

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Consultative Report on :
Application of Verizon :
Pennsylvania, Inc., for FCC : Docket No. M-00001435
Authorization to Provide :
In-Region, InterLATA :
Service in Pennsylvania :

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

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the Global Order and in other proceedings. The OCA is concerned that much of this work remains undone and competition between Verizon and CLECs offering digital services has not significantly progressed. Data services are in great demand by consumers and a more competitive market in this area would greatly benefit consumers. The PUC should reemphasize the importance of such interconnection requirements.

III. COMMENTS

A. Verizon's Challenges In Court To The Commission's Global Order And Performance Metrics Order Must Be Terminated. This Comment Relates To All Checklist Items And The Public Interest Standard.

I. Introduction

It is beyond question that the Commission has worked long and hard to establish a regulatory framework that has promoted the opening of local markets throughout the Commonwealth on an irreversible basis. As a result of the Global Order and Performance Metrics Order,³ the Commission has created the framework that Verizon relies upon in its 271 Application. Yet, Verizon is concurrently seeking to reverse the Commission's rulings on matters such as UNE rate reductions and funding of the state Universal Service Fund ("USF"), under the Global Order; and the imposition of Tier II and Tier III remedies, inclusive of liquidated damages, under the Performance Metrics Order.

Joint Petition of NEXTLINK Pennsylvania, Inc., RCN Telecommunications Services of Pennsylvania, Inc., et al, Docket No. P-00991643, Opinion and Order (Dec. 31, 1999) ("Performance Metrics Order").

The OCA submits that the Commission cannot, while those challenges are before the courts, recommend approval of Verizon's 271 application. Verizon must make a choice either to pursue its 271 Application and withdraw its appeals or to proceed without a favorable recommendation from the Commission. Verizon cannot expect to build upon the pro-competitive foundation established by the PUC and continue to attempt to dismantle that foundation through its appeals while the consultative report is pending.

2. Verizon Has Filed Three Appeals Which Directly Conflict With Its Request For Commission Support Of Its 271 Application.

The OCA has identified three pending appeals by Verizon in which Verizon has challenged the Commission's rulings on matters in the Performance Metrics Order or Global Order. A summary of those proceedings follow:

(a) Federal Appeal of Global Order -- After the Commission issued the Global Order, Verizon filed a complaint in the Eastern District of the United States District Court alleging that the Commission had violated Section 252 of the Telecom Act, 47 U.S.C. § 252, and 28 U.S.C. § 1983, pertaining to Verizon's civil rights.⁴ As part of its appeal, Verizon has alleged that the rates set for wholesale services, including the rural residential promotion discount, and the UNE rates set by the Global Order, were not cost based and violate Section 252.⁵ Additionally, Verizon

⁴ Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n, Complaint filed Oct. 29, 1999, U.S. Dist. Ct., E.D., Civil Action No. 99 CV 5391.

⁵ Id.

alleges that the Commission erred in requiring Verizon to provide unbundled access to switching throughout the Commonwealth and to provide unbundled access to Digital Subscriber Line Access Multiplexers ("DSLAMs"), without consideration of whether the "impair and necessary" standard of Section 251(d)(2) had been satisfied.⁶ On August 3, 2000, the presiding judge in that appeal ruled that the Commission is not immune from suit, but did not rule on the merits of Verizon's appeal.⁷ The Commission and others filed notices of appeal to the Third Circuit of the United States Court of Appeals in September 2000. The OCA submits that Verizon has not withdrawn from the courts its challenge to the wholesale rates, UNE rates, and certain UNE provisioning requirements established by the Commission in the Global Order.

(b) Verizon has likewise continued to challenge portions of the Global Order in the state courts. Having failed to convince Commonwealth Court to reverse the Global Order, on January 19, 2001, Verizon filed a Petition for Allowance of Appeal before the Pennsylvania Supreme Court.⁸ In its Petition, Verizon challenges the adequacy of the due process it received in the course of the Global Order proceeding.⁹ Additionally, Verizon alleges that through the Global Order, the Commission has impermissibly "attempted to undo the (Company's Chapter 30) Plan ... by ordering rate

Id.

Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n, 107 F.Supp 2d 653 (U.S. Dist. Ct., E.D. Aug. 3, 2000).

Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n, Docket No. 55 FAL 2001.

Verizon Pet. at 4-8, 17-21.

reductions, below-cost rates, rate cap extensions, and other provisions that plainly violate the Plan."¹⁰ Further, Verizon asks the Court to determine that the Commission exceeded its authority in establishing the state Universal Service Fund and Consumer Education Fund.¹¹ The OCA, PUC, and others have filed briefs in opposition to this appeal, but as of this date the Supreme Court has not ruled on the merits of Verizon's Petition. Given that Verizon's Petition for Allowance of Appeal to the Supreme Court post-dates Verizon's 271 Notice to the Commission, the OCA submits that it is clear that Verizon's concurrent pursuit of appellate relief and its 271 filing is deliberate.

(c) The third pending appeal arises from the Commission's Performance Metrics Order. Verizon has asked the Commonwealth Court to determine that the Commission has no authority under federal or state law to require Verizon to pay liquidated damages to Verizon's competitors.¹² In the alternative, if such authority exists, Verizon asks that the Court rule that the Commission's failure to impose a limit on how much Verizon may pay out is without support and is arbitrary and confiscatory.¹³ In short, Verizon's appeal is directed at undermining the entire remedies scheme established by the Commission in the Performance Metrics Order.

¹⁰ Id. at 27.

¹¹ Id. at 29.

¹² Verizon Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n. "Docketing Statement Case Summary, Statement of Issues and Description of Previous Settlement Attempts" at 2, filed by Verizon on August 31, 2000 with the Commonwealth Court in Docket 1902 C.D. 2000.

¹³ Id.

3. The Fact Of Verizon's Appeals Create Uncertainty As To Whether Current Conditions Designed To Promote Non-Discriminatory Access To Verizon's Network Will Continue.

As noted above, the Commission committed to support Verizon's 271 Application if and when the record shows that Verizon has complied with all of the Section 271 checklist items and if Verizon has "fully and properly implemented all the provisions of this [Global] Order..."¹⁴ As the Commission reasoned, such a recommendation would be warranted when "the local telecommunications market in Pennsylvania is fully and irreversibly opened to competition."¹⁵ Through the Performance Metrics Order, the Commission intended to create self-effectuating remedies sufficient as to both form and amount to prevent competitive backsliding.¹⁶ Although the Commission allowed Verizon a "six month burn in period" to ramp up liability measures for the full range and amounts of remedies, the Commission categorically stated its intent that "these performance measures, standards and remedies shall be effective... and shall continue beyond the filing and resolution of any Section 271 proceeding commenced by BA-PA."¹⁷

Verizon's concurrent pursuit of its appeals and 271 Application is in direct conflict with the Commission's intention to create a framework to promote not only the

¹⁴ Global Order at 260.

¹⁵ Id.

¹⁶ Performance Metrics Order at 11-12.

¹⁷ Id. at 161.

development of open local markets, but to support the continued open nature of such markets through the combination of performance measures, standards and remedies. For example, the Commission specifically reduced Verizon's UNE prices to better reflect forward looking cost principles in recognition that the telecommunications industry is a declining cost industry.¹⁸ If Verizon were to prevail in its state or federal appeals of the Commission's authority to fix the Global Order UNE rates, presumably Verizon's prior, higher UNE rates would take effect. Verizon's challenge to the Commission's authority to identify what services must be provisioned as UNEs likewise creates the perception of risk that the UNEs currently offered may not continue to be available, so long as Verizon's appeal is pending.

The OCA submits that Verizon's very pursuit of these three appeals creates uncertainty which chills the development of competition and presents the risk that the cost of competing could increase, the conditions which are favorable to competition could be diminished, and the financial incentives intended to prevent backsliding could be removed. The Commission already recognized in the Global Order that where Verizon holds the potential to impact the framework for competition, that competition may suffer.¹⁹ Specifically, the PUC opposed any efforts by Bell to unilaterally open up interconnection contracts which could thus "create additional uncertainty that will stall any progress in developing an open local markets [sic]."²⁰ The Commission should

¹⁸ Global Order at 69-78.

¹⁹ Global Order at 68.

²⁰ Id.

recognize that Verizon's determined pursuit of appellate review of these Commission orders is likely to have an equal or greater chilling effect on the development of competition currently.

4. Verizon's 271 Application Should Be Judged Based On Current Facts And Not Future Promises.

In its appeal of the Performance Metrics Order, Verizon has indicated a willingness to bargain for changes from the terms of the Commission's Order in exchange for elimination of Verizon's appeal.²¹ The OCA submits that the Commission should not accept any conditional offers by Verizon to withdraw or modify its pending appeals as evidence in this proceeding.

In its Docketing Statement to the Commonwealth Court, Verizon indicated a willingness to consent to some liability for "reasonable 'liquidated damages,'" so long as such damages become effective no earlier than when Verizon receives 271 approval from the FCC.²² According to Verizon "[i]f the PUC were to agree to this condition, Verizon's appeal would be unnecessary."²³ The OCA submits that Verizon's offer of compromise has not completely extinguished the threat posed by the appeal of the Performance Metrics Order and remedies that the Commission instituted to assure that local markets are irreversibly open. It is not clear what "reasonable" damages would be.

Performance Metric Appeal, Verizon Docketing Statement at 3, Commonwealth Ct. Dkt. 1902 (C.D. 2000).

²¹ Id. at 3.

²² Id.

An offer set forth in a docketing statement is also not sufficient to remove the potential threat created by the pending appeal. The appeal must be entirely terminated before the commitment to local competition in Pennsylvania can be termed "irreversible."

The Commission has already correctly recognized that the basis for the Commission's consultative report, the Department of Justice review, and the FCC's own decision must be what is known and timely presented, not what Verizon might do in the future. In the Global Order, the Commission stated its understanding of the review process as follows:

Once BA-PA files its Section 271 application for entry into the long distance market with the FCC, it is not permitted to supplement this application with future data, or documentation other than the State Commission's and the United States Attorney General's Recommendation to the FCC. 47 U.S.C. §271(d)(2). This is a federal requirement. *Future actions, proceedings or promises from BA-PA will not substitute for present conditions at the time the FCC and this Commission consider BA-PA's Section 271 application.*²⁴

In ruling on Bell Atlantic New York's 271 Application, the FCC made its standards clear:

In addition, the Commission has found that a BOC's promises of future performance to address particular concerns raised by commenters have no probative value in demonstrating its present compliance with the requirements of section 271.²⁵

²⁴ Global Order at 257-58 (footnote omitted)(emphasis added).

Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Opinion and Order, ¶ 36 (released Dec. 22, 1999) ("Bell NY 271 Order").

The OCA submits that the Commission's course of action is clear.

Verizon's pending appeals, individually and collectively, present a challenge to the Commission's very authority to rule on issues including wholesale rates, UNE pricing, the provisioning of DSLAMs, remedies for missed metrics and performance standards and other rules and provisions supportive of the development of local competition. The Commission should not recommend in favor of Verizon's 271 Application until those challenges are withdrawn. Conditional promises such as Verizon has publicly offered in the Performance Metrics Appeal should not suffice.

5. If Not Terminated, Verizon's Appeals Do Not Allow The Commission To Grant A Favorable Consultative Report.

If Verizon does not withdraw its appeals of the Global Order, the OCA submits that the Commission should oppose Verizon's 271 Application. As noted above, Verizon's appeals address a large portion of the framework established by the Commission to promote open markets throughout Verizon's service territory. As explained below, Verizon should not be permitted to concurrently rely on that framework to support its 271 Application and act to dismantle that same framework.

As the Commission noted in the Global Order, the use of unbundled network elements is one method of competitive entry. Consistent with its obligations under both the Public Utility Code and the Telecom Act, the Commission sought to establish UNE rates which were cost-based and forward looking, as well as just and reasonable.²⁷ In ordering Verizon to provision certain UNEs, including statewide

Global Order at 61-84

unbundled switched access and DSLAMs, the Commission followed the Telecommunications Act of 1996 and its own authority pursuant to Chapter 30.²⁷ The Commission imposed the residential resale promotion discount to facilitate

the promotion of competition envisioned by Chapter 30 and federal law, while assuring that residential and rural customers share proportionately in the more varied and advanced services at lower rates provided by competition. Our modifications should substantially increase competition in the rural residential market.²⁸

Verizon's appeal of the Commission's rulings on these wholesale pricing and UNE issues reflect an attempt to undo the current low UNE rates and to reduce the type and number of network elements which must be unbundled. The OCA submits that Verizon's appeals clearly cut against any finding by the Commission that Verizon is providing and intends to continue to provide non-discriminatory access to its network.

Verizon has also challenged the Commission's creation of a USF through the Global Order. The OCA submits that Verizon's appeal is another example of Verizon's attack on the current pro-competitive framework. As the Commission noted in the Global Order, establishment of a state USF was one part of the regulatory restructuring which the FCC deemed necessary to "complete [the] blueprint for competition [to] be in place."²⁹

²⁷ Id. at 85-92.

²⁸ Id. at 127-28.

²⁹ Id. at 152-53, quoting In the Matter of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers: First Report and Order, CC Docket Nos. 96-98 and 95-185, FCC 96-325, ¶9 (released August 8, 1996).

Likewise, Verizon has challenged the Commission's funding requirement related to the consumer education program established by the Global Order. The Commission committed to create a consumer education program to provide education to consumers during the transition to a fully competitive market.³⁰ The OCA submits that Verizon's opposition on appeal to the Consumer Education Fund is another attack on the pro-competitive steps taken by the Commission to support markets which are irreversibly open. Educating consumers concerning the opportunities for local competition is an essential part of any pro-competitive regime.

In summary, Verizon's appeals present a challenge to the Commission's very authority to issue and enforce the Global Order and the Performance Metrics Order. The OCA submits that in reviewing the Section 271 checklist items and the public interest standard, the Commission must weigh Verizon's pursuit of these issues on appeal as strong negatives. Either Verizon's 271 Application is premature and should not be made or the Commission should oppose Verizon's application where Verizon has committed itself to dismantling many of the Commission's rulings intended to facilitate competition.

6. Verizon's Appeal Of The Performance Metrics Order Necessarily Prohibits A Finding By The Commission That 271 Entry Would Be In The Public Interest.

In issuing the Performance Metrics Order, the Commission sought to assure that Verizon "fulfills its Section 251 obligations" to provide non-discriminatory

Global Order at 186.

access to its networks.³¹ In crafting the Order, the Commission intended to create a framework of "self-effectuating remedies, in a form and in amounts that do indeed prevent competitive backsliding" so as to provide Verizon with some hope of a favorable 271 consultative report.³² The Commission should recognize that Verizon's appeal of the remedies provisions of the Performance Metrics Order is in direct conflict with the Commission's stated purpose and standard.

The importance of the Commission's Performance Metrics Order, including the remedy provisions, cannot be overstated. As the FCC noted in the Bell New York 271 Order, Bell New York's successful application was due in part to the state commission's "adoption of performance assurance measures that create a strong financial incentive for post-entry compliance with the section 271 checklist by Bell Atlantic."³³ Such "anti-backsliding measures" are essential. In its review of the Bell New York application, the Department of Justice carefully reviewed these measures and other measures and determined that the New York local market was fully and irreversibly open.³⁴ The FCC found this to be probative evidence that grant of the application was in the public interest.³⁵

Performance Metrics Order at 11.

Id. at 11-12.

Bell NY 271 Order at ¶ 8.

Bell NY 271 Order at ¶ 429.

Id.

deleted from the system. Verizon's customers are not removed from the system in this manner when changes are made to their service.

3. Effects of Failure to be Listed

Directory listings are an essential part of telephone service. Failure to be listed in the white pages directory listings may seriously harm consumers. Because the directory listings come out at most on an annual basis, the consumer will suffer substantial harm if the listing is dropped from one directory.

This same problem has competitive ramifications when it is associated with switching to a CLEC. Because the Verizon white pages is the primary directory, being dropped from the Verizon white pages effectively drops the phone number and name of the consumer out of the public circulation. Such a failure to include consumers in white pages directory listings decreases consumer confidence in the competitive process and erodes it significantly by harming consumers who have elected to exercise competition.

4. The Verizon Practice Appears Discriminatory

The Verizon practice is discriminatory and inefficient. According to the Verizon Checklist Declaration, the process for UNE-Platform and resale CLECs is that:

if a carrier elects to serve a customer through resale or the UNE-Platform, it must submit an order changing the type of service, but there is no physical disconnection of the established Verizon PA service. Unless the carrier asks Verizon PA to change the customer's listing, there is no need to submit an order *modifying or deleting the listing*.

Checklist Declaration at 134. However, for the Verizon customer who switches to a CLEC with its own switch but uses Verizon's loop, Verizon disconnects the retail service. Id. This creates a "listing service order to delete the customer's directory listing. The directory listing is then "restored" by the competing carrier's loop and number portability order." Id.

The OCA submits that the same process used for UNE-platforms and for resale CLECs should be used for UNE-loop CLECs. The process of deleting and relisting consumers creates a situation which is discriminatory, inefficient and prone to error. The process of manually deleting a directory assistance listing and upon receipt of confirmation from the CLEC manually re-entering the same information into the directory assistance database is highly inefficient and works to increase the number of listings "dropped" from the Verizon white pages. The name and directory listing should be maintained in the database unless and until the CLEC requests that the information be removed or changed. This process would likely decrease the number of errors and "dropped" CLEC listings. Entry into the long distance competition market will only increase the number of problems and exacerbate a problem for which Verizon PA has not developed the necessary effective response.

The OCA submits that there is no adequate remedy to address the significant problems which occur when many consumers are left out of the directory. Since the directory is printed only on an annual basis, any errors cannot be rectified until a subsequent calendar year. Additionally, OCA submits that the accuracy levels submitted

by KPMG do not address the discriminatory effect of the system of delisting and relisting customers or the harm that has been created when customers are "dropped" or "lost."

5. Conclusion

Verizon has not met the requirements for Checklist Number 8 under Section 271. The default process used by Verizon creates an inefficient system through which CLEC customers are harmed. The harm lasts until the next directory listings are published. The OCA submits that permission to enter long distance should not be granted to Verizon until Verizon is able to meet the quality requirements under this checklist item. The process of delisting and relisting consumer white pages listings affects only the customers exercising competition and unfairly discriminates against consumers who decide to participate in competition.

D. Greater Effort Must Be Made To Permit Access By Competitors To Verizon's Equipment Related To Digital Services. This Comment Relates To Checklist Items 1, 2 and 4.

1. Introduction.

The OCA is concerned that more progress needs to be made so that Verizon will open its network and provide relevant information so that competitors can offer digital services. With regard to interconnection and access to network elements, including local loops, all of which pertain to various types of Digital Subscriber Line services ("DSL"), the statute requires Verizon to provide "[i]nterconnection in accordance with the requirements of Sections 251(c)(3) and 252(d)(1)[.]" 47 U.S.C. § 271(c)(2)(B)(iii). maintain "[n]on-discriminatory access to network elements in accordance

with 251(c)(3) and 252(d)(1)[,]" 47 U.S.C. § 271(c)(2)(B)(ii), and provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services[,]" 47 U.S.C. § 271(c)(2)(B)(iv).

The September 30, 1999 Global Order set forth certain policies to provide CLECs with access to Verizon's loops that would "permit the provisioning of an array of [Digital Subscriber Line ("DSL")] services." The PUC indicated in its Global Order that

[i]f the full benefits of competition in the provision of DSL services in Pennsylvania are to be realized, *i.e.* introduction of additional and better services and declining prices, such competition must be robust and sustainable. These conditions will not be met if CLECs are denied access to critical facilities and data or are forced to pay exorbitant charges for loops[.] [Verizon's] delay in introducing its ADSL services suggests to us that the *lack of competition* in the relevant telecommunications services market has forestalled the benefits of technological innovation and the availability of broadband services to Pennsylvania consumers.

Global Order at 111 (emphasis added). At several places in its Global Order, the PUC emphasized the benefits to Pennsylvania consumers that will result from Verizon's deployment of DSL services among rural, suburban and urban areas. Id. at 107, 109, 110, 116. In another and more recent Order, the PUC has required Verizon to determine a method of providing CLECs access to Verizon loops that use fiber optic cable so that CLECs can provide digital services in those areas.²⁷

²⁷ Opinion and Order, Petition of Covad Communication Company for an Arbitration Award Against Bell Atlantic-Pennsylvania Inc., Implementing the Line Sharing Unbundled Network Elements, Docket No. A-31069F0002 (entered Nov. 15, 2000) (Covad).

The OCA submits that the PUC should follow up on its policies as set forth in the Global Order, namely access to loop database information for CLECs, the Unbundled Network Elements, and the potential for the unbundling of DSLAMs. This will assist in providing greater competition in the xDSL market. There is a great degree of interest on the part of consumers in this market. CLEC competition in that market will be extremely beneficial. The above steps will be necessary to ensure benefits to Pennsylvania consumers, especially those in rural areas, as well as to create and sustain a competitive market. The PUC should require improvement on these issues before Verizon is allowed access to the long-distance market pursuant to 47 U.S.C. § 271.

2. Access to Loop Database Information

The OCA submits that Verizon should be required to provide CLECs with information regarding loop qualification at its central offices and, if applicable, with an explanation as to why CLECs cannot have access to DSL related equipment at a particular office. In the Global Order, the PUC set forth policies governing the access of CLECs to Verizon's loop database information. The PUC indicated that CLECs "*must* know the physical characteristics of the loop" in order to make sound business choices regarding DSL service and to allow CLECs to notify customers as to which services are available to them. (Global Order at 114). The OCA submits that access to such information has not been completely provided. The OCA notes that the PUC has stated that it will resolve conflicts concerning access to this information in the interest of obtaining "balanced deployment among rural, suburban and urban areas." (Global Order at 115).

OCA submits that the PUC should address this issue in this 271 proceeding and that CLECs must have access to DSL related loop information before Verizon is granted access to the long-distance market. The OCA understands that Verizon may not be currently supplying CLECs with this information.⁴³

3. Unbundling of DSLAM elements

The OCA submits that competitive access to xDSL elements is important to enhancing competition in Pennsylvania and, therefore, requests that the PUC take the necessary steps to ensure that CLECs not only have the ability to access information needed to compete in the xDSL consumer market, but also the ability to purchase the use of xDSL related equipment from Verizon.

In the Global Order, the PUC stated that "[u]pon resolution of... partitioning issues, multi-hosting or shared DSLAM arrangement will be made available to CLECs[.]" Global Order at 108. The OCA submits that the unbundling of DSLAM UNFs is important to create a competitive marketplace and that the PUC should establish a mechanism to fully address the issue of partitioning before Verizon is allowed access to the long-distance market. It does not appear that substantial progress has been made on this issue since the issuance of the Global Order.⁴⁴

⁴³ The OCA has submitted interrogatories pertaining to implementation of the procedures set forth in the Global Order to Verizon on Friday, February 2, 2001. OCA Set II. Once OCA receives answers to these interrogatories, it may have a better understanding as to Verizon's actions to implement such procedures.

⁴⁴ OCA also notes that the Global Order requires "industry members" to resolve DSLAM partitioning issues. Global Order at 108. Such issue may be another aspect that must be resolved. The OCA would encourage industry members to make progress on that point.

Verizon has also argued that it should not be required to unbundle DSLAMs for sale to CLECs. At the technical conference on February 1, 2001, which pertained to the use of New York's DSL metrics in Pennsylvania, Verizon's representative, stated that "Verizon Pennsylvania has no metrics on DSL resale because it's not a product that we have to resell." Tr. at 12-13. Verizon stated that in accordance with the FCC's approval of the Verizon-GTE merger, Verizon transferred all advanced service assets (e.g., DSLAMs) to a separate date affiliate,⁴⁵ and cannot require its affiliates to resell such services.

The OCA submits that this conclusion has been overturned by the D.C. Circuit Court of Appeals in Association of Communication Enterprises v. Federal Communications Commission, No. 99-1441, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001) ("ACE")⁴⁶. In that case, the Court held that an ILEC could not avoid provisions of the Telecommunications Act of 1996 regarding advanced services (e.g., xDSL) by selling those services through one of its affiliates. Id. at *2, *4-5 (vacating the Order of the FCC that allowed a company to offer advanced services through a separate affiliate and, therefore, avoid the unbundling and resale requirements of the Telecommunications Act).

The Court stated that 47 U.S.C. § 251(c) "requires ILECS to 'negotiate in good faith to provide interconnection with other telecommunications carriers to *provide unbundled access to network elements where technologically feasible*.'" Id. at *2

⁴⁵ Tr. at 13-14.

⁴⁶ Rule 10.8.1 of the Bluebook, Sixteenth Edition, requires that an asterisk precede page references in citations referencing electronic databases such as Westlaw or Lexis.

(emphasis added). Although ILECs argued that this provision should not apply to the sale of "advanced services," which include xDSL, the Court stated that the FCC determined that "advanced services are telecommunications services like any others and *may not be provided by an ILEC unless the ILEC complies with § 251(c).*" Id. (citations omitted). The Court concluded that "Congress did not treat advanced services differently from other telecommunication services[]" and that the requirements of § 251(c) could not be avoided by "setting up a wholly owned affiliate to offer those services." Id. at *5 (citation omitted).

The OCA submits that the Court's reasoning in ACE supports OCA's conclusion that Verizon should be required to negotiate with CLECs to unbundle and provide xDSL services. At the February 2, 2001, Technical Conference in the 271 proceeding before the PUC, the OCA explained that the ACE case supports the PUC's determination in the Global Order to provide for the unbundling of xDSL related equipment. Tr. 22. Additionally, Administrative Law Judge Michael C. Schnierle addressed the ACE case in response to Verizon's position that they are not required to resell DSL services. Judge Schnierle stated that "the Circuit Court basically said that [Verizon] can't shield the data services from resale by sticking them in a separate affiliate." Tr. at 14. The OCA submits that Verizon offer competitive access to DSL related services just as it must do so for other services.

Given the recent ACE ruling, the OCA submits that Verizon should be required to unbundle and resell its DSL AM elements. Moreover, the OCA submits that

the PUC should abide by its Global Order and use its authority to require Verizon to unbundle its DSLAMS.

4. Digital Line Carrier

Moreover, the OCA submits that Verizon should be required to provide line sharing to CLECs for customers served by loops that include fiber facilities ("fiber loops") in order to aid them in obtaining access to xDSL services over such loops. The PUC in Covad stated "the technical aspect [of line sharing over fiber loops] is unclear" and "technology developments in this area are occurring at a rapid pace[,]" and, therefore, directed the parties to advise the PUC as to whether a technical conference should be scheduled to address this issue. Covad at 19. The parties were also required to inform the PUC of "similar efforts taking place in other jurisdictions." Id. More than two and one-half months later it is not apparent that substantial progress is being made on this issue.

The OCA submits that the PUC should require Verizon to offer CLECs competitive access to such fiber loops because access to these loops will allow customers access to competition for these xDSL services. The PUC has recognized that technology in the telecommunications field is advancing rapidly, and the OCA submits that such advancement in technology is the key to providing customers, particularly in rural areas,⁴⁷ with quality xDSL services. The OCA further submits that the PUC should make progress

⁴⁷ Recall that the PUC in its Global Order recognized the need for "balanced development among rural, suburban and urban areas." Global Order at 107, 116.

on such technical issues before the PUC makes a recommendation to the FCC as to whether Verizon should be granted access to long-distance service.

5. Conclusion

The OCA concludes that the PUC should not lose sight of its position in the Global Order regarding DSLAM unbundling and CLEC access to loop information. The PUC should take the appropriate steps to ensure that CLECs obtain prequalification information as well as requiring Verizon to unbundle DLSAM elements in order to ensure a more competitive market. Moreover, the PUC should follow up on its November 15, 2000 Order in Covad by setting a technical conference to discuss whether fiber loops should be available to CLECs.



B



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