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February 28, 2002

In the Matter of Petition of Verizon Maryland, Inc. for a Declaratory Ruling and for an Order Approving Amendments to Interconnection Agreements.	* * *	Case No. 8914

To All Parties of Record and Interested Persons:

Enclosed is a copy of Order No. 77578, issued today by the Commission in the above case.

Also enclosed is an Admission of Service form, which we ask that you complete, sign and return to our office.

Very truly yours,

Naomi Miranda
Management Associate

rmm

Enclosures

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STATE OF MARYLAND
PUBLIC SERVICE COMMISSION
ORDER NO. 77578

IN THE MATTER OF THE PETITION OF VERIZON MARYLAND, INC. FOR A DECLARATORY RULING AND FOR AN ORDER APPROVING AMENDMENTS TO INTERCONNECTION AGREEMENTS.	* * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 8914

On August 17, 2001, Verizon Maryland, Inc ("Verizon") filed a Petition for Declaratory Ruling and an Order Approving Amendments to Interconnection Agreements. ("Petition"). In this Petition, Verizon requests that the Commission declare that the new rates for Internet-bound traffic established in the Federal Communications Commission's ("FCC") *Order* on *Remand*[1] apply as of June 14, 2001. This declaration would only pertain to Verizon's existing interconnection agreements that have change of law provisions.

Verizon also contends that several competitive local exchange carriers ("CLECs") have failed to respond to Verizon's repeated offers to negotiate amendments regarding the FCC's recent Order. Verizon asks that the Commission direct these CLECs to make Verizon's proposed amendment part of their interconnection agreements.

In the *Order on Remand*, the FCC determined that Internet-bound traffic is a form of interstate access traffic that is not subject to the reciprocal compensation obligations of the Telecommunications Act of 1996 ("1996 Act"). *Id.* ¶¶ 30, 39, 42-47. For carriers not already exchanging such traffic or not entitled to compensation for such traffic under the

[1] Order on Remand and Report and Order, *Intercarrier Compensation for ISP-Bound Traffic*, cc Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("*Order on Remand*"). The FCC's *Order on Remand* established a new reciprocal compensation structure for Internet-bound calls.

terms of their interconnection agreements, the FCC ordered that the "bill and keep" compensation system must apply as of the *Order on Remand's* effective date. *Id.* ¶ 81. For carriers entitled to payment for Internet-bound traffic under their agreements prior to the effective date of the new rules, the FCC stated that the new rate regime should be implemented through contractual change-of-law provisions. *Id.* ¶ 82.

Verizon argues that when an interconnection agreement provides for modification of its terms and conditions to reflect changes in applicable law, such modifications are effective as of the effective date of those changes in law.[2] Verizon also argues that applying the FCC rates as of the effective date of the *Order on Remand* under the change-of-law provisions in interconnection agreements is consistent with past practice in Maryland. According to Verizon, a number of competitive local exchange carriers ("CLECs") are refusing to negotiate the required amendment or deliberately dragging out negotiations.

Several CLECs responded to Verizon's Petition.[3] For example, WorldCom, Inc. ("WorldCom")[4] disputes Verizon's contention that it is not negotiating in good faith. WorldCom also claims that any negotiated amendment would not go into effect until that amendment is approved by the Commission rather than becoming effective on the date of the *Order on Remand* as argued by Verizon. WorldCom also argues that the change of law provision in its interconnection agreement with Verizon is not invoked by the *Order on Remand*. WorldCom also requested that the Commission sanction Verizon for withholding

[2] Petition at page 5.
[3] CLECs filing a response include WorldCom, Inc. and Allegiance Telecom of Maryland, Inc. Joint comments were filed by the Competitive Telecommunications Association, Core Communications, Inc., e.spire Communications, Inc., KMC Telecom Holdings, Inc., SniP Link LLC and XO Communications. ("Joint CLEC Parties").
[4] WorldCom filed on behalf of MCImetro Access Transmission Services LLC and MCI WorldCom Communications (formerly MFS Intelenet of Maryland).

reciprocal compensation payments. WorldCom asks that the Commission require Verizon to remit withheld payments and to cease and desist withholding such payments. WorldCom also requests that the Commission impose a fine on Verizon of $25,000 per day.

The Commission Staff ("Staff") also filed a response to Verizon's Petition. Staff recommends that the Commission deny Verizon's request and order Verizon to negotiate amendments to its interconnection agreements to reflect the new rates for Internet-bound traffic. According to Staff, the new rates would become effective upon approval of the Commission or upon the negotiated effective date.

Specifically, Staff recommends dismissal of Verizon's Petition because the claims are too individualized to issue such a ruling. The Staff noted that the interconnection agreements have different change of contract provisions, which may require different orders. Staff expressly notes that merely having a provision called a change of law provision may be insufficient to grant the relief Verizon requests in its Petition. Staff also disagreed with Verizon's analysis of the effective date. According to Staff, if the effective date of a negotiated amendment was required to be the same as the effective date of the *Order on Remand*, the FCC would have stated so expressly.

In its Reply, Verizon contends that its central legal premise has not been challenged by the CLECs. This premise is that the FCC's new rate regime should apply as of June 14, 2001 because the terms of the agreements, including the change-of-law provisions, evidence the parties intent to conform their agreements and conduct to changes in law. Verizon also claims that the CLECS do not dispute their obligation to negotiate amendments in a timely manner and in good faith. According to Verizon, in light of their

failure to meet this obligation, the FCC's new rates should apply as of June 14, 2001. Verizon also argues that the CLECs do not dispute that applying the FCC's new rates as of June 14, 2001 is consistent with past practice in Maryland and industry norms. Finally, according to Verizon, the CLEC's failed to respond to Verizon's argument that delaying the implementation date will create serious harm to competition.

DISCUSSION

On April 27, 2001, the FCC released its *Order on Remand* establishing a new rate regime for Internet Service Provider (ISP) traffic. The FCC declared that ISP-bound traffic constitutes "information access" and thus is not subject to the reciprocal compensation requirement of §251 (b)(5) of the 1996 Act. The FCC concluded that it has the authority under Section 201 of the 1996 Act to regulate ISP-bound calls and to establish inter-carrier compensation rules for such calls.

Under the FCC plan, reciprocal compensation rates for ISP-bound traffic are subject to declining rate caps over a 36-month period. Traffic exceeding a three-to-one ratio of terminating to originating traffic is presumed, unless proven otherwise, to be ISP-bound traffic subject to the FCC's rate structure. After the 36-month period, bill-and-keep compensation would apply to such traffic instead of reciprocal compensation.

While the new rate regime went into effect on June 14, 2001 for carriers entering into new or renegotiated interconnection agreements, the FCC clearly envisioned prospective application of the new rates for existing interconnection agreements. The FCC stated:

> "The interim compensation regime we establish here applies as carriers renegotiate expired or expiring

> interconnection agreements. It does not alter existing contractual obligation, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."[5]

The conclusion that the FCC expected only prospective application of the *Order on Remand* is further supported by the FCC's statement that "as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic."[6] If the *Order on Remand* automatically became effective for all interconnection agreements as of June 14, 2001, the FCC would not have found it necessary to place this restriction on the opt in provision. Carriers opting in after June 14, would have also opted in to the FCC's new ISP rate regime.

Thus, the *Order on Remand* clearly is not self-executing for existing interconnection agreements. Instead, the FCC provides that its interim compensation regime will apply prospectively as carriers renegotiate such agreements. The FCC *Order on Remand* also provides that a party may change the terms of an existing agreement if permitted to do so by a change-of-law provision. The FCC was not directing that agreements be amended pursuant to change-of-law provisions, the agency merely recognized that some agreements may have applicable change-of-law provisions. While individual change-of-law provisions may provide that an agreement shall be deemed to have been amended automatically if the law changes, this is not necessarily the case in every instance.

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[5] *Order on Remand*, ¶ 82.
[6] *Id.* at ¶ 82.

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Thus, Verizon's argument that declaring the FCC's new rates apply as of the effective date of the *Order on Remand* is consistent with controlling legal authority and sound public policy is simply erroneous. The FCC has determined otherwise and found that this aspect of its rate regime should be prospective only. This Commission cannot reach a contrary determination. If Verizon does not agree with the prospective nature of the FCC *Order on Remand*, its only recourse is to petition the FCC or the courts.

Verizon also asks this Commission to order those CLECs who have refused or delayed negotiating an amendment to the interconnection agreement to adopt Verizon's proposed amendment. The Commission is becoming increasingly concerned with the amount of time and resources it is forced to expend on this one issue. However, in this instance, the Commission agrees with Staff that the claims are too individualized for such a generic ruling. Interconnection agreements contain differing change of law contract provisions. The specific wording of each change of law contract provision may require the Commission to reach a different result. Furthermore, Verizon's request appears to be based, in part, on allegations that the carriers have not negotiated in good faith. However, the question of whether an individual carrier has negotiated in good faith is a factual determination which cannot be made in the context of a declaratory ruling.

The Commission finds that the issue of reciprocal compensation for ISP calls has dragged on far too long. In an effort to expedite this matter and hopefully achieve a final resolution, all CLECs listed in Exhibit 9 of Verizon's Request for Declaratory Ruling (Attachment A) are directed to respond to Verizon's proposed amendment within seven days of the issuance of this Order. This response shall take the form of either (1) a declaration that the issue has been resolved and thus no further action is necessary; (2)

acceptance of the Verizon amendment; (3) proposed alternative language with an explanation regarding why this alternative should be adopted by the Commission; or (4) an explanation of why no amendment is necessary or appropriate given the specific language of the individual interconnection agreement. The Commission expects that these filings will be limited to the issues set forth above.

Verizon shall have seven days to respond to the CLEC filings. After receipt of these filings, the Commission shall determine what proceedings, if any, are necessary to resolve the individual issues expeditiously.

Finally, the Commission must address WorldCom's request that Verizon be sanctioned for withholding reciprocal compensation payments. The Commission denies this request. It is inappropriate to consider a request for sanctions, which requires evidentiary support, within the context of a Declaratory Ruling. Furthermore, WorldCom requested that Verizon be fined $25,000 per day for this alleged violation. However, the Commission's fining authority is limited to penalties of $10,000 per day.

IT IS, THEREFORE, this 28th day of February, in the year Two-Thousand and Two, by the Public Service Commission of Maryland,

ORDERED: (1) That Verizon Maryland, Inc's request that the Public Service Commission declare that the new rates established in the Federal Communications Commission's *Order on Remand* apply as of the effective date of that Order is denied;

(2) That Verizon Maryland, Inc's request that the Public Service Commission order those competitive local exchange carriers listed in Exhibit 9 to adopt Verizon's proposed amendment is denied;

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(3) That all carriers listed in Exhibit 9 shall respond to Verizon's proposed amendment within seven days of the issuance of this Order;

(4) Verizon shall have seven days to respond to the carriers filings; and

(5) WorldCom, Inc's request for sanctions is denied.

By Direction of the Commission,

Felecia L. Greer
Executive Secretary

PETITION FOR DECLARATORY RULING OF VERIZON MARYLAND INC.

EXHIBIT 9

CLECs which have failed to respond.

EXHIBIT 9

ICG Telecom Group Inc.
Interactive Communications, Inc.
Intermedia Communications, Inc.
International Telephone Group, Inc.
Interpath Communications, Inc.
Jato Operating Two Corp.
Jerry LaQuiere
Jones Telecommunications of Maryland, Inc., d/b/a Comcast Communications of Maryland, Inc.
JTC Communications, Inc.
LCI International Telecom Corp.
LightWave Communications, LLC
Lightyear Communications Inc.
Massachusetts Local Telephone Company, Inc.
Max-Tel Communications, Inc.
Megatel Corporation
Metromedia Fiber Network Services, Inc.
MVX.Com Communications, Inc.
Netel, Inc. d/b/a Tel3
Net-Tel Corporation
Network Plus, Inc.
New Edge Network, Inc.
New Frontiers Telecommunications
North American Telecommunications Corporation
North American Telephone and Telecommunications, Inc.
NOS Communications Inc.
Ntegrity Telecontent Services Inc.
Nustar Communications Corp.
NuStar Telephone Company Inc.
OMC Communications Inc.
Optimum Global Communications, Inc. d/b/a Local Phone Company
Pathnet Operating, Inc.
Phone Reconnect of America, LLC
Phone-Link, Inc.
Picus Communications LLC
Plan B Communications, Inc.
Preferred Carrier Services, Inc. d/b/a Phone for All (Spanish) Telefonos Para Todos
Quality Telephone, Inc.
Quantum Telecommunications, Inc.
ReFlex Communications, Inc.
Rhythms Links Inc.
ServiSense.com Inc.
Starpower Communications LLC
Talk Time Communications Ltd.
Talk.Com
Tekbilt World Communications Inc.
TeleServices Group, Inc. f/k/a COMAV

EXHIBIT 9

Transbeam
Trucom Corporation
United States Telecommunications, LLC d/b/a Tel Com Plus
US Mobile Services Inc.
US WATS Inc
US West Interprise America Inc
USA eXchange, LLC d/b/a Omniplex Communications Group
USN Communications Atlantic Incorporated
VDL Incorporated d/b/a Global Telecom Brokers
VIC-RMTS-DC, LLC d/b/a Verizon Avenue
We Connect Communications Inc.
xDSL Networks Inc.