DT 01-206

VERIZON NEW HAMPSHIRE

UNE Remand Tariffs

Order Denying Motion for Reconsideration, Rehearing, and/or Clarification

O R D E R N O. 23,993

June 13, 2002

I. PROCEDURAL HISTORY

On May 10, 2002, Verizon New Hampshire (Verizon) filed a Motion for Reconsideration, Rehearing, and/or Clarification (Motion) of the Commission's Order No. 23,948 (Order). The Order dealt with the so-called UNE Remand elements.[1] Verizon NH specifically requested the Commission to reconsider or clarify the Order regarding: (1) access to Dark Fiber at existing splice points, (2) inclusion of projected CLEC demand for Dark Fiber in Verizon's build-out planning, (3) direct, read-only access to the Loop Facilities Assignment and Control System (LFACS), (4) per

[1] The UNE Remand elements are those network elements that ILECs are required to unbundle pursuant to the Federal Communications Commission's decision on remand from the U.S. Supreme Court. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), on remand from *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999). Although the U.S. Court of Appeals for the District of Columbia Circuit recently issued an opinion remanding the list of mandatory UNEs to the FCC for further justification, the list remains in effect during the remand. *United States Telecom Association, et al. v. FCC et al.,* No. 00-1012, 2002 WL 1040574 (D.C. Cir. May 24, 2002).

query mechanized loop qualification charges, (5) phase-out of load coil removal charges, and (6) multiple loop conditioning proposal. On May 20, 2002, CTC Communications Corporation and Covad Communications Company (CTC and Covad or Joint CLECs) jointly filed a Memorandum in Opposition to the Motion (Memorandum). This Order on Reconsideration considers the parties' Motion and Memorandum, as well as our own review of the record and law.

II. POSITIONS OF THE PARTIES

A. Legal Standard

1. Verizon

Verizon claims that the Commission applied an incorrect legal standard to the issues raised in this docket. According to Verizon, the correct legal standard is limited to a two-prong inquiry. The first prong is whether Verizon's filing complies with relevant FCC orders and the Commission's prior Dark Fiber orders. The second prong is whether Verizon's proposed rates are TELRIC compliant in conformance with the Commission's orders in DE 97-171, the SGAT proceeding. Verizon claims that the Commission conducted a fact-finding adjudicative process rather than the compliance process announced. Verizon asserts the Commission denied the company its due process rights as a result of inadequate notice and that the

Commission must therefore reconsider its order utilizing the announced standard or else rehear the entire case after proper notice.

In support, at page 6 of its Motion, Verizon argues that its "private rights" are directly affected, thus making the proceeding an adjudicative one subject to the requirements of a "trial-type" hearing, citing *Statewide Electric Utility Restructuring Plan*, Docket No. DR 96-150, Order No. 22,316, (Sept. 17, 1996). Verizon implies that no "trial type" hearing occurred in this docket. Verizon contends that whenever the Commission "engaged in further fact finding" beyond the scope of the issue of compliance with existing FCC and New Hampshire Commission orders, the principles of due process were violated.

2. CTC and Covad

According to CTC and Covad, Verizon's initial premise is false and, hence, its arguments fail with regard to lack of due process. The initial premise is that Verizon's filing complies with the relevant FCC and other case law. CTC and Covad aver that, in fact, the Commission found a lack of compliance. In support, CTC and Covad point out that Verizon attempts to prove compliance with the same arguments it made during the entire proceeding; then, presuming it has proved compliance, Verizon claims that any

requirements beyond Verizon's own proposals are beyond the scope of the docket and require a new proceeding to meet due process. To the contrary, CTC and Covad argue, the Commission found Verizon's compliance proofs unpersuasive. The Commission did not "engage in further fact finding" but simply required changes to the filing in order to obtain compliance.

CTC and Covad also reject Verizon's due process argument based on the record of Verizon's direct requests for an expedited proceeding and objections to any delays. Memorandum at p. 6-7. In contrast, the Joint CLECs refer to the several times that they and the Office of the Consumer Advocate expressed concern about the truncated process. Verizon, according to the Joint CLECs, fully supported the expedited process and also attested to the Commission that no relevant information was excluded from examination. Memorandum at p. 8. Verizon's claim of inadequate notice that its "private rights" could be impacted is untenable in the face of its declarations on the record, CTC and Covad argue.

Covad and CTC argue that RSA 541:3 provides the relevant legal standard by which the Motion must be measured. They maintain that Verizon's Motion does not present new evidence that was either unavailable or

mistakenly overlooked by the Commission and must therefore be denied. Memorandum at p. 8-9, citing to prior Commission orders on reconsideration.

B. Access to Dark Fiber at Existing Splice Points

1. Verizon

Verizon argues that its Dark Fiber offering, which permits access only at existing hard termination points, complies with the relevant FCC and Commission orders. The existing hard termination points are the only technically feasible access points, according to Verizon, as recognized by the Commission in its Order No. 22,942 when it ordered access at outside plant remote terminals. Verizon argues that access at points requiring the opening of a splice case is not required by the FCC's *UNE Remand Order*, at Para. 206, that the FCC determined that splice cases are specifically inaccessible. Motion at p. 9. Furthermore, Verizon argues against applying the FCC's "best practices" without a Section 252 arbitration proceeding. Motion at p. 9-10. The best practices principle posits that approval in one state can mean approval in other states. Verizon argues that applying the best practices principle requires an adjudicative process during which the ILEC can attempt to prove that conditions in a specific state are different

enough to justify a different finding. Verizon claims it was denied this opportunity here. Motion at p. 9.

Verizon argues that, as a result of the Commission's failure to notice this proceeding as something more than a compliance proceeding, it had no opportunity to carry its burden of proof regarding the technical infeasibility of access at splice points in New Hampshire. Verizon argues that it would have raised various technical issues associated with network integrity and technical requirements, as well as information about the way it accesses its own fiber at splice points. Motion at pp. 10-14. An opportunity to be heard on the matter in a Section 252 arbitration proceeding is recognized by the FCC in its *UNE Remand Order* at para. 227, according to Verizon.

2. Covad and CTC

According to CTC and Covad, Verizon raises here only the arguments it made during the proceeding, providing no new material or material that was overlooked by the Commission. In addition, the Joint CLECs reference decisions by Texas, Indiana, Ohio, Massachusetts, Rhode Island, and the District of Columbia rejecting the same and similar infeasibility arguments. CTC and Covad also point to the fact that two RBOCs have provided access to Dark Fiber at splice points. Memorandum at pp. 11-13.

CTC and Covad further argue that Verizon misconstrues the *UNE Remand Order*; that the FCC in fact does not apply its narrow definition of technical feasibility to Dark Fiber loops but only to subloops. Any limitation on Dark Fiber, in the Joint CLECs interpretation of the *UNE Remand Order*, must relate to a "likely and foreseeable threat" to an ILEC's ability to meet its carrier of last resort obligations, they aver. Memorandum at p. 17. The Joint CLECs contend that the Commission interpreted the *UNE Remand Order* correctly. The Joint CLECs also contend, although they do not consider it a pivotal point, that the Commission's ruling is based upon interpretation of the *UNE Remand Order*, and within the scope of this docket as described by Verizon in its Motion. Finally, the Joint CLECs aver that Verizon splices Dark Fiber for itself and must therefore splice Dark Fiber for CLECs or violate the non-discrimination requirement of Section 251(c)(3) of the Telecommunications Act of 1996 (Tact).

C. Accommodating CLEC Demand for Dark Fiber

1. Verizon

Verizon objects to the Commission's conclusion that projected CLEC demand for Dark Fiber should be accommodated in Verizon's planning. According to Verizon, this amounts to a requirement to construct new facilities to meet CLECs' specific point-to-point needs, in violation of the FCC's and the U.S. Supreme Court's interpretation of the TAct. In reality, Verizon contends, it has met the requirements of the relevant orders by which this docket should be measured and anything more is beyond the scope of the docket.

2. CTC and Covad

The Joint CLECs argue that this issue turns on interpreting the relevant FCC and federal orders and therefore is within the scope of this docket, contrary to Verizon's assertions. Verizon, according to the Joint CLECs, incorrectly expands the FCC's language in the *First Local Competition Order* to prohibit any augment of the network ever to accommodate CLEC needs. Verizon also, in the Joint CLECs' opinion, misconstrues the Eighth Circuit's holding, in *Iowa Util. Bd. v. AT&T*, 120 F.3d 753 (8th Cir. 1997) *rev'd in part, aff'd in part and remanded on other*

grounds, AT&T Corp. v. Iowa Utils. Bd., 535 U.S. 366 (1999), *aff'd*, 219 F.3d 744 (7th Cir. 2000), that ILECs have a responsibility to provide equal but not superior quality access to UNEs. The Joint CLECs point out that the FCC has consistently determined that ILECs must make some changes and augments in order to meet its wholesale obligations, and those changes are not to be construed as providing a "superior" network. Section 251(c)(3) encompasses a duty to make these modifications, according to CTC and Covad, citing the First Report and Order, para 382.

The Joint CLECs also provide copious cites to FCC decisions that ILECs are obliged to consider CLEC demand when renovating existing facilities, as is contemplated by the Commission's Order. Memorandum at pp. 18-24.

D. LFACS

1. Verizon

The Order requires Verizon to provide direct, read-only access to LFACS. Verizon claims that the CLECs' need for access to data is already met via its mechanized loop qualification process. The mechanized loop qualification process, as enhanced in October 2001, provides the underlying data by electronic interface and is used in New York, Massachusetts, Pennsylvania, Rhode Island and Vermont. Motion at 18.

The law does not require any alternate mode of access to the data, Verizon argues. Furthermore, the LFACS is not appropriate for providing the information. Verizon states that the LFACS contains at least one loop make-up (LMU) for only ten percent of the terminals, that the LMU is only for one single loop and not necessarily other loops in the terminal, and that LMUs change. Motion at p. 19 and fn. 23 at p. 25. Nonetheless, Verizon avers that CLECs can obtain the information via three modes: its October 2001 enhanced mechanized access to loop qualification information; its Manual Loop Qualification performed on request; and its paper records reviewed in an Engineering Record Request. Verizon points out that the FCC found that this is substantially the same manner in which Verizon provides the data to its retail operations, and therefore Verizon is providing data in a non-discriminatory fashion. Motion at p. 21.

Read-only access to LFACs is not feasible, Verizon argues. The system would have to be modified, necessitating a significant redesign and reconfiguration. The redesign might include methods to safeguard proprietary information. The cost of these modifications would be high and the time to implement the new system would be long.

Motion at p. 24-25. In addition, the redesign would slow LFACS response time, impairing its usefulness.

2. CTC and Covad

According to the Joint CLECs, Verizon presents no new information regarding CLEC access to LFACS and other loop make-up (LMU) data. Verizon's mechanized loop qualification database remains inadequate for CLEC purposes and CLECs are forced to utilize the slower and more expensive manual loop qualification and engineering query processes. Because Verizon provides adequate information to its retail DSL operations "in one seamless electronic inquiry" (Memorandum at p. 31), the Joint CLECs argue that Verizon discriminates against CLECs in violation of the law. CTC and Covad point out that Verizon's retail operations need not resort to the second and third inquiry processes that CLECs must use. In addition, the Joint CLECs argue that Verizon improperly provides selective information rather than the full spectrum of loop qualification data, thus acting as a "gate keeper," filtering the information in contravention of the FCC's *UNE Remand Order*. Memorandum at p. 29 and 37.

CTC and Covad refute Verizon's claim that the information sought is proprietary or customer specific. Memorandum at pp. 32-33. Even if the information were

proprietary, they argue, by law Verizon must provide non-discriminatory access to its OSS and back office information so that the CLEC can make an independent judgment about the loop's capacity to support advanced services. Thus, they state, the information falls within the exception provided in Section 222(c)(1). *Id.* at p. 34.

E. Per Query Charges for Mechanized Loop Qualification

1. Verizon

Verizon contends that the Commission's determination that the Company's development costs have already been recovered for mechanized loop qualification has no support in the record and must therefore be reconsidered. Moreover, Verizon claims that a per query cost recovery for mechanized loop qualification would necessitate significant changes to its billing system and to LFACS; changes that could result in even higher charges than the monthly charges it recommends.

2. CTC and Covad

The Joint CLECs argue that the record supports the Commission's finding, citing their brief in this docket and further arguing that the costs for updating LFACS should be borne by all carriers or by Verizon alone. CTC and Covad point out that Verizon provides no new evidence to demonstrate that the costs have not been recovered. The

Commission should retain its conclusion that Verizon's mechanized loop qualification system was developed for retail use, the costs of which have been recovered.

In response to Verizon's claim that a per query charge is difficult and costly to implement, the Joint CLECs contend that the charges should merely mimic similar per query charges, e.g., Line Information Database and AIN databases.

F. Phase-out of Loop Conditioning Charges

1. Verizon

The Order requires Verizon to phase-out its charges for loop conditioning incrementally over a three-year period. Verizon argues that the phase-out unfairly forces the company to absorb real costs. This result, Verizon avers, goes against the Commission's requirement, as stated in its SGAT Order, that TELRIC rates have some basis in reality. Furthermore, because the FCC's *UNE Remand Order* and its rules permit charges for conditioning loops, the Commission should remove the phase-out. The Facilitator devised the phase-out, according to Verizon, by misapplying the weighting of new and hot cut activities, a 28% factor that has no correlation to the company's deployment of new plant. Motion at p. 31. Allowing the phase-out to remain, Verizon claims, will create a perverse incentive for CLECs

to order conditioned loops rather than DSL cable lines. Verizon claims that its experience in Massachusetts, where resources are wasted and significant administrative expense is incurred performing unnecessary engineering queries, validates this contention. *Id.*

2. CTC and Covad

The Joint CLECs maintain that Verizon's arguments for reconsideration were all raised during the proceeding and present no new evidence or demonstration of mistake. They contend that Verizon only re-argues what it raised before and therefore reconsideration is not warranted. They nonetheless respond to each of Verizon's arguments, urging the Commission to reiterate its conclusions.

CTC and Covad reiterate their own prior argument that Verizon's loop conditioning charges improperly recover its costs twice. The Joint CLECs declare that the Supreme Court's recent affirmation of the FCC's interpretation of TELRIC[2] could have led the Commission to a decision less favorable to Verizon. Memorandum at p. 40. Instead, the Joint CLECs state that Verizon benefits from the three-year phase-out required by the Order.

[2] *Verizon Communications, Inc., et al. V. FCC*, Docket Nos 00-511 and consolidated cases, slip op. (May 13, 2002).

The Joint CLECs defend the Facilitator's choice of a surrogate factor in devising the phase-out approved by the Order. The Joint CLECs contend that the factor is a reasonable analogy to anticipated growth of broadband activity. Pointing out that Verizon offered no alternative factor in its comments on the Facilitator's Report, the Joint CLECs allege that Verizon is precluded from complaining now. Memorandum at p. 43. Similarly, CTC and Covad argue that Verizon itself had ample and meaningful opportunity but chose not to present the evidence it now asserts would affect the outcome of this docket; and that Verizon itself is responsible for the deficiencies in its databases.

G. Multiple Loop and Spare Loop Conditioning

1. Verizon

The Order requires Verizon to prepare and file a proposal for multiple and spare loop conditioning in two circumstances. Verizon asserts this requirement is more onerous than Verizon's own proposal to prepare and file terms and conditions for multiple loop conditioning only where the multiple loops are in the same cable and being conditioned for the same customer at the same time. In Verizon's view, the Order contemplates random removal of

load coils, producing degradation of voice service and inefficient use of loop plant while increasing costs and perhaps chilling the DSL marketplace. Verizon therefore argues against preparing a cost study with a built-in multiple loop assumption.

2. CTC and Covad

The Joint CLECs contend that multiple loop conditioning is feasible, given that Verizon conditions multiple ISDN loops at one time, that only spare loops are proposed for conditioning, and at least three states require multiple conditioning, as was argued in the Joint CLECs brief.

III. COMMISSION ANALYSIS

RSA 541:3 governs the procedure for a motion for rehearing before the Commission, providing in pertinent part that:

> [w]ithin 30 days after any order...has been made...any party...may apply for a rehearing...specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Pursuant to New Hampshire case law, "good reason" can be demonstrated when a party explains that new evidence exists that was unavailable at the original hearing, or when matters were either "overlooked or mistakenly

conceived." *Dumais v. State* 118 NH 309, 386 A.2d 1269 (1978), *et al*.

We have analyzed each and every ground claimed to be unlawful or unreasonable to determine if there is good reason shown and we see no basis to reconsider or rehear our determinations in Order No. 23,948. Verizon makes no new arguments and raises no new evidence that was unavailable at the original hearing. As for Verizon's claim that it was denied due process, we find that Verizon had both actual and constructive notice of the issues raised and the scope of the proceeding. Given Verizon's experience before the Commission, it is not credible that Verizon was ignorant of the possibility that the Commission could find the filing deficient and order substantive changes.

The process provided in this docket did include the same opportunities to be heard that accompany Section 252 arbitration proceedings in New Hampshire. Verizon's predecessors in interest, NYNEX and Bell Atlantic, participated in the first New Hampshire Section 252 arbitration and therefore Verizon has good reason to understand the comprehensive scope of the New Hampshire process. Consequently, our application of the FCC's "best practices principle" comports with the FCC's fact-finding

requirements. In addition, as CTC and Covad correctly note, Verizon fully supported the expedited process and also attested to the Commission that no relevant information was excluded from examination.

Moreover, the decisions of which Verizon complains are within the scope of the proceeding as noticed. Verizon had ample opportunity to present facts in support of its original filing and to rebut proposed revisions. The fact-finding process followed in this docket resulted in decisions that are within the scope of the proceeding and based on evidence presented by Verizon and other parties. Our decisions regarding access to Dark Fiber, use of projected CLEC demand for Dark Fiber, access to LFACS, per query charges, phase out of loop conditioning charges, and multiple loop conditioning are grounded upon principles set out in New Hampshire and FCC decisions.

Motions for clarification have been granted where the Commission's intent was not sufficiently clear, and not otherwise. See Order No. 23,976 in DT 01-006 (May 24, 2002). Based on Verizon's Motion, we find no reason to clarify Order No. 23,948. Verizon's complaints regarding the order appear to address the provisions as we intended them to be interpreted. Although Verizon disagrees with

our conclusions, Verizon does not appear to misunderstand them.

Based on the foregoing, it is hereby

ORDERED, that the motion of Verizon New Hampshire for reconsideration, rehearing and/or clarification is DENIED, as set forth above.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of June, 2002.

Thomas B. Getz	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary