

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the matter of

Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration

WC Docket No. 02-359

REPLY TO VERIZON'S PETITION FOR RECONSIDERATION

Cavalier Telephone, LLC ("Cavalier") hereby responds to the Petition for Reconsideration in this matter filed by Verizon Virginia, Inc. ("Verizon") on January 12, 2004. ("VZN Petition"). The VZN Petition should be denied in all respects.

1. THE BUREAU PROPERLY SET ASIDE SUPPOSEDLY AGREED-UPON LANGUAGE.

Verizon says the Bureau set aside language on which the parties had agreed, and argues that this is improper because (a) parties are free under 47 U.S.C. § 252(a)(1) to agree to things without regard to the substantive standards of 47 U.S.C. §§ 251-252, and (b) an arbitrator can only resolve "open issues." VZN Petition at 1-2.

Verizon's citations are accurate but irrelevant. Arbitration addresses open or unresolved *issues*, see 47 U.S.C. §§ 252(b)(1), (b)(2)(A)(i), (b)(4)(B), (b)(4)(C), 252(c), not open or unresolved *contract language*. Resolving any "issue" will inevitably affect the language of the contract. The parties may have already identified all contract provisions affected by an arbitrator's resolution, but sometimes the substance of a resolution — which the parties may not have foreseen — will require new language in provisions the parties had not realized were in play. In that case, resolving the issue may well dictate changes in contract language that the parties had previously, in some sense, "agreed upon." As a result, arbitrators may and should

mandate changes even to agreed-upon contract language where needed to effectuate the resolution of an “issue.” Verizon’s specific complaints are baseless for this reason, and for the additional reasons discussed below.

a. Dark fiber splicing. The parties litigated many practical and operational concerns regarding access to dark fiber.¹ Verizon complains that the Bureau deleted language agreeing that Verizon did not have to splice dark fiber, but disingenuously ignores the specific reason the Bureau struck that language: the need to conform the contract with “Applicable Law,” which the parties agreed was appropriate. *See MO&O* at ¶ 105. That law changed — or at least was clarified — by the Commission’s *Triennial Review Order*,² as the Bureau noted, so that the original language no longer complied with applicable law. To claim that the now-outmoded language should remain in the contract is pettifoggery. Since Verizon doesn’t like the fact that the Commission requires splicing, it would obviously prefer that the old language be included, and then force Cavalier to request that the offending sentence be deleted (as “Applicable Law” now plainly requires), and then litigate some more about that. The Bureau, however, properly resolved the parties’ dispute about dark fiber by conforming the language of the contract to “Applicable Law.”

b. Loop qualification rate. The parties disagreed about pricing of loop qualification. Cavalier ultimately proposed that the parties use the rates adopted by the Bureau in the *Virginia*

¹ See Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration, WC Docket No. 02-359, *Memorandum Opinion and Order* (released December 12, 2003) (“*MO&O*”) at ¶¶ 100-125.

² In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, CC Docket Nos. 01-338, 96-98, and 98-147, FCC 03-36, Report and Order and Order on Remand and Further (footnote continued)...

Cost Issues Arbitration Order. See *MO&O* at ¶¶ 82 & ff. The Bureau agreed, and interpreted that earlier order as not just setting rates for certain elements, but instead as identifying the complete set of elements for which Verizon could charge. That exhaustive list did not include the \$0.40 charge for loop qualification. As above, the Bureau resolved an "issue" in a way that affects contract provisions that the parties might not have specifically identified in advance.

c. Loop qualification language. Verizon complains that the Bureau told the parties to renegotiate Section 11.2.12.2 of the contract, even though one subsection — Section 11.2.12.2(A) — was not identified as in dispute. Here, the Bureau properly looked at each party's proposal for Section 11.2.12.2 *as a whole*, concluded that each of them fell short, and sent the parties back to the drawing board to come up with language that conforms to applicable law. This action is completely consistent with the Bureau's obligation to deal with open *issues*, not with each and every nit of particular contract language.³

2. RECONSIDERATION IS NOT NEEDED AS TO BILLING INFORMATION (ISSUE C3).

In resolving Issue No. C3 the Bureau recognized that Verizon was putting Cavalier in an impossible situation by sending Cavalier traffic from third-party carriers without the information needed to identify which third-party carrier originated the traffic (so that Cavalier can send that carrier a bill). See *MO&O* at ¶¶ 32-43. The Bureau specifically found that Verizon must send to Cavalier *both* (a) the information regarding the originating carrier that is normally generated by Verizon's billing system *and* (b) "*in addition to* those billing tapes, whatever information it has

...(footnote continued)

Notice of Proposed Rulemaking, 2003 FCC LEXIS 4697 (released August 21, 2003) (the "*Triennial Review Order*").

³ Negotiations will either moot Verizon's complaint or show that the Bureau is right. If the parties really agree on Section 11.2.12.2(A) *in light of the renegotiation of Section 11.2.12.2 as a whole*, it will appear in the final contract. But if, in light of the need to renegotiate all of Section 11.2.12.2, Section (footnote continued)...

about the originating carrier or calling party number to Cavalier for those calls where such information is not readily apparent on the billing tapes sent to Cavalier and Cavalier requests such information.” *MO&O* at ¶ 42 (emphasis added).

Verizon implies that reconsideration is needed to correct an oversight, the result of which is supposedly that the specific contract language imposed by the Bureau “does not sufficiently reflect the *Order’s* holding that the provider of transit services is *only* required to pass to the terminating carrier the billing information that the transit provider receives from the originating carrier.” *VZN* Petition at 2 (emphasis added). But the discussion above shows that Verizon’s argument is wrong, because it ignores what the Bureau actually held: the Bureau did not find that this was the “only” information Verizon had to provide.

In this regard, while Verizon is correct that the Bureau did not require Verizon to pass to Cavalier information Verizon does not have, the Bureau also found that (a) in some cases Verizon does not pass adequate billing information (*MO&O* at ¶39) and that (b) Verizon typically has access to information that would address this problem, *even if that information is not embedded in industry-standard billing data*. Specifically, Verizon controls how it passes calls to Cavalier, and is likely to possess information to identify the underlying carrier. See *MO&O* at ¶ 40 & n.148. The contract language the Bureau adopted is intended to require Verizon to provide that information, and to preclude Verizon from squelching critical call identifying data, and from populating call record fields with incorrect data. The mandated contract language, in short, plainly *does* properly implement the Bureau’s ruling on this issue.

Verizon’s proposal on reconsideration would simply revert the parties back to the *status*

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11.2.12.2(A) is no longer mutually acceptable, that will simply prove that the Bureau was right to include it within the general directive to renegotiate the issue.

quo prior to arbitration. This would eliminate any Verizon incentive to cease squelching important information necessary for Cavalier to render accurate bills. The Commission was correct to adopt Cavalier's proposed language in 5.6.6.2, and reconsideration should be denied.

3. THE BUREAU SHOULD NOT RECONSIDER DELETION OF VERIZON'S LOOP QUALIFICATION LANGUAGE (ISSUE C9).

In resolving Issue No. C9, the Bureau rejected both parties' proposed language regarding loop qualification, and directed the parties to renegotiate it. *MO&O* at ¶¶ 62-81. The Bureau is plainly authorized to take this step when it concludes that neither party's final offer would fulfill the requirements of the statute. *See* 47 C.F.R. § 51.807(f)(3). On reconsideration, Verizon claims that its proposed language was clear and conformed to the same "applicable law" that the Bureau relied upon in its ruling. VZN Petition at 3-6.

Cavalier submits that Verizon's need to explain, at this late stage of the proceedings, how its language supposedly works, is itself evidence that the language is not quite as clear as Verizon would suggest. For example, the Bureau fairly strongly indicated that it wanted the contract to specify that Cavalier is entitled to use LFACS for loop qualification. *MO&O* at ¶ 70 n. 231. Verizon's language, however, does not mention LFACs; it generically refers to "a mechanized database." Verizon says that this is good enough. *See* VZN Petition at 5. But simple logic indicates that while LFACS may be a mechanized database, there are mechanized databases that are not LFACS. In other words, Verizon's language does not, in fact, directly guarantee access to LFACS.

Cavalier is prepared to negotiate with Verizon on this point. Cavalier understands that it is not entitled to anything not consistent with applicable law, and expects Verizon understands that as well. Verizon has not shown that the Bureau erred in any way in requiring such renegotiation. Reconsideration, therefore, should be denied.

4. THE BUREAU PROPERLY EXCLUDED CUSTOMER CONTACT VIOLATIONS FROM THE CONTRACTUAL LIMITATION OF LIABILITY (ISSUE C25).

Verizon claims that the Bureau erred in deciding that Verizon would be liable for repeated violations of standards of professionalism in its contacts with Cavalier customers, without being subject to contractual limitation of liability clauses. VZN Petition at 6-8. Verizon's basic argument is that it is customary in the industry to limit damage liability to direct damages and that there is supposedly no reason to depart from that standard here. *Id.*

Verizon has not shown that the Bureau's conclusion on this issue was in any way mistaken; Verizon has just restated why it thinks its position is right. This is not a valid ground for reconsideration. That said, while damages from disparagement are real and can be extensive, it can be very difficult to prove direct damages from this kind of misconduct. Disparagement by Verizon will damage Cavalier's reputation with actual and potential customers, leading to early disconnects, fewer sales, etc., going well beyond the precise, surgically-defined harm caused by poisoning the mind of the particular customer(s) targeted for this activity.

If the ban on unprofessional Verizon conduct is to have any teeth, Verizon must be fully liable for *all* the damages such conduct causes. It is therefore fully appropriate to exclude this type of contract breach from the general contractual limitation of liability.⁴

⁴ The Bureau invested a great deal of time and effort dissecting the parties' respective positions regarding unprofessional conduct, and fashioned a solution that did not fully adopt the views of either party. See *MO&O* at ¶¶ 145-58, 180-84. If the Bureau is inclined to modify its conclusion as to the proper balance of contractual provisions on this issue by limiting Cavalier's potential recovery to "direct" damages, then Cavalier submits that maintaining a fair balance of provisions would require the Bureau to clarify in the contract itself what those "direct" damages are. This would be accomplished by including a liquidated damages provision for violations of the professionalism standards, as Cavalier had suggested. Liquidated damages ensure that a damaged party is compensated where actual damages are hard to determine, and are small relative to the costs of litigation. As long as the liquidated damages amount reflects a reasonable estimate of those damages in light of the information available at the time of contracting, a liquidated damages provision is not a "penalty" and is fully enforceable. See American Law Institute, *RESTATEMENT OF THE LAW, SECOND, CONTRACTS* § 356, comments a & b (1981). A precise contractual definition of what damages are recoverable in the case of a violation of the
(footnote continued)...

5. **THERE IS NO REASON TO RECONSIDER THE BUREAU'S RULING ON WIN-BACK CHARGES (ISSUE C27).**

Verizon makes several claims regarding reconsideration of the Bureau's decision to allow Cavalier to impose "win-back" charges on Verizon. *See* VZN Petition at 8-14. First, Verizon claims that the Bureau lacks jurisdiction to set such a rate for Cavalier. *Id.* at 9-10. Second, it claims that the Order is contrary to the evidence. *Id.* at 10-14. Finally, it asserts that Cavalier never supplied a cost study to support its charges. *Id.* at 13-14.

The jurisdictional argument is simply wrong. The charge of \$13.49 is not being "set" in the context of this case — at least not in any ratemaking sense. That charge was "set" for Verizon, by the Virginia State Corporation Commission, in Case No. PUC970005.⁵ In this case, Cavalier simply took the position that "what's good for the goose is good for the gander," so that if Verizon can assess that charge on Cavalier, then fairness requires that in analogous situations Cavalier be permitted to assess it on Verizon. Establishing this sort of symmetry and mutuality in the terms and conditions associated with the parties' activities under the contract is plainly within an arbitrator's authority, including the Bureau acting in the stead of a state.⁶

On the merits, Verizon claims that Cavalier should not be entitled to this charge because

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professionalism standards would simultaneously moot Verizon's concerns as stated in its Petition, and give those standards the bite they need to actually affect Verizon's behavior.

⁵ *See* 4/15/99 Final Order, available at <http://www.state.va.us/scc/caseinfo/puc/case/c970005d.pdf>.

⁶ Note also that Verizon first *agreed* to arbitrate this issue but then claimed that the Bureau lacked jurisdiction — a "bait and switch" tactic that provides an equitable basis for jurisdiction. *See* Cavalier's Post-Hearing Brief (10/27/03) at 72. In this regard, the same Fifth Circuit case cited in Verizon's Petition (at 1 n.1) held that "[t]here is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c);" that "Congress clearly contemplated that...carriers subject to the Act might choose to include other issues;" and that "these non-251 issues might be subject to compulsory arbitration if negotiations fail." *Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 2003 U.S. App. LEXIS 23781 at *9-*10 (5th Cir. 2003); *see also id.* at n. 15 (citing authorities); Cavalier Submission of Supplemental Authority (11/26/03) (discussing *Coserv* case). Clearly, therefore, both legal and equitable grounds support the Bureau's exercise of jurisdiction.

Cavalier admitted that it does not perform physical cross-connect and field functions in the case of handling a Verizon win-back order. VZN Petition at 11-12. But the Bureau noted that Verizon itself could not confirm at the hearing what individual functions are, and are not, included within the win-back charge, and Verizon's witnesses admitted under cross-examination that most of the functions performed by Cavalier are the in fact the same. See *MO&O* at ¶¶ 203-205. Moreover, the Bureau specifically and properly found that Cavalier's processing of a win-back is similar in "purpose and scope" to Verizon's. See *MO&O* at ¶ 204. This record plainly supports using Verizon's charge to Cavalier in a symmetrical fashion, as the Bureau did.

Verizon's claim that Cavalier should have produced its own cost study to support *Verizon's* charge, VZN Petition at 12-13, is meritless. Cavalier did not propose any new rates of its own on this issue; and it did not propose to charge Verizon more than Verizon charges Cavalier for analogous functions, similar in "purpose and scope."⁷ Once Cavalier demonstrated that it was seeking a reciprocal charge for functions that Verizon was charging to Cavalier, the burden shifted to Verizon to explain, if it could, why this was not appropriate. Verizon's witnesses failed at this task: they weren't sure what the charge covered with any specificity, but they did admit that in general terms Cavalier wanted to charge Verizon for the same things Verizon charged Cavalier for. No reconsideration on Cavalier's basic right to assess win-back charges on Verizon, therefore, is warranted.

That said, the discussion above shows that Cavalier is *not* attempting to establish or justify a separate and independent rate for its performance of these functions but, instead, to rely on Verizon's rate. As a result, Cavalier agrees with Verizon that the parties' agreement should

⁷ In fact, this rate meets the aim of language initially sought by Verizon for §§ 20.2 and 20.3 of the interconnection agreement, under abandoned Issue V9. See Cavalier's 10/24/03 Notice of Final Subsequent Offers, Exhibit "B," Update to Status of Issues, at p. 4.

contain language to the effect that any changes in *Verizon's* rate for these functions in the future should translate automatically into changes in Cavalier's rate. See VZN Petition at 14, citing *MO&O* at ¶ 205 & n. 679. While Verizon now anticipates that its rate will be reduced, that may not be true for the entire term of the contract, so language implementing this point should make clear that Cavalier's charge to Verizon will be the same as Verizon's charge to Cavalier, whatever that charge might be over the course of the contract term.

6. CONCLUSION.

For the reasons stated above, Cavalier respectfully requests that the Bureau deny Verizon's Petition for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that true and accurate copies of the foregoing pleading were served on the following persons on January 22, 2004, by the methods indicated:

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