

DT 04-018

VERIZON NEW HAMPSHIRE

**Petition for Consolidated Arbitration for an Amendment to the
Interconnection Agreements with Competitive Local Exchange
Carriers and Commercial Mobile Radio Service Providers**

Order Addressing Motions to Dismiss

ORDER NO. 24,308

April 12, 2004

I. PROCEDURAL HISTORY

On February 20, 2004, Verizon New Hampshire (Verizon) filed with the New Hampshire Public Utilities Commission (Commission) a Petition for Consolidated Arbitration (Petition), pursuant to 47 U.S.C. § 252(g). The Petition requests that the Commission arbitrate disputes between Verizon and Competitive Local Exchange Carriers (CLECs) and Commercial Mobile Radio Service (CMRS), or wireless, carriers relating to Verizon's October 2, 2003, proposed amendment to all interconnection agreements (Proposal).

By Order of Notice issued on March 8, 2004, the Commission made all Parties listed in the Petition mandatory Parties to this docket, and ordered each Party to submit a letter by March 12, 2004, confirming its need to amend its interconnection agreement and affirming its intent to participate in this proceeding.

Letters of intent and responses to Verizon's Petition were duly filed by: A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation, Broadview Networks Inc., Bullseye Telecom Inc., Choice One Communications of New Hampshire Inc., Comcast Phone LLC and its subsidiary Comcast Phone of New Hampshire LLC, Covad Communications/DIECA Communications Inc., DSCI Corporation, IDT America Corp., KMC Telecom III LLC, KMC

Telecom V Inc., and XO Communications Inc., (collectively, the Competitor Coalition); Adelphia Business Solutions Operations Inc. d/b/a Telcove, DSLnet Communications LLC, ICG Telecom Group Inc., Level 3 Communications LLC, Lightship Telecom LLC, and PaeTec Communications (collectively, the CLEC Coalition); AT&T of New England Inc. (AT&T); Biddeford Internet Company d/b/a Great Works Internet (GWI); Conversent Communications (Conversent); CTC Communications (CTC); Global Crossing; MCImetro Access Transmission Services LLC and New England Fiber Communications LLC (MCI); Revolution Networks (RevNets); RNK Telecom (RNK); United Systems Access Telephone (USAT); and Z-Tel Communications (ZTel). Nextel Communications of the Mid-Atlantic Inc. (Nextel), Sprint, OneStar, ARCH Wireless Operating Company Inc. (ARCH), and Cellco Partnership d/b/a Verizon Wireless and its affiliate AirTouch Paging d/b/a Verizon Wireless Messaging Services (Verizon Wireless) notified the Commission that they will not participate¹. The Office of the Consumer Advocate (OCA) notified the Commission of its intent to participate in the docket.

On March 12, 2004, RevNets filed a Motion to Dismiss and requests for discovery, and on March 16, 2004, RevNets filed a second Motion to Dismiss and its Response to Verizon's Petition. On March 19, 2004, RevNets filed a Motion to Compel responses to discovery requests. GWI and the CLEC Coalition each filed Motions to Dismiss on March 16, 2004.

Verizon filed individual Responses to RevNets, GWI, and the CLEC Coalition's several Motions to Dismiss on March 25, 2004, and commented on ZTel's response to the Order of Notice. Verizon filed an Opposition to RevNets Motion to Compel on March 29, 2004.

¹ Nextel and ARCH affirm that, since they do not purchase or plan to purchase the relevant unbundled network elements (UNEs), they have no need or desire to amend their existing interconnection agreements with Verizon. Sprint states that it has no current interconnection agreement with Verizon, and purchases UNEs out of Verizon's Statement of Generally Available Terms and Conditions (SGAT). OneStar affirms that it is no longer certified to provide service in New Hampshire. Verizon Wireless stated it expects to be dismissed as a Party subsequent to filing a stipulation of dismissal with Verizon.

On April 2, 2004, the CLEC Coalition submitted a Reply to Verizon's Opposition to the CLEC Coalition's Motion to Dismiss and MCI filed a response to the Motions to Dismiss filed by RevNets and the CLEC Coalition. Verizon filed its Surreply Regarding the CLEC Coalition's Motion to Dismiss on April 9, 2004.

Procedural issues and the Motions to Dismiss are addressed herein. As a result of the Commission's action on the procedural issues, it is unnecessary to address the substance of Verizon's Petition in this Order.

II. POSITIONS OF THE PARTIES AND STAFF

A. Verizon

Verizon states that the proposed amendment implements requirements of the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)* FCC Rcd 17405. Verizon claims that the *TRO* deems that negotiation of interconnection agreements commences upon the effective date of the *TRO* (§§703-704) and that Verizon in fact initiated negotiations on that date by issuing a letter to each CLEC informing the CLECs that a draft amendment was available to implement the rules promulgated in the *TRO* (October 2 Letter). Verizon contends that its Petition is filed pursuant to the arbitration window (February 14, 2004 to March 11, 2004) established by 47 U.S.C. § 252(b)(1) and the *TRO* at §703. Further, Verizon says that a ruling is required within nine months of October 2, 2003, which is approximately July 2, 2004.

In its response to RevNets' Motion to Dismiss, Verizon states that its Petition is timely as it was filed within the window prescribed by the *TRO* and the *Telecommunications Act of 1996 (TAct)*, and that Verizon has attempted to negotiate in good faith while RevNets has failed to respond to Verizon's proposals. In response to GWI, Verizon stated that GWI's assertion that the arbitration await the results of separate proceedings concerning the *TRO* was unreasonable, and

indicated that this Commission's action in January, 2004, to open an arbitration docket on behalf of certain CLECs (DT 03-208) is evidence that the issues regarding implementation of the *TRO* for the SGAT and for CLEC interconnection agreements are not duplicative. As for the CLEC Coalition's Motion to Dismiss, and the CLEC Coalition's Reply to Verizon's Opposition, Verizon asserts that the terms of the GTE/Bell Atlantic Merger have run their course and do not apply to the *TRO*. Verizon claims that its Petition meets the requirements of §252 of the *TAct*, that prompt implementation of the terms of the *TRO* is a critical Commission responsibility and should not be delayed pending appeals of the *TRO* and finally that the FCC's new network modification rules constitute a change in law. Verizon disagrees with ZTel's assertion that Verizon did not properly request negotiations, and states that Verizon retained its rights to amend its Proposal to conform with the holdings of *United States Telecom Association v. Federal Communications Commission* 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*). In response to the Parties' assertions that Verizon did not comply with the requirements of the *TAct* §252(b)(2), Verizon argues that the *TRO* doesn't mandate compliance with the formal requirements of §252(b). The *TRO* requires compliance, Verizon asserts, only with the time table for modifications of agreements. Verizon requests that the various Motions to Dismiss be denied.

B. RevNets

RevNets states that it has no need to amend its interconnection agreement with Verizon at this time, and that Verizon's Petition is unlawful, unnecessary and premature. RevNets believes that Verizon overstates the language of the *TRO*, and has failed to show that it has engaged in good faith negotiations. RevNets also claims that Verizon's letter was inadequate to establish the commencement of negotiations, and that Verizon has not met the evidentiary burden required by

§252(b) in support of its request for arbitration. RevNets requests that the Commission dismiss the Petition and close this proceeding.

RevNets requested that the Commission address its Motion to Dismiss and other preliminary Motions prior to requiring a detailed response concerning the substantive objections to Verizon's Proposal. RevNets noted recent actions on the part of the Maryland and North Carolina Commissions, both of which declined to act on Verizon's Petitions.

C. GWI

GWI joins with RevNets' Motion to Dismiss, and requests a stay of the proceeding, contending that Verizon has failed to negotiate in good faith, and that the Proposal does not accurately reflect Verizon's obligations under the *TRO*.

D. ZTel

ZTel contends that Verizon has never sought to amend its interconnection agreement. ZTel describes Verizon's October 2 Letter as a notice of the discontinuance of certain UNEs, none of which ZTel purchases from Verizon. The October 2 Letter, according to ZTel, did say that carriers wishing to amend their agreements should contact Verizon, but did not state that Verizon itself wished to amend its existing agreement with ZTel. Therefore, according to ZTel, since ZTel has no need or desire to amend its interconnection agreement, it claims that the arbitration window has not yet opened.

E. Competitor Coalition

The Competitor Coalition states that Verizon's Petition is insufficient to meet the mandates of a request for arbitration under §252 of the *TAct*, and that Verizon's Proposal should be amended within 60 days to reflect the decisions made by the D. C. Circuit Court in *USTA II*. Nonetheless, the Competitor Coalition requests that the Commission assert jurisdiction over the

matters at issue, maintaining the status quo until interconnection agreement amendment issues are resolved.

F. RNK

RNK supports the request of GWI for a stay in this proceeding, until the legal defects of Verizon's Petition are cured, and until the Commission rules on RevNets' Motion to Dismiss.

G. MCI

While MCI is willing to proceed on a consolidated basis, contending that there are some issues that will lend themselves to consolidated treatment, it reserves the right to argue the following: 1) the extent and degree to which the arbitration should be conducted on a consolidated basis; 2) that the change-of-law provisions in the existing interconnection agreements, rather than the provisions of the *TRO*, govern the negotiation timetable; and 3) that Verizon has independent obligations under State law and §271 of the *TAct* to provide network elements that are affected by the *TRO*, and those obligations should be included in any amendments to interconnection agreements.

In response to the Motions to Dismiss of RevNets and the CLEC Coalition, MCI contends that other carriers have no right to object to an MCI/Verizon arbitration, and declares that any procedural deficiencies can be quickly cured. MCI does not believe *USTA II* should delay this proceeding and requests that the Commission deny the Motions to Dismiss. Alternatively, MCI requests that, if the Commission denies Verizon's request for a consolidated arbitration, that the Commission proceed with arbitration proceedings for those CLECs, such as MCI, that wish to go forward with arbitration.

H. Conversent

Conversent contends that Verizon's attempts to negotiate an amendment to its interconnection agreements have consistently failed to recognize Verizon's future obligations under §271 of the *TAct*. Conversent states that Verizon is seeking, through these amendments, to eliminate its obligation to provide certain UNEs, in contradiction to Verizon's obligations under the SGAT, Commission rulings, the *TRO*, and §271.

I. CLEC Coalition

The CLEC Coalition states that Verizon's Petition should be dismissed for the following reasons: 1) the Petition is premature because under the Bell Atlantic/GTE Merger conditions, Verizon is required to offer UNEs under existing agreements until the *TRO* is final and non-appealable; 2) the Petition fails to comply with significant procedural requirements that are mandated by law; 3) because the law is too uncertain to efficiently arbitrate all of the issues; and 4) the *TRO* does not change the law with respect to routine network upgrades. In its Reply to Verizon's Opposition to the CLEC Coalition's Motion to Dismiss, the CLEC Coalition reaffirmed its prior argument.

J. AT&T

AT&T urges the Commission to undertake the arbitration in a timely manner, in order to be able to meet the 9-month time constraints. In response to the CLEC Coalition's Motion to Dismiss, AT&T claims that Verizon has met its §252 obligations with respect to its negotiations with AT&T. AT&T asserts that it will be harmed if the Commission grants the Motion to Dismiss.

III. COMMISSION ANALYSIS

The changes sought by Verizon in its Proposal appear to be very similar to those which are being considered in Docket No. DT 03-201, Revisions to Verizon New Hampshire's

Statement of Generally Available Terms and Conditions (SGAT). Some of the Parties in that docket have requested that Verizon identify all the changes resulting from its interpretation of the *TRO*. It appears that Verizon has done so in this Petition. Because CLECs are not required to negotiate interconnection agreements in New Hampshire in order to operate and purchase UNEs, and since many CLECs purchase directly from the SGAT, DT 03-201 is a more appropriate proceeding for the consideration of wholesale changes to the availability of network elements, and the rates, terms and conditions under which network elements are offered to CLECs in New Hampshire.

Of course, if Verizon and individual CLECs wish to negotiate different rates, terms and conditions than those in the SGAT, they are free to enter into negotiations pursuant to §252 of the TAct.

If however, Verizon wishes to proceed with its request for consolidated arbitration of multiple interconnection agreements due to a change in federal law, we conclude that this Commission is not the appropriate forum for such arbitration. As contemplated by the TAct at §252(e)(5) if a state does not act, the FCC will act in its stead. Rather than “run out the clock” until July 2, 2004, at which point Verizon would be free to take its request to the FCC, we make clear by this order that we will not exercise our right to arbitrate these interconnection agreements. Verizon, therefore, is free to take the request to the FCC without further delay.

The decision to send this issue to the FCC is not taken lightly. Our reasons are many. First, the strain on New Hampshire resources would be enormous given the number of arbitration agreements at stake. To meaningfully address all agreements, considering the various terms and conditions in each agreement, within the narrow window accorded by the TAct, is not feasible.

Second, the FCC's *TRO* made sweeping changes to ILEC unbundling obligations under §251 of the TAct. Changes to interconnection agreements requiring interpretation of the FCC's regulatory standards, such as have been occasioned by the *TRO*, are more appropriately dealt with by the FCC itself. If the request for arbitration were due to negotiation of a new interconnection agreement or renegotiation of an expired interconnection agreement between Verizon and one or more competitors in New Hampshire, we would likely reach a different result. For example, the Commission arbitrated an interconnection agreement between Verizon and Global NAPs in Docket No. DT 02-107. Here, however, the changes have nothing to do with operation in New Hampshire; they are the result of a change of rules promulgated by the FCC. In this case, we find it appropriate that Verizon take these issues up directly with the FCC.

Finally, we take this step as a matter of efficiency and resource conservation. The status of the applicable law remains in flux, as the D.C. Circuit decision on the *TRO* has reversed certain FCC decisions and is being challenged. It is not a prudent use of our limited state resources to arbitrate these agreements, on an expedited basis, only to face the possibility that the *TRO* standards will yet again be changed by the Circuit Court or U.S. Supreme Court.

For the foregoing reasons, we will notify the FCC of our intent not to address these interconnection agreements. Therefore, it is not necessary to rule on the motions to dismiss or the motion to compel filed by Revolution Networks. We direct our Executive Director to forward a copy of this order to the FCC.

Based upon the foregoing, it is hereby

ORDERED, that the Commission will not act on Verizon's Petition; and it is

FURTHER ORDERED, that the Executive Director forward a copy of this order to the FCC.

By order of the Public Utilities Commission of New Hampshire this twelfth day of
April, 2004.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary