

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
BellSouth Emergency Petition for) WC Docket No. 04-245
Declaratory Rule and Preemption)
of State Action)

**REPLY COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

On July 6, 2004, the Federal Communications Commission (Commission) released a *Public Notice* by which the Commission established a pleading cycle for comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action.¹ Interested parties were invited to file Comments on or before July 30, 2004, and Reply Comments on or before August 16, 2004. The Pennsylvania Public Utility Commission (PA PUC) hereby files timely Reply Comments.

The PA PUC submits these Reply Comments to address the Comments of Verizon filed July 30, 2004. The Regional Bell Operating Company in Pennsylvania is Verizon Pennsylvania Inc., which is a Verizon Telephone

¹ According to the Notice, on July 1, 2004, BellSouth filed an emergency petition for declaratory ruling and preemption of state action regarding a recent order of the Tennessee Regulatory Authority (TRA). BellSouth asserts that on June 21, 2004, the TRA issued an order that sets a "market rate" for switching for customers with four or more lines in the Top 50 MSAs in the context of a section 252 arbitration, citing authority pursuant to 47 U.S.C. §271. BellSouth argues that the TRA has no authority to establish rates under section 271, arguing that only the FCC has authority to regulate section 271 rates. Accordingly, BellSouth requests that the Commission issue an order declaring that states have no jurisdiction over elements provided pursuant to section 271 and should preempt the TRA's order.

Company affiliated with Verizon Communications Inc. Verizon Comments at Appendix A.

Verizon urges the Commission to grant BellSouth's petition. In support, Verizon cites to several recent PA PUC decisions. Verizon Comments at 2 (citing Reconsideration Order entered May 28, 2004 at PA PUC Docket No. I-00030100 and Order entered July 8, 2004 at PA PUC Docket No. R-00038871C0001).² Verizon argues that the PA PUC "relied on section 271 in ordering Verizon to continue providing circuit switching for enterprise customers and line sharing at TELRIC rates." *Id.* According to Verizon, these orders entered by the PA PUC are "part of a systematic and nationwide effort by CLECs to reimpose the discredited regime of maximum unbundling by relying on section 271 to override the Commission's no impairment findings...." *Id.* at 1.

Contrary to Verizon's representations, the PA PUC orders cited by Verizon do not support the granting of BellSouth's Petition. Far from requiring section 271 access at TELRIC rates, the PA PUC has held that existing section 271 access requirements and the TELRIC rates at which they have been priced will continue on an interim basis pending further action by the Commission. This policy insures

² These orders are available at the PA PUC website. Go to <http://www.puc.state.pa.us/PcDocs/467014.doc> and <http://www.puc.state.pa.us/PcDocs/478365.doc> respectively.

Verizon has filed a federal complaint for declaratory and injunctive relief against the May 28 Reconsideration Order. *Verizon Pa. Inc. v. Fitzpatrick*, No. 04-2709 (amended complaint filed Aug. 10, 2004, E.D. of Pa).

that the PA PUC does not sanction any Verizon proposal³ filed in Pennsylvania that arguably violates or compromises Verizon Pennsylvania Inc.'s ongoing section 271 commitments to keep local markets open to competition.

The PA PUC's Reconsideration Order of May 28 provides:

We grant the petition in part to clarify our position on the pricing of network elements unbundled pursuant to § 271. Contrary to Verizon's suggested interpretation, the *December Order* does not mandate that TELRIC pricing be used to price such network elements. Rather, as observed by ARC, the order merely provides that existing Tariff No. 216 rates be used at present because they are currently in effect and fall within the range of a just and reasonable price. Verizon remains free to exercise all of its rights to propose the establishment of new just and reasonable prices applicable to § 271 network elements.

Since the *Triennial Review Order* did not fully flesh out all the processes, procedures and requirements associated with Verizon's § 271 access obligations, we recognize that it remains unclear as to where and how Verizon's "just and reasonable" rate for access in a particular state (since § 271 is granted on a state-by-state basis) is established and/or disclosed to the requesting carrier. Our review of the *TRO*, the D.C. Circuit's opinion, and even the FCC's brief in the *USTA* litigation, has not provided any clarity on this point. However, given that the Tariff No. 216 is filed with the Commission, the Commission's existing procedures for tariff changes, namely 66 Pa. C.S. §§ 1301 and 1308, are available to be used if Verizon seeks to establish new non-TELRIC rates for enterprise switching. Meanwhile, the uncertainty again supports our observation that the

³ Verizon Pennsylvania Inc. has filed several proposed tariff revisions. The July 8 Order addresses Verizon's proposal concerning line sharing. Recent PUC Orders entered August 5, 2004, at PA PUC Docket Nos. R-00049524 and R-00049525 address switching and transport. The August 5 Orders have been challenged in federal court in Verizon's federal district complaint at No. 04-2709 cited above in footnote 2.

Tariff No. 216 rates are currently in effect and should be used until a new rate is properly established.

...

Presently, no FCC decision has relieved Verizon from its ongoing § 271 obligations in Pennsylvania, or fully defined what those obligations are in the wake of the *Triennial Review Order*. We conclude that there is no firm basis for this Commission to unilaterally sanction removal of a § 271 element from Verizon's offerings in Pennsylvania under the present state of FCC orders. If Verizon believes that its § 271 obligations in Pennsylvania have changed, it should put that issue to the FCC. Upon FCC approval of Verizon's position, modifications of relevant offerings would then be appropriate.

Reconsideration Order at 11-13 (footnote omitted).⁴

Similarly, the PA PUC's Order of July 8 provides:

Based on the conclusion that line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA's ongoing Section 271 obligations, we conclude that there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA's tariff under the present state of FCC orders. We further note that on October 24, 2003, the Verizon telephone companies filed a petition asking the FCC to forebear from § 271 obligations. See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; CC Docket No. 01-338. The matter is pending. Therefore, we conclude that it would be improvident to adjudicate Verizon PA's request to remove line sharing from its PA 216

⁴ The PA PUC notes that the PA PUC has an existing tariff filing system that, if needed, can be used to allow Verizon pricing flexibility. See, e.g., *Verizon Pennsylvania Inc. Informational Tariff for Competitive Services*, Pa. P.U.C. No. 500, Section 2, 1st Revised Sheet 13 at ¶ 29 (providing pricing flexibility on certain retail offerings).

Tariff until the ambiguity surrounding its obligation to maintain line sharing based on Section 271 has been addressed by the FCC.

If Verizon PA believes that line sharing should no longer be a part of its Section 271 obligations, that issue should be put to the FCC either in conjunction with or separate from, its forbearance request. Our determination to answer the second material question on Section 271 TA96 authority, makes it unnecessary to address state authority or preemption issues at this time. We express no opinion regarding the enforceability of our independent state authority preserved by 47 U.S.C. § 251(d)(3) and any other applicable law. After Verizon obtains a determination from the FCC as to its ongoing obligation to maintain line sharing as part of its 271 commitments, Verizon may then petition the Commission for such further action as may be appropriate.

July 8 Order at 20.

Furthermore, the PA PUC disagrees with Verizon's sweeping argument that state commissions have no authority to regulate 271 elements. Verizon claims that "Congress then assigned to the Commission, and the Commission alone, the task of ensuring that BOCs comply with those requirements." The Comments further claim that "Congress, moreover, did not provide any role for state commissions *after* approval of an application for long-distance authority." Verizon Comments at 1, 3, 5.

In Pennsylvania, as in other states, Verizon has subjected itself to state commission oversight under the so-called "Performance Assurance Plan." See *In the Matter of Application of Verizon Pennsylvania Inc. et al.*, Memorandum

Opinion and Order, FCC 01-269 (rel. Sep. 19, 2001), CC Docket No. 01-138; *accord* 47 U.S.C. §271(c) (linking state commission review and approval of interconnection agreements with the conditions for RBOC entry into the long distance market). The PA PUC may monitor Verizon's post-entry performance under the Plan and may impose penalties and measurements to ensure post-entry compliance with section 271 requirements. Not only is such state commission action lawful, the Federal government anticipates that state commissions will take such action in their role as an "effective steward" of competition. *Verizon Commun. Inc. v. Law Off. of Curtis V. Trinko, LLP*, ___ U.S. ___, 124 S.Ct. 872, 882 (2004).

The PA PUC also agrees with commenters that have questioned whether the BellSouth petition is the proper pleading to accomplish any desired clarification of the role of state commissions with respect to section 271 access or pricing. See, e.g., Letter of the New Jersey Division of the Ratepayer Advocate at 2, 4 (arguing that a rulemaking is the more appropriate vehicle to address the issues raised by BellSouth); *see also* Opposition of NARUC at 2-3 (arguing that BellSouth must comply with the forum requirements of 47 U.S.C. §252(e)(6)).

As discussed above, the PA PUC encourages the Commission to further address the processes, procedures and requirements associated with an RBOC's section 271 obligations. Such action, however, must be in conformance with the rule of law. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*,

535 U.S. 743 (2002). Where the Commission has procedural discretion, the PA PUC supports the Comments urging the Commission to proceed by rulemaking.

Conclusion

The BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action should be DENIED.

RESPECTFULLY SUBMITTED,

/s/ Maryanne Reynolds Martin

Maryanne Reynolds Martin
Assistant Counsel
Attorney ID No. 74648

Frank B. Wilmarth
Deputy Chief Counsel

Bohdan R. Pankiw
Chief Counsel

Counsel for Pennsylvania Public
Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265
Tel: (717) 787-5000
Fax: (717)783-3458

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