

DT 02-110

VERIZON NEW HAMPSHIRE

Verizon Cost of Capital

Order Denying Motion to Re-Open and
Taking Official Notice of FCC Orders

O R D E R N O. 24,236

November 7, 2003

Hearings in this docket examining the cost of capital to be used for setting Verizon New Hampshire's (Verizon's) rates were held before the New Hampshire Public Utilities Commission (Commission) on April 22 and 23, 2003. Briefs and post hearing data responses were filed on or before July 9, 2003 and before the record was closed, although the Commission has not yet issued its final order. On September 15, 2003, Verizon filed a letter requesting that the Commission re-open the record in this docket (Request to Re-open). The Office of the Consumer Advocate (OCA) and WorldCom, Inc. (MCI) filed letters in opposition to Verizon's Request to Re-open on September 17, 2003 and September 25, 2003, respectively.

In its Request to Re-open, Verizon asked that the Commission permit parties to file supplemental testimony and to schedule additional hearings on the supplemental testimony. Verizon argues for an opportunity to "explain the application of" the Federal Communications Commission's (FCC's) *Triennial Review*

Order (TRO).¹ Verizon points out that the FCC's Wireline Competition Bureau applied the standards established in the *Triennial Review Order* in an arbitration of interconnection disputes in Virginia (*Virginia Arbitration Order*). According to Verizon, the FCC's determinations in the *TRO* as applied in the *Virginia Arbitration Order* are critical to the Commission's deliberations and demonstrate the validity of Verizon's position in this docket.

Opposing Verizon's Request to Re-open, the OCA contends that the *TRO* impacts only that small portion of the overall question of cost of capital pertaining to unbundled network elements and that the *TRO* is not final, as it is being under appeal in multiple jurisdictions. The OCA also argues that the *TRO* presents a clarification of the FCC's prior rulings which does not affect the relevance of the testimony already filed in this docket. The OCA states that the Commission is entitled to rule on the record as complete at the time the case closed, i.e., after the filing of post hearing briefs. In the OCA's view, for efficient use of resources the Commission should issue its order and then Verizon can request rehearing if it believes the order is inconsistent with applicable law.

¹ *Report and Order on Remand and Further Notice of Proposed Rulemaking*. In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, and 98-147 (rel. Aug. 21, 2003, eff. Oct. 2, 2003).

MCI also recommends the Commission deny Verizon's Request to Re-Open, arguing that the requirements for additional testimony, pursuant to N.H. Code Admin. Rule Puc 204.01(d), have not been met. That rule requires supplemental testimony only on new or unanticipated issues. According to MCI, the issues identified by Verizon were amply discussed on the record as it stands. Further, MCI argues that the *Virginia Arbitration Order* rejected the use of the one-stage, constant growth DCF model, the model Verizon proposes for determining cost of capital in this docket.

N.H. Code Admin. Rule Puc 204.01(d) states "[I]n the event that the scope of a proceeding is expanded or issues arise which were not reasonably anticipated by the petitioner, the Commission shall allow the petitioner to file supplemental testimony on the new or unanticipated issues." When this standard is met, re-opening the record is mandatory.

The FCC issued a press release in February 2003 summarizing its oral deliberations in the Triennial Review docket. The press release indicated that the FCC's soon to be released order would clarify that a TELRIC-based cost of capital should reflect the risks of a competitive market and that separate UNEs may have different costs of capital. These clarifications are now reiterated in paragraphs 677 through 684 of the *TRO*. Based upon the press release, on March 7, 2003,

Verizon filed a motion requesting the Commission suspend the proceedings to await issuance of the *Triennial Review Order*. The Commission denied that request, directing that parties and Staff could request leave to file supplemental testimony if the FCC order issued prior to hearings. The subject of the FCC's press release, specifically regarding cost of capital, was raised at the hearings. Transcript Day 2 at p. 82-85. In addition, Verizon raised and argued the issue throughout its brief, arguing the clarifications enumerated in the FCC's Triennial Review press release at pages 3, 4, 7, 10, fn.14, and 12. The transcript and record in this docket demonstrate that the issues raised by Verizon were not only anticipated but discussed several times.

Because we find that the clarifications contained in the *Triennial Review Order* were neither new nor unanticipated, the requirements of Puc 204.01(d) are not met and re-opening the record in this docket is not mandated. Nonetheless, since we have discretion to waive the provisions of our rules, pursuant to Puc 201.05, we will consider whether re-opening the record is in the public interest and whether the orderly proceeding of this docket would be disrupted thereby.

We find that waiving the requirements of Puc 204.01(d) would not serve the public interest and would unreasonably and unnecessarily delay the orderly and efficient conduct of this proceeding. The information that Verizon wished to address in

additional testimony concerns the legal interpretation of an FCC order, the *TRO*, and of an arbitration order made by a bureau of the FCC. The Commission regularly analyzes and applies such FCC orders, as well as orders issued by other state and federal commissions and courts, in carrying out its function as an adjudicator regarding utility disputes, even when the orders have not been identified in the course of hearings. Further, legal interpretation is not a factual dispute and therefore any lack of opportunity to cross-examine a witness and to assess credibility is not a procedural infirmity. In the Request to Reopen, Verizon provided its interpretation of the relevant sections of the *TRO* and, in response, several parties provided differing interpretations. Providing additional process for testimony and hearings regarding legal interpretation would be wasteful of the resources of the parties and of the Commission, to the detriment of the public interest.

We here notify the parties and Staff that we take official notice of the *TRO* and the Wireline Competition Bureau's *Virginia Arbitration Order*, pursuant to RSA 541-A:33, VI. The statute provides that parties must be so notified and given an opportunity to contest the material which has been officially noticed. In this case, parties may contest our grant of official notice by November 21, 2003.

Based upon the foregoing, it is hereby

ORDERED, that Verizon's Request to Reopen is hereby denied; and it is

FURTHER ORDERED, that official notice is taken of the FCC's *Triennial Review Order* and of the Wireline Competition Bureau's application of that order in the *Virginia Arbitration Order*; and it is

FURTHER ORDERED, that parties may contest the official notice taken by filing on or before November 21, 2003.

By order of the Public Utilities Commission of New Hampshire this seventh day of November, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary