

Dee May
Vice President
Federal Regulatory



1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2529
Fax 202 336-7922
dolores.a.may@verizon.com

August 20, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of Local Competition Provision of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Dear Ms. Dortch:

Please place the attached white paper on the record in the above proceedings.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachment

cc: Scott Bergmann
Matt Brill
Michelle Carey
Jeff Carlisle
Daniel Gonzalez
Chris Libertelli
Tom Navin
Jessica Rosenworcel
John Stanley

THE COMMISSION SHOULD REJECT ALTS' ARGUMENTS TO UNLAWFULLY DELAY THE MANDATE IN *USTA II*

In a White Paper of July 28, 2004, Verizon explained that the Commission should reject the claims of certain CLECs that they be able – through drawn-out negotiations, a lengthy change of law process, or otherwise – to delay giving effect to the reduction of ILEC unbundling obligations mandated by *U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (“*USTA I*”).¹ In response to Verizon’s filing, the Association for Local Telecommunications Services (“*ALTS*”) urges the Commission to forestall the timely implementation of the D.C. Circuit’s mandate in *USTA II*, and specifically to obligate Verizon “to continue providing network elements at cost-based rates while it negotiates new interconnection agreements with its competitive carrier customers.”²

For the reasons set forth below, the Commission should reject ALTS’s dilatory tactics and explicitly provide that any reduction in unbundling requirements pursuant to *USTA II* be effective promptly, without lengthy negotiations or processes at the state level.

1. Many interconnection agreements explicitly provide that in the event a UNE is no longer required to be provided – either as a result of a judicial decision or regulatory order – the ILEC may cease provisioning the UNE, subject *only* to notice requirements set forth in the agreements. As explained in Verizon’s initial filing, there is therefore absolutely no basis to require a drawn-out negotiation process or transition period to effectuate a reduction in ILEC unbundling obligations where interconnection agreements contain such “flow through” provisions.³

ALTS has no answer to this straightforward point, but instead complains that “Verizon does not provide any examples of such agreements.”⁴ This is peculiar, particularly in light of the fact that several of ALTS’ own members have themselves entered into interconnection agreements with Verizon that contain this exact type of “flow through” language. For example, Verizon’s interconnection agreement with Broadriver Communication Corporation, a member of ALTS, contains the following “flow through” provision:

¹ Letter from Dee May, Vice President of Federal Regulatory, Verizon, to Marlene H. Dortch, FCC Secretary, CC Docket Nos. 01-338, 96-98, 98-147 (July 28, 2004) (attaching White Paper entitled “The Commission Cannot Lawfully Delay or Otherwise Avoid Implementation of the Mandate in *USTA I*” (“*Verizon White Paper*”)).

² Letter from Jason Oxman, General Counsel, ALTS, to Rebecca Dortch, FCC Secretary, WCB Docket Nos. 96-98, 98-147, 01-338, at 1 (August 3, 2004) (“*ALTS Ex Parte*”).

³ See Verizon White Paper at 2.

⁴ ALTS Ex Parte at 1.

Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to Broadriver hereunder, then Verizon may discontinue the provision of any such Service, payment or benefit, and Broadriver shall reimburse Verizon for any payment previously made by Verizon to Broadriver that was not required by Applicable Law. Verizon will provide thirty (30) days prior written notice to Broadriver of any such discontinuance of a Service, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.⁵

Similarly, Verizon's interconnection agreement with Winstar Communications, another ALTS member, has the following "flow through" provision:

Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, a Party is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to the other Party hereunder, then the Providing Party may discontinue the provision of any such Service, payment or benefit. The Providing Party will provide thirty (30) days prior written notice to the other Party of any such discontinuance of a Service, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.⁶

The Broadriver and Winstar agreements both explicitly include as a "Service" "[a]ny . . . Network Element" offered under those agreements.⁷

It is important to recognize that these examples evidence the various parties' understanding that *nothing more than a certain number of days* is necessary to permit the cessation of UNE provisioning and, moreover, that the agreed-upon time frame provides *a perfectly adequate period of time* for CLECs to make alternative arrangements or to

⁵ Interconnection Agreement between Broadriver Communication Corporation and GTE Southwest Incorporated (d/b/a Verizon Southwest), General Terms and Conditions § 4.7 (Texas) ("*Broadriver ICA*").

⁶ Interconnection Agreement between Verizon Pennsylvania Inc. and Winstar of Pennsylvania, LLC, General Terms and Conditions § 4.7 (Pennsylvania) ("*Winstar ICA*") (adopting the terms of the Interconnection Agreement between Business Telecom, Inc. and Verizon Maryland Inc.).

⁷ Broadriver ICA § 2.83; Winstar ICA § 2.84.

negotiate commercial terms to continue to use ILEC networks. This is especially true in light of the fact that these provisions resulted from the imbalanced Section 252 bargaining process that *favored* the CLECs.⁸

Accordingly, because these “flow through” provisions, by their very terms, allow ILECs to align their commercial practices with the mandate of *USTA II* without further process, there is no legitimate basis for the Commission to require any negotiations or change of law process for a reduction in unbundling obligations to be implemented.⁹ Under the interconnection agreements containing these provisions, that is the end of the matter. Indeed, any attempt to block the enforcement of the “flow through” provisions would *undermine* the D.C. Circuit’s mandate in *USTA II*, where as allowing these provisions to take effect directly *effectuates* the mandate in *USTA II* and therefore the will of Congress in enacting Section 251.

2. Even where an interconnection agreement does not include a “flow through” provision, there are still no grounds for the Commission to delay implementation of the mandate of *USTA II* by requiring continued adherence to interconnection agreements that conflict with that decision until the conclusion of lengthy negotiations over “changes in law” at the state level. This is true because a proper understanding of the judicial function dictates that *USTA II* did not “change” the governing law; therefore, its vacatur of the Commission’s unbundling rules did not trigger the generic “change of law” provisions in interconnection agreements.¹⁰

ALTS does not quarrel with the black letter law in Verizon’s initial filing establishing that judicial interpretations and constructions of statutory schemes do not “change” the law because “[a] judicial construction of a statute is an authoritative statement of what the statute meant *before* as well as after *the decision of the case giving rise to that construction.*” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).¹¹ Nor does ALTS seek to refute the principle that when a court strikes down an agency regulation, it is not *changing* the law but finding that the agency rule *does not comply with* the law because “[t]he regulation constitutes only a step in the administrative process.” *Dixon v. U.S.*, 381 U.S. 68, 74-75 (1965) (quoting *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 135 (1936)); *see also Legal Envtl. Assistance Found. v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) (explaining that “if [an agency’s] regulations are inconsistent with the statute . . . , these regulations are void *ab initio*”). Thus, ALTS’s filing leaves unchallenged the conclusion that *USTA II*’s vacatur of the

⁸ See Verizon White Paper at 2.

⁹ See *id.*

¹⁰ See *id.* at 2-3.

¹¹ See also *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (explaining that when judges “make law,” it is “*as though* they were ‘finding’ it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.” (emphasis in original)).

Commission's unbundling rules is not a "change" of law, but rather "an authoritative statement" by the D.C. Circuit of what Section 251 "meant before as well as after the decision." *Rivers*, 511 U.S. at 312-13.

ALTS instead offers *ad hominem* accusations of inconsistency. In particular, it accuses Verizon of "a complete reversal of the position it takes on [the change of law] provisions."¹² But its shining example of this supposed inconsistency – set forth in block format in its filing – quotes a letter that was not even from Verizon and regardless does not address the issue that the judicial decision here is a statement of what the law has always been. See Letter from Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., to Marlene H. Dortch, FCC Secretary, CC Docket Nos. 01-338, 96-98, 98-147, at 1-2 (January 21, 2003) (the "*SBC Letter*"). ALTS's accusation that Verizon has changed position is therefore unfounded.

Moreover, ALTS's additional claim that Verizon is contradicting itself because it sought negotiations with CLECs after *new* obligations to provide high-capacity loop facilities were imposed on it is not only without merit, but itself proves that requiring lengthy negotiations when an unbundling obligation is lifted would be unlawful.¹³ First of all, Section 251(c)(1) plainly *requires* ILECs to "negotiate in good faith in accordance with [S]ection 252 the particular terms and conditions of agreements to fulfill the [interconnection and unbundling] duties described" in Sections 252(c)(2) and (3). So when a *new* obligation to provide facilities is created by the Commission, an ILEC has no choice under the Act but to enter into Section 252 negotiations with CLECs concerning "the particular terms and conditions" of providing the facilities. In addition, it is abundantly clear in such a circumstance that negotiations are needed from a practical perspective to fill in the operational details and procedures of how the parties will implement the new provisioning requirements. Indeed, in the *Triennial Review Order*, where the Commission referenced the change of law process, it was in the context of "new agreement language implementing new rules."¹⁴

When an ILEC is *relieved* of an unbundling obligation, by contrast, there is neither a duty under the Act to enter into negotiations pursuant to Section 252 nor any new practical arrangements to be worked out. Consequently, if the Commission were to perpetuate through existing interconnection agreements the unbundling obligations that have now been declared unlawful, such action would be tantamount to simply reinstating the thrice-vacated UNE rules themselves for the period of time prescribed for any change of law process. It would also, in effect, be granting itself the stay that both the D.C. Circuit and the Supreme Court denied it, thereby flouting those court orders. And it – or

¹² ALTS Ex Parte at 2.

¹³ See *id.*

¹⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338 et al., 18 FCC Rcd 16978, ¶ 700 (Aug. 21, 2003) (the "*Triennial Review Order*"), *vacated in part by USTA II*, 359 F.3d 554 (D.C. Cir. 2004); Errata, 18 FCC Rcd 19020 (Sept. 17, 2003).

any other effort by the Commission to delay or otherwise avoid the import of *USTA II* – would violate the Commission’s basic legal duty to implement both the “letter [and] spirit of the mandate.” *Coal Employment Project v. Dole*, 900 F.2d 367, 368 (D.C. Cir. 1990) (per curiam) (quoting *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1130 (D.C. Cir. 1987)).¹⁵

3. As Verizon explained in its initial filing, the Commission must promptly unwind the unlawful unbundling obligations that were imposed on ILECs by the Section 252 process and the resulting interconnection agreements in order to execute the D.C. Circuit’s mandate in *USTA II*.¹⁶ To do so, the Commission must make clear that all reductions in ILEC unbundling obligations mandated by *USTA II* promptly flow through all interconnection agreements. This would implement the mandate of *USTA II* and the will of Congress, and thus be entirely consistent with the Commission’s general duties under the Act.

ALTS objects to this judicious course of action, which promotes rather than frustrates compliance with law, on several grounds – none of which alter its validity.

First, it claims the Commission has rejected Verizon’s “core claim of judicial support” for its position because, according to ALTS, the Commission has held that the “*Mobile-Sierra* doctrine is not applicable to interconnection agreements.”¹⁷ But ALTS is wrong on two fronts. As an initial matter, Verizon never suggested that *Mobile-Sierra* was a necessary or even “core” source of authority for the Commission to order that all reductions in unbundling obligations flow through existing interconnection agreements. Rather, Verizon simply pointed out that *in addition to* the Commission’s “broad remedial authority to correct for the effect of its own unlawful acts, such as its imposition of unlawful unbundling obligations through the mechanism of interconnection agreements[,]”¹⁸ the “Commission *also* has authority under the *Mobile-Sierra* doctrine to override the provisions of interconnection agreements that would impede the implementation of the mandate in *USTA II*.”¹⁹ In fact, ALTS has nothing at all to say about *Callery Properties* and *Natural Gas Clearinghouse*, and the broad remedial authority described in those cases.

¹⁵ See also *City of Cleveland v. FPC*, 561 F.2d 344, 346-48 (D.C. Cir. 1977) (Court of Appeals has broad authority to enforce its mandate, which encompasses “everything decided, either expressly or by necessary implication”) (quoting *Munro v. Post*, 102 F.2d 686, 688 (2d. Cir. 1939)).

¹⁶ Verizon White Paper at 4-6.

¹⁷ ALTS Ex Parte at 2-3.

¹⁸ Verizon White Paper at 5 (citing *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) (“An agency, like a court, can undo what is wrongfully done by virtue of its order.”); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (1992) (reading *Callery* to stand for “the general principle of agency authority to implement judicial reversals”)).

¹⁹ *Id.* at 5 n.3 (emphasis added).

Furthermore, ALTS's contention, based on a footnote in *IDB Mobile Communications, Inc. v. COMSAT Corp.*²⁰, that the Commission has held that *Mobile-Sierra* is not applicable to interconnection agreements is misplaced. The footnote statement to which ALTS refers is pure dicta: the case involved a satellite contract, not an ILEC interconnection agreement. The footnote dicta also fails to address the circumstance where, as here, the interconnection agreement reflects prior vacated rules. Indeed, the suggestion that the footnote in *IDB Mobile* is controlling here is further belied by the *Triennial Review Order*, where the Commission subsequently noted that it received argument by various parties on the application of *Mobile-Sierra*, but in fact neither decided whether it applied nor even mentioned *IDB Mobile*.²¹

Here, the Commission must draw upon either its broad remedial authority, the *Mobile-Sierra* doctrine, or its other powers, to make clear that all *reductions* of unbundling obligations required by *USTA II* take effect in *all* outstanding interconnection agreements without protracted negotiations or regulatory proceedings at the state or federal level. Failure to do so would be reversible error because it would result in the indefinite perpetuation of an unlawful regulatory regime. This is particularly true now that the unlawful rules have been vacated for a *third* time, and because, since the D.C. Circuit has lifted the temporary stay of its vacatur²², the ILECs' unbundling obligations no longer exist. See *Triennial Review Order* ¶ 705 (“[O]nce the USTA decision is final and no longer subject to further review, . . . the legal obligation upon which the existing interconnection agreements are based will no longer exist.”). In short, the Commission has not just the authority promptly and fully to remedy the effects of its unlawful unbundling rules but, indeed, the *duty* to do so.

Second, ALTS contends that the Commission has already rejected Verizon's “interpretation of [its] interconnection agreement obligations.”²³ But ALTS fails to cite anything to support its charge that the Commission actually rejected the conclusion that the D.C. Circuit's vacatur of the Commission's unlawful unbundling rules is not a “change” of law, but rather “an authoritative statement” by the D.C. Circuit of what Section 251 “meant before as well as after the decision.” *Rivers*, 511 U.S. at 312-13. That is because nothing in the *Triennial Review Order* ever *considered* the nature of judicial decisionmaking. Likewise, notwithstanding the Commission's statement in the *Triennial Review Order* that it was not “interfering with the contract process[,]”²⁴ it in

²⁰ *IDB Mobile Communications, Inc. v. COMSAT Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n.50 (2001).

²¹ *Triennial Review Order* ¶ 701 & n.2085.

²² See *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (April 13, 2004) (order granting stay of mandate through June 15, 2004); *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (June 4, 2004) (order denying further stay of mandate).

²³ ALTS Ex Parte at 2.

²⁴ *Triennial Review Order* ¶701.

fact did just that. As Verizon fully explained in its initial filing, the Commission exercised its broad authority in the *Triennial Review Order* to bring interconnection agreements into line with the rules it adopted there, proving that it can and has modified interconnection agreements.²⁵

In particular, the Commission overrode the plain terms of all interconnection agreements that were silent on change of law and/or transition time by: (1) “requir[ing] incumbent and competitive LECs to use section 252(b) as a default timetable for modification of interconnection agreements” needed to give effect to the new unbundling requirements adopted in that order; and (2) deeming the effective date of the *Triennial Review Order* to be the “notification or request date for contract amendment negotiations” to give effect to those new requirements.²⁶ It also read the Section 252 timetable into even those interconnection agreements where change of law provisions already existed.²⁷ In addition, it established a three-year transition period for new line sharing arrangements pursuant to which it dictated annual increases in rates and a termination of line sharing at the end of the transition period, notwithstanding the terms of existing interconnection agreements.²⁸ Thus, despite its claim that it could not “interfer[e] with the contract process[,]” the Commission actually exercised its authority to impose on all interconnection agreements new terms and requirements designed to bring them into line with the Commission’s new rules.

Finally, ALTS argues that “[t]o follow Verizon’s logic, because no change of law . . . has actually occurred, Verizon remains obligated to provide, pursuant to section 251 of the Act, those unbundled network elements that it is currently providing.”²⁹ To the contrary, Section 251(d) plainly demands that the Commission “establish regulations to implement the requirements of [Section 251]” – including, of course, the unbundling obligations under Section 251(c)(3) that ALTS apparently wishes to perpetuate indefinitely. And, as *USTA II* highlights, “after eight years” there still are not – *and never have been* – any valid unbundling rules for mass market circuit switching, high-capacity loops and transport, and dark fiber. *USTA II*, 359 F.3d at 595. It is therefore simply absurd to suggest that, in the absence of valid implementing regulations, Section 251 could ever be read to require unbundling, much less to *continue* unbundling that is itself the product of an unlawful regulatory regime.

Verizon therefore does not contend, as ALTS suggests, “that judicial review of the FCC’s interpretation of the statutory parameters of the incumbents’ unbundling

²⁵ See Verizon White Paper at 5.

²⁶ *Triennial Review Order* ¶ 703.

²⁷ *Id.* ¶ 704.

²⁸ *Id.* ¶ 265.

²⁹ ALTS Ex Parte at 3.

obligations is meaningless.”³⁰ Verizon maintains just the opposite: The D.C. Circuit’s opinion in *USTA II* vacating – for a third time – the Commission’s unbundling rules is quite *meaningful* and its mandate should be given effect.

³⁰ *Id.* at 4.