet Service Providers Association; and General Counsel Gary M. Epler, Esq., for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On February 24, 2003, the New Hampshire Supreme Court (Court) granted the Joint Motion of Verizon New England, Inc. d/b/a Verizon New Hampshire (Verizon) and the New Hampshire Public Utilities Commission (Commission) to remand to the Commission the remaining portions of *Verizon New Hampshire*, Order No. 23,948 (April 12, 2002) (*UNE Remand Order*) and Order No. 23,993 (June 13, 2002). In particular, the Court remanded to the Commission that portion of Order No. 23,993 denying Verizon NH's request that the Commission amend the portion of the UNE Remand Order requiring that Verizon provide access to dark fiber at existing splice points. Consistent with the terms of the Court's remand, Verizon must file a copy of the

Commission's order on remand (this Order) and inform the Court whether its appeal should be withdrawn.

During the course of Verizon NH's appeal of this matter, the Federal Communications Commission (FCC) issued its decision in *In re Application by Verizon New England Inc. for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, FCC 02-262, WC Docket No. 02-157 (September 25, 2002). Upon review of the FCC's decision, the Commission found that good cause existed for it to reconsider its decision in the *UNE Remand Order* requiring Verizon NH to provide access to dark fiber at splice points. See *Verizon New Hampshire*, Order No. 24,181 (June 6, 2003). Accordingly, pursuant to RSA 365:28, the Commission ordered that a limited rehearing for purposes of reconsideration be held on July 8, 2003. *Id.*

On July 3, 2003, the Commission issued a secretarial letter stating that due to a conflict, the hearing would be rescheduled to July 22, 2003 and would be limited to oral argument on whether Order No. 23,948 should be altered, amended, set aside or otherwise modified in light of the FCC decision in *In Re Application by Verizon New England, Inc. for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, FCC 02-262, WC Docket No. 02-157 (Sept. 25, 2002).

II. MOTIONS TO INTERVENE

The Commission held the remand hearing on July 22, 2003. Brian Susnock, for himself and The Destek Group Inc. (DesTek), and John Leslie for the New Hampshire Internet Service Providers Association (NHISPA) orally moved to intervene in the proceeding in order to press their contention that Verizon's disallowance of access to dark fiber at splice points was predatory and anti-competitive behavior.

In support of the motion, DesTek stated that although it is not a competitive local exchange carrier (CLEC) and therefore not entitled to direct access to dark fiber, keeping open the option of access in the future is important to DesTek's business.

NHISPA said it is not a CLEC but it has members who are CLECs. NHISPA said that access to dark fiber at splice points, in addition to access at hard termination points, will be important for "distance learning" communications in the future. NHISPA admitted that its CLEC members are not interested in pursuing the issue at this time.

Verizon objected to the motions to intervene on grounds that the moving parties had not previously participated in the docket or in the Court appeal and they were not CLECs entitled to raise the issue of access.

Staff took no position on the motions.

After hearing argument, the Commission denied the motions to intervene. In announcing the Commission's ruling, the Commission noted that the moving parties had not met the statutory criteria for intervention contained in RSA 541-A:32, nor had they shown that any actual controversy over access to dark fiber at splice points exists in New Hampshire. The Commission noted that the moving parties have no substantial interest that would be directly affected by the outcome of this case. Further, the Commission said that any alleged harm to the moving parties is speculative. The Commission nevertheless allowed DesTek and NHISPA the opportunity to make public comments.

III. POSITIONS OF VERIZON AND STAFF

On the merits of the remanded matter, Verizon stated that the issue is whether Verizon's current Statement of Generally Available Terms and Conditions (SGAT), providing for access to dark fiber at hard termination points but not at splice points, complies with the FCC's rules and the Commission's prior orders (*i.e.*, those made prior to the UNE Remand Order). Verizon argued that the current SGAT does so comply, pointing the Commission's attention to the FCC's ruling on CLEC arguments concerning Verizon's compliance with TACT Section 271 conditions, and to the FCC's definition of subloops, in support of its argument that Verizon satisfies all applicable

requirements by virtue of allowing interconnection at hard termination points.

Staff agreed that Verizon is compliant with the FCC's rules and with prior Commission orders. Staff stated, however, that it did not believe that the FCC has closed the door on a state-by-state analysis of the matter of access at splice points. Staff said that, even though the Commission could not, consistent with the FCC's rules, simply rely on the decisions of other states to allow access at splice points, the Commission could require access at splice points after a hearing on the factual issues of technical feasibility and the importance of such access to the development of telecommunications and competition in New Hampshire.

IV. PUBLIC COMMENTS

In their public comments, DesTek and NHISPA repeated their assertion that access to dark fiber at splice points is important to distance-learning and competition, and said that the issue should be preserved for the future.

V. COMMISSION ANALYSIS

We have reviewed the arguments and statements made at the hearing, as well as the documents in this docket, including the report of the Facilitator, submitted to the Commission on January 3, 2002, and the Modified Facilitator's Report submitted on January 16, 2002 (MFR). In the MFR the Facilitator concluded

that when an issue had been resolved by a prior Commission order, that issue should be outside the scope of the instant docket, and that the Commission should not decide such an issue without a further hearing. Regarding access to dark fiber at splice points, the Facilitator stated in item 7.a. of the MFR, "...this issue has already been addressed in previous Commission orders involving access points. Therefore, the previous Commission Orders form the basis of the recommendation."

We believe that the issue of access to dark fiber at splice points is not now ripe for decision because there is no factual controversy before us that requires its adjudication. Based on the representations made in this docket by the parties and interested persons, there is no basis to conclude that evidence would be adduced in further proceedings in this docket to support a finding that lack of access to dark fiber at splice points now presents or may soon present a barrier to competition and innovation in services to New Hampshire. The parties at hearing agreed that Verizon complies with our prior orders and with FCC requirements regarding access at splice points. Therefore, based on the record before us, we vacate that portion of the *UNE Remand Order* requiring that Verizon provide access to dark fiber at existing splice points.

Based upon the foregoing, it is hereby

ORDERED, that the portion of the UNE Remand Order, Order No. 23,948, requiring that Verizon provide access to dark fiber at existing splice points is vacated.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of August, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary