BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company.	DOCKET NO.020960-TP ORDER NO. PSC-03-1139-FOF-TP ISSUED: October 13, 2003

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
BRAULIO L. BAEZ
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APPEARANCES:

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On behalf of the Commission.

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

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LIST OF ACRONYMS AND ABBREVIATIONS USED IN THE ORDER.

AAIS	Assignment Activation Inventory Systems
AC	Alternating Current
ADR	Alternative Dispute Resolution
ADSL	Asymmetrical Digital Subscriber Line
ALEC	Alternative Local Exchange Company
BR	Brief
BRI-ISDN	Basic Rate Interface - ISDN
CAADR	Commercial Arbitration and Alternative Dispute Resolution
CFR or C.F.R.	Code of Federal Regulations
CLEC	Competitive Local Exchange Company
CO	Central Office
Covad	DIECA Communications, Inc. d/b/a Covad Communications Company
DAML	Digital Added Main Lines
d/b/a	Doing business as
DC	Direct Current
DLC	Digital Loop Concentrator or Digital Loop Carrier
DN	Docket Number
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
DS0	Digital Signal Level 0
DS1	Digital Signal Level 1
DS3	Digital Signal Level 3

DTE	Department of Telecommunications and Energy (Massachusetts)
EXH	Exhibit
F.S.	Florida Statutes
FCC	Federal Communications Commission
FDI	Feeder Distribution Interface or Fiber Distribution Interface
FPSC	Florida Public Service Commission
HDSL	High Bit-Rate Digital Subscriber Line
HFPL	High Frequency Portion of the Loop
ID	Identification
IDLC	Integrated Digital Loop Carrier
IDSL	ISDN Digital Subscriber Line
ILEC	Incumbent Local Exchange Company
IOF	Interoffice Facilities
IP	Interconnection Point
ISDN	Integrated Services Digital Network
IVR	Interactive Voice Response Unit
LEC	Local Exchange Company
LFACS	Local Facilities and Control System
LGX	Light Guided Cross-Connect
LIDB	Line Information Data Base
LNP	Local Number Portability
LOF	Lack of Facilities
LSC	Local Service Confirmation
LSR	Local Service Request

LST	Line & Station Transfer
NID	Network Interface Device
No.	Number
OSS	Operation Support Systems
POD	Production of Documents
POI	Point of Interconnection
POT	Point of Termination
POTS	Plain Old Telephone Service
PSC	Public Service Commission
PUC	Public Utilities Commission
SDSL	Symmetric Digital Subscriber Line
TELRIC	Total Element Long-Run Incremental Cost
TR	Transcript
UNE	Unbundled Network Element
Verizon	Verizon Florida Incorporated
VLSNE	Verizon Local Switching Network Element
VTS	Verizon Telecommunications Service
WISE	Wholesale Internet Service Engine
xDSL	"x" distinguishes various types of DSL

BACKGROUND

On September 6, 2002, DIECA Communications, Inc, d/b/a Covad Communications Company (Covad) petitioned this Commission to arbitrate certain unresolved interconnection terms, conditions and prices in an agreement with Verizon Florida Inc. (Verizon). Verizon filed its response to Covad's petition on October 1, 2002. This matter was set for an administrative hearing by Order No. PSC-02-1589-PCO-TP, issued November 15, 2002. The hearing was originally set for April 16-18, 2003.

On January 24, 2003, the parties filed a Joint Motion to Continue Hearing. Counsel for both parties advised us that they would be available to appear on May 14 and 15, 2003. The parties' motion was granted by Order No. PSC-03-0155-PCO-TP, issued January 30, 2003. As such, the new dates for the Hearing in this matter were set for May 14 and 15, 2003, with a Prehearing on April 21, 2003. At the prehearing, the parties stipulated to a "paper hearing," whereby all testimony and exhibits would be stipulated into the record with cross-examination waived. Accordingly, the Commission held a hearing on May 14, 2003. Both parties filed their post-hearing briefs on June 16, 2003.

Of the 55 issues that were originally set forth in Covad's Petition for Arbitration, 26 issues were resolved by the parties. Issues 3, 6, 11, 14-18, 20-21, 26, 28-29, 31, 39, 40, 44, 45, 47-50, and 53-55, as identified in the Order Establishing Procedure, have been resolved and are not addressed in this Order. Included in the parties' post-hearing briefs were positions on thirty issues. On August 29, 2003, the parties notified us that they had also reached agreement on Issue 38.

This Order addresses the remaining issues presented in the Petition.

I. EFFECTIVE DATE OF CHANGE IN LAW

Arguments

In its brief, Covad argues that the New York Commission concluded that Covad's proposed language provides suitable procedures for continuing services when further negotiations and

disputes occur. In addition, Covad reports that the FCC, in the Virginia Arbitration Award, rejected Verizon Virginia's proposed change of law language which included discontinuance terms and separate changes in law provisions that are similar to what Verizon proposes here.

Covad further argues that its newly proposed language is abundantly fair and reasonable because it provides suitable procedures for continuation of services when renegotiations are taking place, pursuant to section 4.6 of the Agreement, due to changes in law that materially affect any provision of the Agreement. Verizon's proposed language for section 4.7, according to Covad, is both one-sided and draconian in that it freely allows Verizon to discontinue services under the Agreement shortly after the release of an FCC or court decision, based on Verizon's unilateral interpretation of the decision. In particular, Verizon's proposed section 4.7 permits Verizon to interpret a governmental decision, order, determination or action in a light that is most favorable to it and, based upon Verizon's unilateral interpretation, immediately discontinue services currently provided, 45 days after the decision regardless of potential ambiguities with the decision and differing interpretations of it.

Verizon argues that under its proposed language, once there is an effective order eliminating a prior obligation, Verizon "may discontinue immediately the provision of any arrangement" pursuant to that obligation, except that Verizon will maintain existing arrangements for 45 days, or for the period specified in the order or other source of applicable law (including, among other things, the agreement, a Verizon tariff, or state law). The company contends this language strikes a reasonable balance between Verizon's right to have its obligations under the agreement remain consistent with the terms of applicable law and the interest, shared by Verizon and Covad, in ensuring a smooth transition to the new legal regime.

In contrast, according to Verizon, under the language Covad currently proposes,[1] Verizon could be required to continue

[1]Numerous state commissions have previously rejected language, such as that Covad originally proposed with respect to this issue (*see* Covad Petition Attach. A at 3 (Agreement § 4.7)), that would require Verizon to wait until the entry of

providing Covad with access to a UNE or other service indefinitely, even though the legal obligation to provide that access had long since disappeared. Yet, as the New York Public Service Commission (New York PSC) has recognized, "[w]hether to maintain the status quo following a judicial, legislative, or regulatory decision is the prerogative of those decisionmakers" and should not be changed through an interconnection agreement, without the consent of both parties. (*GNAPs New York Order* at 21) Verizon notes that in Docket No. 011666-TP our staff has likewise advised in its recommendation that it would be "inconsistent with logic, as well as any known practice within our legal system," for a change in law not to be "implemented when it takes effect."

Nonetheless, under Covad's proposal, Verizon argues that before it could obtain the benefit of an effective order eliminating, for example, the requirement to provide a particular UNE, Verizon would first have to negotiate with Covad for a 30-day period following the effective date of the order. If, after 30 days, the parties had not arrived at mutually acceptable revisions to the agreement to implement that effective order, Verizon would be required to seek a ruling from this Commission, the FCC, or a court of competent jurisdiction confirming that Verizon was, indeed, entitled to the benefit of that effective order. During all this time, Verizon would be required to continue providing access to that UNE, even though it no longer had any obligation under applicable law to do so. Only after Verizon prevailed in the administrative or legal proceeding, and this Commission, the FCC, or a court "determine[d] that modifications to this Agreement are

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a final and nonappealable order before taking advantage of a change in law. *See, e.g.*, Order Resolving Arbitration Issues, *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York Inc.*, Case 02-C-0006, at 21 (N.Y. PSC May 24, 2002) ("*GNAPs New York Order*"); Order, *Petition of Global NAPs, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration To Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45, at 72 (Mass. DTE Dec. 12, 2002); Arbitration Award, *Petition by Global Naps, Inc., for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Verizon Delaware Inc.*, PSC Docket No. 02-235, at 41 (Del. PSC Dec. 18, 2002), *adopted as modified on other grounds*, Order No. 6124, PSC Docket No. 02-235 (Del. PSC Mar. 18, 2003).

required to bring it into compliance with the Act," would Verizon finally be permitted to cease providing access to the UNE. (*Id.*)

Decision

Covad's position is that a law should not take effect until tested and ruled upon by a commission or judicial body. It is our belief, however, that a new statute or change in a statute is controlling from the effective date designated by the legislative body that has promulgated it. As for rule changes, they become effective and controlling in accordance with the statutory provisions under which they were adopted or pursuant to statutory provisions allowing the agency to engage in rulemaking. See, e.g., Section 120.54(3)(e), Florida Statutes. We believe that court case law becomes effective and controlling from the date of the court's decision, unless stayed pending appeal, and remains effective until otherwise overturned.

Based on the foregoing, we are more persuaded by the position of Verizon in this issue. That position is that a change in law should be implemented when it takes effect. Though Verizon's position has been consistently upheld in various other states, Covad did not cite an instance where its specific position has been adopted. We also note that in a recent decision on the identical issue this Commission ruled that a change in law should be implemented when the law takes effect, unless it is stayed by a court or commission having jurisdiction. (Order No. PSC-03-0805-FOF-TP). We believe that this record supports the same conclusion.

Based on the above, we find that a change in law should be implemented when the law takes effect, unless it is stayed by a court or commission having jurisdiction.

II. TIME LIMIT ON PREVIOUSLY UNBILLED CHARGES
ANTI-WAIVER PROVISIONS OF THE AGREEMENT

These two issues appeared separately as issues two and nine in our staff's recommendation. They are, however, so closely related that they will be discussed as one in this Order.

Arguments

According to Covad witnesses Evans and Clancy, "Back-billing should be limited to services rendered within one year of the current billing date in order to provide some measure of certainty in the billing relationship between the parties." Witnesses Evans and Clancy emphasize that "the time and expense necessary to resolve back-bills older than one year as well as the difficulty of accounting for back-bills older than one year cause a serious impediment to Covad's ability to manage its business effectively." The witnesses make this point to stress that researching back-bills for a period longer than one year causes an undue burden on the CLEC. Witnesses Evans and Clancy state:

> Allowing Verizon to back-bill without time limitations creates significant problems for Covad. One, Covad is not the ultimate party to be billed. As a wholesale provider, Covad may still have to pass these charges through to its retail customer. Back billing a retail customer results in a loss of goodwill and creates other potential problems.

Although this portion of witnesses Evans' and Clancy's testimony addresses the effects of back-billing on Covad's retail customers, the witnesses offer specific testimony where back-billing problems have arisen with Verizon. In its brief, Covad contends that it "has experienced significant problems with Verizon in regard to back billing, which will be perpetuated under Verizon's proposal." Witnesses Evans and Clancy illustrate such an instance that occurred in New York:

> Between the August 4, 2001 and September 4, 2001, billing cycles, Verizon inexplicably added approximately one million one hundred thousand dollars ($1.1 million) for various unidentified back-billed charges dating back to July 1, 2000 . . . After expending significant resources over a period of 9 months to identify what the $1.1 million in charges where[sic] for, Covad determined, and Verizon agreed, that over $358,000 of the back-bill - or more than 30% of the bill - were invalid charges.

In its brief, Covad also states "Covad's officers must attest to the accuracy of financial statements filed with the Securities and Exchange Commission ('SEC')." Covad also contends, "If Verizon is able to back-bill Covad for material billing errors based on the statute of limitations Verizon proposes - then Covad may be faced with amending multiple years of SEC filings to adjust for material errors created by Verizon's poor billing practices." Covad simply states the waiver provisions of the Agreement should be modified if the Commission applies a one-year limitation on back-billing.

In summary, Covad believes a time limit of one year to assess previously unbilled charges should be imposed to ensure some measure of certainty in the billing relationship between the parties. Covad has concerns that back-billing without time limitations will adversely effect its retail customer relationships as Covad may have to pass charges on to its end users. Covad also questions Verizon's billing practices and notes the statute of limitations proposal will be burdensome and time consuming for its financial officers to reconcile past charges for any time period longer than one year.

Verizon witness Hansen asserts that "the parties' rights in this regard, in the absence of a voluntary agreement otherwise, are governed by the five-year statute of limitations in § 95.11(2)(b), Florida Statutes, which also governs each party's right to challenge the amounts billed by the other party." Verizon states the five-year statute of limitations is the only result consistent with federal and state law. Moreover, Verizon argues that this Commission has no authority to depart from the state statute of limitations "to devise a novel limitations period to apply solely to interconnection agreements."[2]

Verizon also claims that setting a time limit on back billing has no merit because back billing for long periods of time is not the norm. In its brief, Verizon states:

> Covad has identified *no* instances in Florida – and only *one* instance in states other than Florida, which occurred

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[2]"*See* 1996 Act § 601(c)(1) (1996 Act "shall not be construed to modify, impair, or supersede . . . State . . . law unless expressly so provided in [the] Act"), *reprinted at* 47 U.S.C. § 152 note." (Emphasis in original)

> nearly two years ago — when Verizon sent Covad a bill for services rendered more than one year prior to the billing date . . . Even then, no charge on the bill was more than 14 months old; indeed, the bill was primarily for services rendered within one year of the bill date. (Emphasis in original)

Verizon also asserts that there are times when it has to back-bill because of regulatory constraints. Verizon witness Hansen explains:

> Regulatory orders mandating the provision of a new UNE normally do not permit Verizon to defer provisioning orders for the new UNE until all the rate-setting and billing work is completed. As a result, Verizon may have no choice but to "back" bill the alternative local exchange carrier ("ALEC"), which normally has ordered the service with full knowledge that it will be billed for that service at a later date.

With regard to the "anti-waiver", Verizon states the anti-waiver provisions in the agreement should not be modified as a result of its position on the statute of limitations. "Verizon believes that resolution of Issue No. 2 will resolve Issue No. 9."

To summarize, witness Hansen is asking this Commission to conclude that the five-year statute of limitations in Florida Statutes should apply to the parties' right to assess previously unbilled charges for services rendered. Verizon acknowledges that "[c]arrier-to-carrier billing is a complicated and evolving process . . . such billing is subject to regulatory changes that may make it difficult for carriers to bill for services promptly and completely." Beyond that, Verizon points to the 1996 Act which does not give the Commission authority to "supercede state law."

We believe this is a very straightforward issue. The testimony of Verizon witness Hansen highlights that back-billing occurs on occasion out of necessity; however, placing a time limit on back-billing can conflict with the five-year statute of limitations in Florida. We agree with Verizon's claim that it is in Verizon's best interest to bill as promptly as possible in order to collect on amounts owed.

Chapter 95 of the Florida Statutes describes limitations on billing between two parties. Of specific interest for the purposes of this proceeding, is Chapter 95.11(2)(b), which states:

> 95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows: (2) WITHIN FIVE YEARS.--(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument, except for an action to enforce a claim against a payment bond, which shall be governed by the applicable provisions of ss. 255.05(2)(a)2. and 7 13.23(1)(e).

The testimony of Covad witnesses Evans and Clancy points out that allowing Verizon to backbill without time limitations causes serious problems for Covad. The witnesses describe one back-billing instance beyond a year in New York where the parties later found more than 30% of the charges on the bill were in error. However, Covad fails to describe any such back-billing instances in Florida. Therefore, it appears that back-billing beyond a year between these parties in Florida presumably occurs rarely, if at all.

Decision

We acknowledge Covad witnesses Evans' and Clancy's concern regarding the difficulty of reconciling back-bills older than one year. However, we are perplexed why this issue has not been resolved between the two parties, particularly in light of the fact that, according to the record, there have been no back-billing instances in Florida. We are not persuaded by Covad's limited arguments to deviate from the statute of limitations. Moreover, we do not believe that one difficult back-billing instance in another state warrants a departure from Florida's five-year statute of limitations, nor are we aware of any authority to do so. Furthermore, neither party has identified a legal basis for doing so.

We believe that the current state of the law should be sufficient. Accordingly, we find that the five-year statute of limitations in Florida Statutes § 95.11(2)(b) shall apply to the parties' rights to assess previously unbilled charges for services

rendered. In light of that finding, the anti-waiver provisions of the Agreement shall not be altered.

III. TIME ALLOWED BILLING PARTY TO RESOLVE DISPUTES

Arguments

Witnesses Evans and Clancy characterize Covad's position as Verizon "should provide its position and a supporting explanation regarding a disputed bill within 30 days of receiving notice of the dispute." Witnesses Evans and Clancy contend that Verizon's response to billing disputes is "unacceptably slow." Witnesses Evans and Clancy state:

> In the year 2002, Covad has filed over 1,300 billing claims with Verizon East. In Covad's experience, it takes an average of 221 days to resolve a high capacity access/transport claim, 95 days to resolve a resale/UNE claim, and 76 days to resolve a collocation claim in the Verizon East region. Covad still has 3 disputed billing claims open with Verizon since the year 2001.

Covad's desire to set some type of guidelines regarding this issue is apparent. The Covad witnesses state that the Interconnection Agreement between Verizon and Covad must provide for specific deadlines for each step in the procedures used to resolve claims. Witnesses Evans and Clancy assert that Verizon's behavioral pattern is "to play games with the claim resolution procedures." The witnesses also describe Verizon's billing practices as "anticompetitive and discriminatory." The witnesses explain:

> As Covad recently explained in detail to Verizon, Verizon has been repeatedly misapplying Covad payments to the wrong accounts, resulting in under payments in the accounts for which payment was intended, unnecessary and unwarranted late fees for Covad, and raising the prospect of unwarranted service disconnection by Verizon . . . Verizon's inability to correctly apply Covad's payments results in wasteful efforts by both Verizon's and Covad's organizations to identify and resolve unnecessary billing disputes.

Covad believes it "needs better - and contractually enforceable - assurance of performance" measures than has been provided by Verizon. Covad supports its position on providing a response within 30 days by citing "applicable billing performance metrics to which Verizon is currently subject in New York and Pennsylvania." In its brief, Covad states:

> Metric BI-3-04 requires that 95% of CLEC billing claims be acknowledged within two (2) business days.[3] Metric BI-3-05 requires 95% of CLEC billing claims to be resolved within 28 calendar days.[4] Thus, requiring Verizon to state its position and provide a supporting explanation within thirty days is by no means unreasonable.

In summary, Covad's position speaks to the accountability between the two parties and their respective billing practices. Covad witnesses Evans and Clancy acknowledge that "Verizon controls the billing process," and "[i]f it wants prompt submission of disputes, it should bill in a timely and easily auditable manner." Hence, Covad is requesting that language requiring the billing party to provide a response (position and explanation) within 30 days of receiving the dispute be adopted.

Verizon witness Hansen believes that "the appropriate standard for inclusion in an interconnection agreement is that the parties shall use commercially reasonable efforts to resolve billing disputes in a timely manner." The witness states that Verizon's ability to respond to billing disputes in a timely manner "depends in large part on the degree of detail that an ALEC provides when it submits its dispute and whether the dispute pertains to recent bills." Addressing Covad's 30-day proposal, witness Hansen asserts:

> Unless Verizon has relatively easy access to the data necessary to investigate an ALEC's claim, it may be

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New York State Carrier-to-Carrier Guidelines Performance Standards and Reports, NY PSC Case No. 97-C-0139, May 2002 Compliance Filing at 94 (May 14, 2002).

[4] *Id.* These metrics are the same in Pennsylvania.

> unable to resolve it within 30 calendar days after receipt of the ALEC's dispute, even if the ALEC provides all the information necessary to resolve that dispute. However, if Verizon must seek additional information from an ALEC regarding its billing dispute, Verizon also may be unable to resolve that dispute within the 30-day time frame.

Verizon witness Raynor states that performance measurements should be dealt with "on an industry-wide basis" rather than in an interconnection agreement. He states that "measurements adopted in an interconnection agreement could not be easily modified through periodic reviews, such as the review process staff has proposed for the Florida measurements." In its Brief, Verizon states:

> Covad has offered no reason why this Commission should approve a billing dispute resolution performance measurement outside the context of the industry-wide proceeding. If such performance measurements were adopted on an interconnection-agreement-by-interconnection-agreement basis, the process for responding to such disputes would soon become unworkable, as different standards may be established for different ALECs.

To summarize, witness Raynor states, "Covad has, in essence, proposed the inclusion of measurements of Verizon's billing dispute resolution performance in its interconnection agreement." Verizon believes issues such as this should be settled in a generic proceeding and not in an interconnection agreement. Moreover, the measurement Covad is proposing places no obligations on Covad to provide all the information necessary for Verizon to investigate the complaint at the time it is submitted. In its Brief, Verizon characterizes Covad's proposal as "unreasonable":

> In Rhode Island and other states where Verizon reports its performance under final versions of billing dispute resolution measurements, the business rules for those measurements have a standard of 95% of claims acknowledged within 2 business days and 95% of claims resolved within 28 calendar days after acknowledgment; in

contrast, Covad's proposed language appears to require 100% performance.

Based upon Covad witnesses Evans' and Clancy's testimony regarding the average number of days it takes to resolve claims in the Verizon East region, we find that there should be some sort of guideline to address this issue. We also agree with Verizon witness Hansen that "the parties shall use commercially reasonable efforts to resolve billing disputes in a timely manner." However, this language is vague and does not guarantee any specific level of accountability. Verizon argues that there are instances where insufficient information has been provided by the Billed Party, which makes it difficult to respond in a timely manner. Nonetheless, there is no reason why the Billing Party cannot request clarification of the information provided by the Billed Party.

Nevertheless, Covad was recently an active participant in our Docket No. 000121C-TP, which dealt with adopting measurements of Verizon's performance in providing products and services to all CLECs in Florida. Covad subsequently entered into a stipulation regarding the performance measurements in that docket. In that proceeding, Covad did not seek adoption of measurements of Verizon's performance in responding to CLEC billing disputes. We believe Covad should have addressed this issue in that proceeding as it was the appropriate venue to adopt such measurements. There is a periodic review process (every 6 months) in place, and we believe it is more appropriate for the parties to deal with this issue in that manner.

Decision

We approved the settlement agreement in Docket No. 000121C-TP that established a set of performance metrics with which Verizon must comply. Covad had the opportunity to address billing dispute measurements in the context of that docket. We find that this issue addresses a performance metric and should not be incorporated as part of the interconnection agreement between the parties, but should be addressed in the periodic review process in Docket No. 000121C-TP.

IV. LATE PAYMENT CHARGES DUE ON DISPUTED BILLS

Arguments

Covad witnesses Evans and Clancy contend that once a claim has been acknowledged by Verizon, the late payment charges associated with that claim should be suppressed until the claim is resolved. The witnesses describe the present process:

> Currently, Verizon is assessing Covad late payment charges on amounts that are in the process of being disputed. Covad then files a dispute for those late payment charges. The following month, Verizon will assess late payment charges on the original disputed amount *as well as* the disputed late fee charges from the prior month. (Emphasis in original)

Witnesses Evans and Clancy state that because of the process that Verizon currently employs, Covad is forced "to file multiple claims to address the late payment charges, depending on how long it can take to resolve the claim and issue a credit." They assert that this practice of filing many claims to resolve a single dispute can impede the dispute resolution process as a whole. According to witnesses Evans and Clancy, "All of this unnecessary bureaucracy can be avoided easily by suspending late payment charges until the underlying dispute is resolved."

Covad asserts in its brief that Verizon is applying late charges upon late charges:

> Also, Verizon should not be allowed to assess a late payment charge to unpaid previously billed late payment charges when the underlying charges are in dispute. Late payment charges should only apply to the initial outstanding balance.

Witnesses Evans and Clancy note that the issue is over the accrual of late payment charges for disputed charges, not undisputed charges. Covad does not object to late payment charges accruing on undisputed charges.

In summary, Covad believes late payment charges should be suspended until the underlying dispute is resolved. Witnesses Evans and Clancy address the incentives for both parties regarding this issue. They note, "For Verizon, the incentive is for prompt payment of undisputed charges, and for Covad, the incentive is for Verizon to rapidly resolve disputes." The witnesses believe this issue directly relates to Issue 4 because "if Verizon is obligated under the Agreement to respond to claims within 30 days, then Verizon should not be rewarded - in the form of late payment charges - for failing to meet that obligation."

Verizon witness Hansen states that, consistent with this Commission's precedent, Covad should be required to pay late fees on its entire balance for the duration that the balance is unpaid. The witness identifies this Commission's precedent as follows:

> In arbitrating a dispute between Covad and BellSouth, this Commission rejected Covad's claims and found that, when a "dispute is resolved in favor of BellSouth, Covad shall be required to pay the amount it owes BellSouth plus applicable late payment charges." Order No. PSC-01-2017-FOF-TP at 118, Docket No. 001797-TP (Fla. PSC Oct. 9, 2001).

In its brief, Verizon cites the Commission's explanation of the issue in the arbitration between Covad and BellSouth:

> BellSouth's proposal, which allows Covad not to pay disputed portions of a bill during the pendency of the dispute but includes assessment of late payment charges on the disputed amounts if BellSouth prevails, is reasonable. It affords Covad the opportunity to challenge portions of its bills without paying the disputed amounts; if a dispute is resolved in BellSouth's favor, BellSouth is reimbursed for the carrying costs associated with the disputed amount.

Verizon witness Hansen denies that Covad is obligated to pay late charges during the pendency of a dispute. According to the witness, CLECs are not required to pay late charges on disputed amounts during the pendency of a billing dispute. The witness further states that, during the pendency of a dispute, Covad does

not need to file separate claims regarding any late charges that continue to be billed on the disputed amounts. Late charges billed on disputed amounts will be automatically credited if it is found that Covad's claim is correct.

Witness Hansen states that Verizon applies late charges for two reasons:

> First, it provides ALECs with an incentive to pay undisputed - or previously disputed - amounts promptly. Second, it compensates Verizon for the time value of money, the risk of ultimate non-payment, and the cost of collection efforts when ALECs do not pay such amounts promptly.

To summarize, Verizon states it "is not a bank and should not have to finance its competitors' ongoing business operations by providing interest-free, forced loans merely because a competitor filed a billing dispute." According to witness Hansen, Covad's proposal is an invitation for abuse in that it "would provide [Covad] with an incentive to manipulate the dispute resolution process in order to avoid making prompt payment . . .". The witness speculates Covad may file multiple claims "that will necessarily take longer than 30 days to resolve simply to avoid payment." When a dispute is ultimately resolved in Verizon's favor, the applicable late charges should be paid in full along with the disputed amount.

Decision

Having just found in this order that no limit or standard will be established in this Docket for Issue 4, we further find that no remedy be established Issue 5. We also note that Covad does not specifically cite any instances of billing disputes occurring in Florida that relate to this issue, although, should one arise, it is in the interest of both parties to resolve billing disputes in a timely manner.

We find that this issue should be handled in the periodic review process in Docket No. 000121C-TP, and Verizon's ability to assess late payment charges shall remain as is. Consistent with this Commission's previous findings, (Docket No. 001797-TP) late

payment charges shall apply on disputed amounts if the dispute is ultimately resolved in favor of Verizon.

Covad raises another issue concerning Verizon's ability to assess a late payment charge on unpaid, previously billed, late charges when the underlying charges are in dispute. In other words, should late payment charges be compounded? As this aspect was not incorporated in the language for Issue 5, we find this question is not ripe for a decision at this time as the record is limited. The parties had the opportunity to introduce this issue at the Issue Identification conference.

As indicated earlier in this Order, we have approved the settlement agreement in Docket No. 000121C-TP that established a set of performance metrics with which Verizon must comply. Covad had the opportunity to address billing dispute measurements in the context of that docket. As discussed in Issue 4, we find setting time limits relating to billing disputes addresses a performance metric and should not be incorporated as part of the interconnection agreement between the parties. Therefore, as no measure has been established, there cannot be a remedy, i.e., placing limits on Verizon's ability to assess late payment charges. Any such remedy or penalty should be established under industry-wide performance measurements and performance assurance plans in Docket No. 000121C-TP.

V. INCLUSION OF MANDATORY ARBITRATION PROVISION

Arguments

In its brief, Covad argues that, unlike situations in which the dispute involves only the relationship between Verizon and Covad, a service-affecting dispute harms either Covad's or Verizon's end users. The services that both Parties provide to their customers must be protected to the greatest extent possible, and a dispute that affects those services must be resolved quickly. Accordingly, either Party should be able to submit such a dispute to binding arbitration under the expedited procedures described in the Commercial Arbitration Rules of the American Arbitration Association (rules 53 through 57) in any circumstance where negotiations have failed to resolve the dispute within five (5) business days.

Covad urges that this is consistent with recent rulings of the New York Commission on this issue. In the *AT&T NY Arbitration,* the Commission held that it had the authority to require commercial arbitration and alternative dispute resolution (CAADR) provisions in interconnection agreements established pursuant to the 1996 Act.[5] The New York Commission noted that such procedures are a typical feature in the interconnection agreements it has approved in the past. The New York Commission observed:

> An ADR process makes sense for disputes arising out of the interconnection agreement affecting the obligations and performances of the parties, and we include only one in this interconnection agreement . . . . This process is intended to provide for the expeditious resolution of all disputes between the parties arising under this agreement. Dispute resolution under the procedures provided in this agreement shall be the exclusive remedy for all disputes arising out of this agreement. (*Covad/AT&T NY Arbitration Award* at p.10)

The New York Commission also found that "a provision for expedited resolution of service-affecting disputes is an essential element of the agreement" because "the failure to seasonably address service issues could directly impact customers."[6] The New York Commission required that its Expedited Dispute Resolution process be included as an option for either party in the *AT&T NY Arbitration* because the ADR in the subject agreement was shown to be inadequate for expedited resolutions. The New York Commission therefore required that its EDR process be included to supplement the ADR processes in the agreement.[7]

Covad urges that its proposal to shorten the negotiation time frame before invocation of the CAADR process and the use of the

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[5]*Covad/AT&T NY Arbitration Award* at 10.

[6]*Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York, Inc.*, Case No. 01-C-0095, Order On Rehearing at 11 (2001) ("*AT&T Arbitration Order on Rehearing*").

[7]*AT&T Arbitration Order on Rehearing* at 12.

expedited procedures of the Commercial Arbitration Rules of the American Arbitration Association should render the process more adequate for expedited resolution of service-affecting disputes. The need for an expedited process is heightened when the dispute is between a wholesale provider with virtually monopoly control over necessary facilities and a competitor of the wholesale provider.

In its brief, Verizon observes that, although federal law protects parties' rights to *choose* to resolve their disputes through binding arbitration, *see* 9 U.S.C. §§ 1 *et seq.*, no provision of federal law or state law authorizes this Commission to require a company to give up its right to seek resolution of any dispute before an appropriate forum. As both the United States Supreme Court and the Florida state courts have made clear, arbitration is "a matter of consent, not coercion." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989); *see, e.g., Nestler-Poletto Realty, Inc. v. Kassin*, 730 So. 2d 324, 326 (Fla. 4th DCA 1999) ("The general rule favoring arbitration does not support forcing a party into arbitration when that party did not agree to arbitrate."). Indeed, "arbitrators derive their authority to resolve disputes *only because the parties have agreed* in advance to submit such grievances to arbitration." *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986) (emphasis added). For these reasons, Verizon argues, this Commission cannot impose upon Verizon the language that Covad has proposed — but to which Verizon has not agreed — that would require the parties to conduct binding arbitration of certain disputes. *See* Revised Proposed Language Matrix at 3 (Agreement § 14.3).[8]

Decision:

Covad points out, and we agree, that the New York Commission has ordered binding arbitration over the objection of one of the parties. However, in the New York example, the parties had already agreed to binding arbitration for dispute resolution. The New York Commission merely ordered that portion of the agreement enhanced to

[8]Because no provision in the 1996 Act expressly modifies either the Federal Arbitration Act or Florida state arbitration law, the Act cannot be construed to have done so implicitly. The 1996 Act contains a savings provision providing that nothing in the Act shall be "construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." 1996 Act § 601(c)(1), *reprinted at* 47 U.S.C. § 152 note.

a higher level known as Expedited Dispute Resolution. Other than the New York reference, neither party has provided any authority for Federal or State of Florida mandates for arbitration over the objection of a party. We agree with Verizon that private mediators can only derive their authority from the consent of the parties to be bound by them. AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648-49 (1986)

Based on the above, we find that an arbitration provision in an agreement is an option to which the parties may agree, but it may not be imposed against the wishes of any party.

VI. TERMINATION OF AGREEMENT UPON SALE OF EXCHANGES OR TERRITORY

Arguments

In its post hearing brief Covad contends that Verizon's proposed language would allow Verizon to terminate the Agreement unilaterally in connection with the sale or transfer of a Verizon-served territory and would expose Covad to unwarranted risk and uncertainty. Covad argues that in order to enter into and compete in the local exchange market throughout Florida, Covad must be assured that if Verizon sells or otherwise transfers operations in certain territories to a third-party, then such an event will not alter Covad's rights under the Interconnection Agreement, or undermine Covad's ability to provide service to its residential and business customers. Covad proffers that if Verizon's contract language is adopted, Covad, and its customers, will be unable to rely on continuous wholesale service pursuant to the terms of an interconnection agreement.

Covad states that the proposed agreement by Verizon specifies that Covad will be given no less than 90 calendar days prior written notice that the agreement will terminate when it sells or transfers its operations in a territory. Covad further argues, however, that it is unreasonable to expect that Covad will be able to negotiate a new agreement with a prospective buyer within that time frame. Covad presents that, under the Act, a CLEC must have good faith negotiations with an ILEC for a period of 135 days before a CLEC can petition to arbitrate an open issue. Covad then argues that if the buyer in this instance were intransigent regarding any issues in the agreement and

refused to honor them or negotiate in good faith, the buyer could conceivably terminate Covad's service on the date Verizon officially sells or transfers its territories to the buyer. As a result, Covad potentially could be forced to choose between capitulating to the buyer's unreasonable positions or abandoning service.

Verizon, in its post hearing brief, argues that although the agreement permits either Verizon or Covad, with the prior written consent of the other party, to assign the agreement to a third party, no provision of federal law requires Verizon to condition any sale of its operations on the purchaser agreeing to an assignment of this agreement. Verizon further states that once Verizon sells an exchange or territory, it is no longer the ILEC for that service area and has no obligations under the interconnection provisions of the 1996 Act.[9] Verizon purports that no provision of the 1996 Act obligates the purchaser – that is, the new ILEC – to assume the agreement Verizon entered into with Covad. Instead, that new ILEC would have the right to enter into its own agreement with Covad, assuming that carrier is not a rural carrier that is exempt from that obligation.[10]

Verizon states that adopting the language that Covad has proposed would not prevent Verizon from terminating its obligations under the agreement if it sells an exchange but does not assign the agreement to a purchaser. Covad's proposed language states only that Verizon "may assign" the agreement. Verizon concludes that Covad's language thus places no limitation on Verizon's right to terminate the agreement following the sale of an exchange, and that the Commission should reject that language as surplusage because another section of the agreement already authorizes Verizon to assign the agreement.

Verizon then concludes that if Verizon were to sell an exchange or territory in Florida, Covad could protect any rights and interests it has by participating in a proceeding before this Commission regarding the sale.

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[9]*See* 47 U.S.C. § 252(a) (obligating ILECs to enter into interconnection agreements); *id.* §§ 251(h), 252(j) (defining ILEC for purposes of § 252).

[10]*See* 47 U.S.C. § 251(f).

Covad believes that Verizon's proposed language would allow unilateral termination of the Agreement in connection with the sale or transfer of a Verizon-served territory and would expose Covad to unwarranted risk and undermine Covad's ability to provide continuous service. While this is a legitimate business concern, Covad has not constructed a sufficient legal argument.

Decision

We are more persuaded by the position of Verizon in this issue. Verizon correctly notes that, although the agreement permits either party, with the prior written consent of the other party, to assign the agreement to a third party, no provision of federal law requires the conditioning of a sale of operations on the purchaser agreeing to an assignment of an agreement. Furthermore, we agree with Verizon that a CLEC may be able to protect any rights and interests it has by participating in a proceeding before this Commission regarding the sale of an ILEC.[11]

Based on the above, we find that Verizon should be permitted to terminate this Agreement as to any exchanges or territory that it sells to another party.

VII. FUTURE ACTIONS FOR VIOLATION OF SECTION 251 OF THE ACT

Arguments

In its brief, Covad argues that its proposed language is intended to address Trinko v. Bell Atlantic Corp., 305 F.3d 89, 103-105 (2d Cir. 2002), cert. granted, Verizon v. Law Offices of Curtis Trinko, 123 S.Ct. 1480 (2003). In Trinko, the court held that because section 252(a)(1) of the Act allows the parties to negotiate interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251," 47 U.S.C. § 252(a)(1), the act of entering into a negotiated interconnection agreement with an ILEC can extinguish a CLEC's right to recover damages, pursuant to 47 U.S.C. §§ 206 & 207, for violations of section 251.

[11] *See* Fla. Stat. § 364.335(2).

Arguably, urges Covad, the court's holding could be viewed by some to find that CLECs that have negotiated certain provisions of an interconnection agreement with an ILEC only have the right to sue for common law damages for breach of contract (as opposed to invoking §§ 251 or 252) unless the agreement specifies that the terms are premised on the standards set forth in sections 251(b) and (c) of the Act. Accordingly, Covad wishes explicitly to preserve causes of action that arise from sections 206 and 207 of the Act and make clear that nothing in the Agreement waives either Party's rights or remedies available under Applicable Law, including 47 U.S.C. §§ 206 & 207.

Verizon argues in its brief that Covad seeks to insert provisions into the agreement that it claims are necessary "to deal with" Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 305 F.3d 89 (2d Cir. 2002), and Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 123 S. Ct. 1480 (2003) (No. 02-682), where the Second Circuit concluded that, "[a]fter the state commission approves . . . an [interconnection] agreement, the Telecommunications Act intends that the ILEC be governed directly by the specific agreement rather than the general duties described in subsections (b) and (c) of section 251."

Verizon urges that this Commission not include in the agreement language that purports to "deal with" – that is, overrule – a decision of a court of appeals. Whether this Commission's approval of an interconnection agreement affects any right that an ALEC might have to bring a suit under § 206 or § 207 based on claimed violations of § 251 in the absence of such an agreement[12] is a question that is not within this Commission's jurisdiction. See 47 U.S.C. § 206 (referring to authority of "the court"); id. § 207 (referring to filing of complaints with "the [FCC]" or "in any district court of the United States"). Instead, that question should be addressed by a court of competent jurisdiction if and when it arises.

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[12] See Trinko, 305 F.3d at 105 n.10 (declining to decide "whether a plaintiff can bring suit for a violation of the duties under section 251 when there is no [interconnection] agreement").

In any event, Verizon argues, language inserted into a particular interconnection agreement could not overrule the Second Circuit's decision, which was based on its interpretation of the 1996 Act.[13] However, the suggestion contained in Covad's proposed language that neither party "waives [its] rights . . . under . . . §§ 206 & 207" by entering into the interconnection agreement – rights that uniform federal court authority holds that neither party has[14] – could potentially serve to impede Verizon's ability to defend against such a cause of action should Covad ever assert one.

Decision

We believe that the stated language is inconsistent with existing law, and attempts to control events which are not within the jurisdiction of this Commission. We note that the identical requested language was recently rejected in an arbitration involving these same parties in New York. Based on the above, Covad's proposed language is denied.

VIII. VERIZON'S OBLIGATION TO PROVIDE COVAD WITH ACCESS TO INFORMATION ABOUT VERIZON'S LOOPS

Arguments

Covad states that it considers Issue 12 to be "purely legal in nature" and as such has provided no testimony regarding it. However, Covad proposes that the language presented below be added to its interconnection agreement. The two sections of the interconnection agreement (in the Additional Services section)

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[13] Contrary to Covad's implication, the Second Circuit did not hold in *Trinko* – a case in which an end-user, not an ALEC, brought suit against Verizon – that an ALEC waives its right to bring suit under § 206 and § 207 to obtain remedies for violations of § 251 by entering into an interconnection agreement. Indeed, the words "waive" and "waiver" are nowhere to be found in the court's opinion. Instead, the court held that an ALEC with an interconnection agreement has no right to waive. See Trinko, 305 F.3d at 102.

[14] See, e.g., Trinko, 305 F.3d at 102; Building Communications, Inc. v. Ameritech Servs., Inc., No. 97-CV-76336 (E.D. Mich. June 21, 2001); Intermedia Communications, Inc. v. BellSouth Telecomms., Inc., 173 F. Supp. 2d 1282 (M.D. Fla. 2000).

affected by Covad's proposed supplemental language are presented below (with original language omitted) the proposed additional language underlined for emphasis:

> 8.0 OSS
>
> 8.1.4
>
> Verizon will provide such information about the loop to Covad in the same manner that it provides the information to any third party and in a functionally equivalent manner to the way that it provides such information to itself.
>
> 8.2 Verizon OSS Services
>
> 8.2.3
>
> Verizon, as part of its duty to provide access to the preordering function, must provide Covad with nondiscriminatory access to the same detailed information about the loop at the same time and manner that is available to Verizon and/or its affiliate.

Covad believes the above additional language will ensure it has access to the same information in the same manner as Verizon makes that information available to third parties, as well as in a functionally equivalent manner as it provides to itself and its affiliates.

Covad states that the current interconnection agreement is deficient in providing nondiscriminatory access in that the agreement lacks specifics. Covad claims that Verizon attempts to limit its broad statutory obligations to keep them confined to what is specifically stated in the interconnection agreement or tariff. Covad believes Verizon has set up this design in order to put Covad at risk of losing substantive rights if Covad takes no action to include its rights and entitlements as a written part of the interconnection agreement between the two companies. Covad believes that without clear and unambiguous language in the agreement that outlines Verizon's specific

duties, the risk of further litigation and competitive harm to Covad is real.

Covad further asserts that Verizon's mechanized loop qualification database (the LiveWire database) was designed by the company to meet the needs of its retail DSL customers. Covad states that LiveWire is less useful and more expensive to CLECs than is direct access to Verizon databases via a read-only application.

Covad states that LiveWire merely provides a "yes/no" indication as to whether the loop in question meets Verizon's specifications for its ADSL product (Infospeed DSL). Covad argues that, because Verizon's indicator was custom-designed for Verizon's equipment and deployment decisions for Verizon's own retail service offering, the indicator is not relevant to competitors' service offerings.

Covad claims that Verizon's process masks the underlying loop makeup data that Verizon's own engineers must evaluate to determine the suitability of particular loops for Verizon's retail ADSL service. Covad seems to claim that Verizon withholds this information from Verizon's own engineers (lowering the quality of service Verizon provides itself) in order to justify providing this more detailed loop makeup information to its competitors at a heavy premium via manual loop qualification or by an engineering query process. Covad claims this gives Verizon the opportunity to claim it is providing nondiscriminatory access to CLECs, while actually doing the opposite.

Covad provides an example pointing out that Verizon states it provides nondiscriminatory access to loop information for CLECs via three methods:

1. Mechanized Loop Qualification (LiveWire),
2. Manual Loop Qualification, and
3. Engineering Query.

According to Covad, when CLECs use LiveWire (which Covad claims was designed by Verizon for its use only), more often than not they will need to obtain additional information from Verizon. Covad states this additional information will carry a higher

price since it will need to be obtained either by manual loop qualification or engineering query. The bottom line, according to Covad, is discrimination, wherein Verizon operates a seamless loop qualification process for its retail operations, and a cumbersome manual process for CLECs.

According to Covad, Verizon contends that it provides a second way for CLECs to obtain mechanized access to loop makeup information. Covad states that Verizon offers access to such information through its LFACS database. However, Covad contends that access to loop makeup information by way of LFACS is not indicative of parity because the CLEC does not have access to the underlying data in LFACS. This is important, Covad claims, because the inventory of loops contained in the LFACS database is selective and does not provide the full spectrum of information CLECs need to determine the qualification of a loop. Covad further contends that this situation has been compounded by Verizon's failure to adequately populate the LFACS database properly over time. If Verizon had both adequately populated the LFACS database, and provided CLECs with direct, read-only access to such a fully populated LFACS, as well as the underlying databases that contain relevant loop makeup data, Covad states that it would have true non-discriminatory access.

Covad contends that it is significant that critical loop qualification information such as loop composition, existence, location and type of any equipment on the loop, loop length, wire gauge(s) of the loop, electrical parameters of the loop, and engineering work in progress are only provided by the engineering query process. Covad implies it is not parity for CLECs to have to pay for and "endure an arduous and lengthy engineering process," while Verizon enjoys a loop qualification system crafted to its needs.

Covad further claims that this additional language is necessary "because the agreed contract language does not expressly state the specific scope of Verizon's obligation to provide nondiscriminatory access." Covad believes this additional language will remedy this concern while making "the extent of Verizon's obligations in this regard . . . unequivocal."

In its post-hearing brief, Verizon proposes additional language to the interconnection agreement that it believes would make its obligation to comply with federal law more explicit:

§8.2 Verizon OSS Services

> §8.2.3 Verizon, as part of its duty to provide access to the pre-ordering function, will provide Covad with nondiscriminatory access to the same detailed information about the loop within the same time interval as is available to Verizon and/or its affiliate.

Verizon witness White states that Verizon agrees that it is obligated to provide Covad with nondiscriminatory access to loop qualification information, but disagrees with Covad's proposed additional interconnection agreement language. Witness White attempts to clarify the issue by first discussing the means by which Verizon provides Covad with loop qualification information in Florida.

Witness White explains that there are at least four different ways CLECs can access loop information in former Bell Atlantic states. However, in Florida, and in Verizon's other former GTE jurisdictions, Verizon offers CLECs a single, mechanized loop qualification inquiry, according to Verizon witness White.

According to Verizon witness White, this transaction provides CLECs with information contained in Verizon's Wholesale Internet Service Engine (WISE) database. Verizon witness White states that this database, which he claims is the same database accessed by Verizon's retail representatives in Florida, contains all the loop qualification information available in the LiveWire database used in the former Bell Atlantic service areas, as well as information normally available only through one or more of the other loop qualification transactions offered in those areas.

Verizon witness White states that in addition to providing this information by way of an automated process, Verizon will - on an exceptions basis, when a CLEC makes a specific request to its account manager - manually investigate loop qualification

information on particular loops. Verizon witness White states that Verizon provides this information in the same time and manner as it would for itself.

According to Verizon witness Kelly, LiveWire is a system used in the former Bell Atlantic states that provides multiple functions, but is used by Covad primarily for loop qualifications. However, Verizon witness Kelly also states LiveWire is not applicable to Florida, or any other former GTE territory. Verizon witness Kelly states that the system used in Florida is the Assignment Activation Inventory Services (AAIS) system and is accessed through Verizon's WISE system. According to witness Kelly, AAIS performs equivalent functions as LiveWire, but contains additional data.

Per witness Kelly, AAIS has loop makeup information incorporated as an inherent part of the system - something that is not available in LiveWire. Witness Kelly also confirmed that the Bell Atlantic LiveWire system returns a simple yes/no response as to loop qualification, whereas the former GTE states' AAIS returns information on not only the qualification of loops, but loop length, wire gauges, and other information.

Verizon witness Kelly states that if a CLEC disputes the results obtained in AAIS via the WISE system (Verizon Florida's mechanized loop qualification system), the CLEC may request a manual look-up by escalating through its account manager. This manual look-up is performed as a courtesy only, and Verizon Florida maintains that it has no manual loop qualification in the former GTE territories as in the former Bell Atlantic states. Contrary to Covad's complaint, Verizon witness Kelly states Verizon Florida does not support engineering queries.

Verizon's witness Kelly counters another Covad issue regarding access to the LFACS database. According to witness Kelly, the LFACS database does not exist in Verizon Florida. Addressing Covad's comment that CLECs should have direct read-only access to Verizon's database containing loop information, witness Kelly expressed concern that even read-only access to Verizon's systems poses security risks.

Verizon witness White states that Covad's proposed additional language to the interconnection agreement is not applicable to operations in Florida. As an example, witness White points to Covad's proposition that it should be able to submit an Extended Query in certain instances. Witness White rejects this proposal, stating Extended Query is not a transaction used by Verizon in Florida or any other former GTE jurisdiction. In addition, witness White states that Covad has proposed that Verizon should respond to Covad's manual loop qualification requests in one business day. Witness White reiterates that Verizon does not have a manual loop qualification process in Florida or other former GTE states.

Further addressing Covad's claims regarding manual loop qualification, Verizon witness White explains that even when Verizon manually investigates information for a particular loop on an exceptions basis, the appropriate standard is that Verizon provide Covad with that information in the same time and manner that Verizon provides the information to itself.

Verizon states that it objects to Covad's specific use of the word *manner* in its proposed language. Verizon argues that language that purports to regulate the *manner* in which Verizon provides loop qualification information has no basis in the Telecommunications Act of 1996, or any FCC rule, or order implementing the Act. Verizon proposes adding language to the interconnection agreement that it believes would make its obligation to comply with federal law more explicit.

For nearly all aspects of this issue, the processes are not available in Florida because it is a former GTE state, rather than a Bell Atlantic state. In the end, Covad appears to be left only with the argument that, in Florida, the interconnection agreement is not as specific as Covad would like it to be. We note that Covad is getting access to Verizon Florida's loop information via AAIS, as are other CLECs in Verizon's Florida territory. We further note that Covad has provided no evidence that access to loop qualification information via AAIS is being provided in a manner less than parity.

Decision

We believe that Covad's initial reasoning for proposing the additional language presented in this issue was based on the false belief that the loop qualification process described by Covad above was available to it in Florida, but was not being offered by Verizon. Verizon has systematically rebutted Covad's claims, explaining those systems are available only in the former Bell Atlantic territories.

We find that neither Covad nor Verizon's proposed additional language should be ordered to be included in the parties' interconnection agreement. Covad's proposed additional language is unnecessary for its stated purpose, and it adds nothing to ensure that Verizon provides access to loop information at parity. Verizon's proposed additional language regarding this issue was offered too late in the process (as part of Verizon's post-hearing brief) and did not provide Covad a chance to comment.

Other demands by Covad are not applicable to operations in Verizon Florida, such as access to LiveWire, Manual Loop Qualification, and the LFACS database. Verizon is concerned that direct access to certain of Verizon's databases poses a security risk, even if access is on a read-only basis. Any such access, at Verizon's option, should only be allowed by passing through a Verizon security firewall, whether built in as an integral part of a system interface, or as a stand-alone application.

Accordingly, no additional language regarding this issue will be ordered to be included in the parties' interconnection agreement.

IX. INTERVAL REQUIREMENTS FOR RETURN OF LOCAL SERVICE CONFIRMATIONS FOR PRE-QUALIFIED LOCAL SERVICE REQUESTS

Arguments

While the position statements, as put forth in the parties' briefs, appear to be in agreement, detailed review of the arguments presented suggests otherwise.

In their joint testimony, Covad witnesses Evans and Clancy state that Verizon should (a) return firm order commitments electronically within two business hours after receiving an LSR that has been pre-qualified mechanically and within seventy-two hours after receiving an LSR that is subject to manual pre-qualification; and (b) return firm order commitments for UNE DS-1 loops within forty-eight hours.

According to Covad witnesses Evans and Clancy, these proposed intervals are identical to those set forth in New York's current guidelines. Witnesses Evans and Clancy contend that Firm Order Commitments (referred to by Verizon as Local Service Confirmations, or "LSCs") are critical to Covad's ability to provide its customers with reasonable assurance regarding the provisioning of their orders. Covad witnesses Evans and Clancy state that an LSC from Verizon confirms that Verizon will deliver what Covad requested and allows Covad to inform a customer that the service they requested will be delivered. The Covad witnesses further state that a LSC date is also critical for the provisioning process of stand-alone loops in that it identifies the date Verizon will schedule Covad's technician to perform installation work at the end user's address. Witnesses Evans and Clancy claim that the end user is required to provide access to their premises, and potentially to negotiate access to shared facilities, where Verizon's terminal is located, at their premises. According to Covad witnesses Evans and Clancy, providing an LSC within a single day facilitates Covad's ability to contact end users and assure they will be available. This capability, according to the witnesses, assists in resolving one of the inefficiencies that remains in the provisioning process: "No Access" to the end user's premises for the Verizon technician. According to witnesses Evans and Clancy, if the end user is not able to provide access on the originally scheduled LSC date, Covad can communicate with the end user and get back to Verizon to reschedule. The witnesses contend that the efficiency gained by providing a LSC within a single day will provide significant savings to both Verizon and Covad, while significantly improving the customer experience.

Verizon witness Raynor states that Verizon takes the position that the intervals for these confirmation notices should be set in Docket No. 000121C-TP. According to Verizon witness

Raynor's direct testimony filed in January 2003, Covad proposed to establish specific intervals in its interconnection agreement that differ from those our staff initially proposed in December 2002.

Verizon witness Raynor states that our staff's initial proposal in Docket No. 000121C-TP, like the measurements under which Verizon previously reported its performance in Florida, contained, in pertinent part, the following intervals and performance standards:

(a) Fully Electronic/Flow Through Orders:
95% within 2 system hours

(b) Orders That Do Not Flow Through:
UNE non-designed < 10 lines 95% within 24 clock hours
UNE designed < 10 lines 95% within 48 clock hours
UNE non-designed or designed >= 10 lines 95% within 72 clock hours

Verizon witness Raynor points out that the business rules in our staff's proposal also contain a number of exclusions, such as for non-business days and delays caused by customer reasons.

Verizon witness Raynor argues that Covad's proposal here is very different from the initial proposal in Docket No. 000121C-TP. Witness Raynor states that Covad has proposed that, for stand-alone loops, LSCs should be returned within two business hours for all electronically pre-qualified local service requests for stand-alone loops and line sharing orders, and within 24 hours for all local service requests for stand-alone loops that are subject to manual pre-qualification. According to the Verizon witness, Covad's proposal appears to require 100% of Verizon's LSCs to be returned in the intervals that Covad prefers, as compared to the 95% on-time standard in our staff's proposal. Verizon witness Raynor further argues that Covad's proposal also does not provide a longer interval for electronically pre-qualified orders that do not flow through, which our staff's proposal does. The witness points out that Covad's proposal does not provide for longer intervals for orders of 10 or more lines, which our staff's proposal does.

Verizon witness Raynor points out that neither Covad nor any other CLEC suggested any changes to our staff's proposal with respect to a measurement of LSC timeliness as part of Docket No. 000121C-TP. According to witness Raynor, as with Issue 4, Covad is again seeking performance measurements that are unique to it and that cannot easily be modified.

In discussing Covad's proposals for including LSC intervals in the parties' interconnection agreement, Verizon witness Raynor notes that Covad witnesses Evans and Clancy claim the "intervals proposed by Covad are identical to those set forth in New York's current guidelines." Witness Raynor states that aside from the fact that the intervals proposed in their testimony here are not the same as those contained in Covad's proposed language for inclusion in the parties' agreement, there is no reason for us to include the intervals set out in the New York guidelines in the parties' agreement. The witness observes that we recently adopted performance measurements that apply to Verizon's performance for all CLECs in Florida, and those are the performance standards that govern Verizon's performance in Florida today.

According to Verizon witness Raynor, even if Covad were seeking to include in the parties' interconnection agreement the Florida measurements pertaining to LSC intervals, witnesses Evans and Clancy would still be wrong in claiming that Covad "is not seeking to change the industry-wide performance standards." The witness states that Covad's proposal apparently would include in the agreement only the intervals in which LSCs are to be returned, but exclude the accompanying performance standards (e.g., 95% on time), business rules, and exclusions, all of which are an integral part of the measurements that this Commission adopted.

On June 25, 2003, we issued Order No. PSC-03-0761-PAA-TP adopting industry-wide performance measures for Verizon Florida including the following:

1. LSC Notice Timeliness
   Benchmark: 95% on time (except as noted)
   Fully Electronic/Flow Through:
   Standard - <=2 system hours

Resale POTS/UNE (non-designed)<10 lines
Standard - <=24 clock hours
Resale POTS/UNE (non-designed)>=10 lines
Standard - <=48 clock hours
Resale Specials/UNE designed Services <10 lines
Standard - <=24 clock hours
Resale Specials/UNE designed Services >=10 lines
Standard - <=48 clock hours
UNE Transport/EELs
DS1 and below
Standard - <=24 clock hours
DS3 and above
Standard - 90% <=72 clock hours
Interconnection Trunks
Standard - <=5 business days
Projects
UNE Transport/EELs - Standard - 90% w/in 72 hours
IC trunk projects - 95% w/in 10 business days
Interconnection Trunk Requests:
Held and Denied - Average Interval
Standard - Average 13 days

2. Reject Timeliness
Benchmark: 95% on time (except as noted)
Fully Electronic/Flow Through:
Standard - <=2 system hours
Resale POTS/UNE (non-designed)<10 lines - No Flow Through
Standard - <=24 clock hours
Resale POTS/UNE (non-designed)>=10 lines - No Flow Through
Standard - <=48 clock hours
Resale Specials/UNE designed Services <10 lines - No Flow Through
Standard - <=24 clock hours
Resale Specials/UNE designed Services >=10 lines - No Flow Through
Standard - <=48 clock hours
UNE Transport/EELs
DS1 and below
Standard - <=24 clock hours
DS3 and above
Standard - 90% <=72 clock hours

Interconnection Trunks
Standard - <=5 business days
Projects
UNE Transport/EELs - 90% w/in 72 hours
All IC trunk projects - 95% w/in 10 business days
Interconnection Trunk Requests:
Standard - <= 5 days

Intervals

On June 25, 2003, we approved a settlement agreement between Verizon and its major CLEC customers, including Covad, in Docket No. 000121C-TP, in which the parties agreed to a comprehensive set of performance metrics. In addition to approving the settlement agreement between the specific parties, this Commission also ordered that the performance measures contained in the settlement be set as the uniform performance metrics by which Verizon is to abide for all its remaining CLEC customers.

We believe that both Covad's and Verizon's initial arguments in their testimony regarding intervals are largely moot at this point. These initial arguments were based either on a preliminary proposal by our staff in Docket No. 000121C-TP, made in December 2002, or on other recommendations or FCC measures that predated our final order in Docket No. 000121C-TP, which established performance measures for Verizon as mentioned above.

We believe that the intervals that should be in effect for Verizon with Covad are the intervals ordered by us in Order No. PSC-03-0761-PAA-TP. We further believe that the only practical way to monitor Verizon's performance is to monitor and analyze the level of service provided to all its CLEC customers. In doing so, intervals and other measures of service would of necessity have to be the same for each CLEC if the results are to have any comparative value. The processing of CLECs' Local Service Requests (LSRs) would soon become unmanageable if different timeliness standards were applied to each CLEC.

Including Intervals in the Interconnection Agreement

The intervals should not be ordered to be included in the parties' interconnection agreement. The inclusion of these performance metrics ordered in Docket No. 000121C-TP in Verizon's interconnection agreement would be confusing. If we ordered a change in the metrics adopted in Docket No. 000121C-TP, Verizon would be required to perform at those levels, while having to continue to perform at the intervals described in its interconnection agreement with Covad, or a change in the interconnection agreement would be required every time a change to Docket No. 000121C-TP is made.

Decision

Verizon will be required to provide Local Service Confirmations (LSCs) to Covad based on the requirements of our order in Docket No. 000121C-TP. Furthermore, those intervals shall not be required to be inserted as part of the interconnection agreement between Covad and Verizon. If Covad believes that the intervals set in Order No. PSC-03-0761-PAA-TP are inappropriate, Covad is encouraged to participate in future performance measure reviews. The appropriate venue for modifying Verizon's performance metrics is Docket No. 000121C-TP.

X. BUILDING OF FACILITIES IN ORDER TO PROVISION UNE AND UNE COMBINATION ORDERS; MANNER OF PROVIDING LOOPS

Arguments

Covad witnesses Evans and Clancy believe that Verizon's proposed language would unduly restrict Covad's access to network elements and combinations that Verizon ordinarily provides to itself when offering retail services. Moreover, the Covad witnesses believe that pursuant to Section 251(c)(3) of the Act, and applicable FCC rules, Verizon is obligated to provide Covad access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory terms. Witnesses Evans and Clancy contend that this reasoning requires that incumbents provide requesting carriers UNEs in situations where the incumbent would provide the UNE to a requesting retail customer as part of a retail service offering.

Verizon witnesses Kelly and White state that federal law is clear that "Verizon is not required to build facilities to provision a UNE order." Witnesses Kelly and White assert that Verizon does not construct network elements solely for the purpose of unbundling network elements. The witnesses add that although Verizon is not required to do so, Verizon does provide alternative local exchange carriers (ALECs) with additional opportunities for access to network elements beyond the mandated provisioning obligations. As an example, witnesses Kelly and White maintain that when facilities are unavailable and Verizon has construction underway to meet its own future demand, Verizon will provide ALECs with an installation date of a pending job.

Additionally, witnesses Kelly and White assert that Verizon will perform the cross-connection work between the multiplexers and the copper or fiber facility running to the end user. Also, Verizon will place the necessary line cards in order to provision the high capacity loop when requisite electronics have not been deployed but space exists for them in the multiplexers at the central office and the end user premises. Moreover, Verizon witnesses Kelly and White claim that in the event that Verizon lacks the facilities necessary to provide a requested network element, and there are no pending construction jobs that would make the necessary facilities available, Covad is not prevented from obtaining the desired facilities. Verizon, pursuant to the terms of it's tariff, will build the necessary facilities for Covad.

In response, Covad witnesses Evans and Clancy make three assertions. First, witnesses Evans and Clancy assert that "Covad has never expected Verizon to engage in construction activities." Second, the witnesses assert that the Act and FCC rules and orders require Verizon to take affirmative steps to condition existing loop facilities to enable competing carriers to provide service not currently provided over other facilities. Third, the witnesses assert that while Covad expects the occasional Lack of Facilities (LOF) rejections from the Verizon UNE ordering process, Covad also expects that "loops will be provisioned and conditioned for use as UNEs just as they would be if Verizon were using the loop to serve its own customers." "Covad basically

asked Verizon to provide UNE and UNE combinations to Covad in instances that it would provide it to itself."[15]

Covad witnesses Evans and Clancy state that Covad's proposed language "does not require construction of new facilities. It only obligates Verizon to perform tasks routinely performed for its retail customers." Witnesses Evans and Clancy believe that there is a clear distinction between constructing a new facility and modifying an existing one to improve its capacity. In a Pennsylvania hearing transcript, an exhibit in this proceeding, Covad witness Hansel clarifies Covad's assertion:

> . . . we are not asking them to build a superior network. We are not asking them to lay new fiber. We are asking them to install, you know, a card in a multiplexer. If that shelf has happened to run out of cards go to the next shelf and just slip in a card.

Covad witness Hansel contends that these are routine modifications that Verizon is attempting to characterize as new and major construction.

Covad provided numerous cites where it believes the Act, FCC rules, or FCC orders require Verizon to take affirmative steps to condition existing loop facilities in order to enable competing carriers to provide service not currently provided over other facilities.[16] Covad describes the conditioning of existing loop facilities for DS-1 loops as not only including the removal of bridge taps and load coils, but the addition of doubler cases, central office shelf space, repeaters, or similar equipment to the loop. Covad indicates that the FCC imposed an obligation, which arose from the unbundling provisions of section 251(c)(3) of the Act, on Verizon to unbundle local loops for requesting carriers in the Local Competition First Report and Order at paragraph 380 (". . . some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3)"). Additionally, in the same

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[15] EXH 1, p. 203, lines 18-20.

[16] EXH 11, Covad's Response to Staff's Third Set of Interrogatories, Interrog. No.51, pp. 4-6.

response, Covad indicates that this obligation was repeated by the FCC in the First Advanced Services Order at paragraph 53 (". . . To the extent technically feasible, incumbent LECs must 'take affirmative action to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities'") and subsequently in the UNE Remand Order at paragraph 167(". . . we require incumbent LECs to condition loops"). Moreover, Covad infers in its brief that these same obligations require that Verizon provide requesting carriers UNEs in situations in which the incumbent would provide the UNE to a requesting retail customer as part of a retail service offering.

Covad witnesses Evans and Clancy's third assertion is that this is an issue of parity. Specifically, the witnesses contend that "Verizon does not treat ALEC orders for high capacity loops in parity with orders for its retail access customers." Witnesses Evans and Clancy provide an example of what Covad believes is Verizon's discriminatory policy and practice in the provisioning of DS-1 UNE loops:

> Verizon provisions its DS1 Special Access circuits over fiber facilities, which require electronic equipment placed at both ends of the fiber. The equipment terminates to a shelf at the Central Office and at the customer's location. If all the slots on the shelf were in use and a Verizon customer requested a DS1 loop, Verizon would add another shelf and provision the circuit at no additional charge to the customer. The same is not true for a Covad order. If all the slots on the shelf of equipment are full, Verizon rejects Covad's order and will only provision the order if Covad orders it as a retail customer would. If Covad agrees to this outrageous requirement in order to satisfy its customer's request, it will now get the service but at much higher rates. However, the next request for a DS1 circuit will be provisioned with no problem until all the slots on the newly installed shelf are filled.

Witnesses Evans and Clancy argue that Verizon should be required to augment the DS-1 equipment with additional equipment in order

to provide the added DS-1 capacity requested by Covad's customers at no additional charge, the same as Verizon does for its customers.

Verizon provided no rebuttal testimony on this issue; alternatively, Verizon chose to further establish its position with transcripts from other state commission hearings and with its responses to interrogatories and deposition questions, all of which have been entered into this record as exhibits. In the Pennsylvania Hearing Transcript, Verizon counsel Panner argues that ". . . the requirement to provide access to UNEs is to provide access to an existing network. If a retail customer comes to us we may have to do construction to expand our network. That is not something that we are required to do in order to provide unbundled network elements." Verizon counsel Panner opines that the question in this issue is whether Verizon is required to engage in major construction activities in order to create a network that Verizon would subsequently unbundle. Verizon counsel Panner maintains that under the law, Verizon is not required to build a network. Consequently, counsel Panner concludes that Verizon "won't agree to do it."

Further, in the Pennsylvania Hearing Transcript, Verizon witness Kelly explained what Verizon will and will not do. Verizon witness Kelly defines provisioning as connecting those elements that are in Verizon's inventory together to make them work. Witness Kelly acknowledges that Verizon will do that to unbundle network elements. Verizon witness Kelly defines construction as when Verizon must go out and get "something" that is not in Verizon's inventory and putting that "something" in to now have it work. Witness Kelly states that "we don't do something that is not in our inventory." This statement is echoed by Verizon witness Bragg in the New York Hearing Transcript. Witness Bragg states that Verizon:

> . . . will provision or connect any existing inventory parts of a loop to provide a UNE to a location, and that would include cross connects, line cards, [and][sic]any existing inventory piece. What we will not do is construct, undertake construction activity, to create elements that are not existing at a location.

> And we believe our policy is compliant with the current rules, in fact, exceeds the current rules.

In response to a staff interrogatory, Verizon identified the "requisite electronics" that Verizon will order to provision high capacity loops for ALECs and the corresponding situations where Verizon would provision such loops. Verizon indicates that:

> Verizon's practice is to fill ALEC orders for unbundled DS1/DS3 network elements as long as the central office common equipment and equipment at the end user's location necessary to create a DS1/DS3 facility can be accessed. Specifically, when Verizon receives an order for an unbundled DS1/DS3 network element, Verizon's Engineering or facility assignment personnel will check to see if existing common equipment in the central office and at the end user's location has spare ports or slots. If there is capacity on this common equipment, operations personnel will perform the cross connection work between the common equipment and the wire or fiber facility running to the end user and install the appropriate DS1/DS3 cards in the existing multiplexers. They will also correct conditions on an existing copper facility that could impact transmission characteristics.

Verizon further points out that although it will place a doubler in an existing apparatus case, it will not attach new apparatus cases to copper plant in order to condition the line for DS-1 service.

During his deposition, Verizon witness Kelly summarized Verizon's position on provisioning high capacity loops as set forth in the New York and Pennsylvania Hearing transcripts. Witness Kelly claims that if a facility is in Verizon's inventory and available for Verizon's provisioning systems to assign and use, Verizon will do that. Conversely, witness Kelly claims that if it is a job that requires an engineer to go to work then Verizon will not provision the loop because "that's then a build and you're now getting into potentially looking at rearranging your CO." Accordingly, the witness claims that if Verizon has a pending engineering job, Verizon will inform the ALEC of the

job and if the ALEC resubmits the order after the given estimated completion date, Verizon will then provision the loop.

Decision

Pursuant to Section 251(c)(3) of the Act, Verizon is obligated to provide Covad access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory terms. The FCC has found that Section 251(c)(3)'s requirement that incumbents provide CLECs "nondiscriminatory access" to UNEs requires that incumbents provide ALECs access to UNEs that is "equal-in-quality" to that which the incumbent provides itself.[17] Further, the United States Supreme Court has affirmed that Section 251(c)(3) obligates an incumbent to provide requesting carriers combinations that it provides to itself; otherwise, an entrant would not enjoy true "nondiscriminatory access."[18]

We do not interpret these legal standards to require that an ILEC actually construct facilities to provide an ALEC with unbundled access to its network, even if the ILEC performs such construction for its retail customers. However, we agree with Covad witnesses Evans and Clancy that there is a clear distinction between constructing a new facility and modifying an existing one to improve its capacity. In fact, in the recently released Triennial Review Order, the FCC found that requiring an incumbent LEC to modify an existing transmission facility in the same manner it does so for its own customers provides competitors access only to a functionally equivalent network.[19] Further, the FCC concluded that because incumbent LECs are able to provide "routine modifications" to their customers with relatively low expense and minimal delays, requesting carriers are entitled to

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[17] *Local Competition Order*, ¶ 312; 47 C.F.R. § 51.311(b).

[18] *Verizon Communications v. F.C.C.*, 535 U.S. 467, 538, 122 S.Ct. 1646, 1687 (2002).

[19] 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 Capability, CC Docket Nos. 98-147, 96-98, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, ¶ 639 (rel. August 21, 2003) ("Triennial Review Order").

the same attachment of electronics.[20] The FCC states that "by routine network modifications we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers."[21] Therefore, Verizon's obligations under applicable law to provide Covad with nondiscriminatory access to UNEs and UNE combinations do require Verizon to build facilities in order to provision Covad's UNE and UNE combination orders with the exception of constructing an altogether new local loop.

In summary, Verizon is required to perform the same routine network modifications for CLECs that it regularly performs for its retail customers; however, this does not include constructing new cables for a specific CLEC.

XI. APPOINTMENT WINDOWS FOR INSTALLATION OF LOOPS; PENALTIES

Arguments

Covad witnesses Evans and Clancy argue that Verizon should be obligated to provide Covad a commercially reasonable three-hour appointment window when it will deliver the loop. Witnesses Evans and Clancy further argue that Verizon should waive the nonrecurring dispatch charges it imposes when it fails to meet this committed time frame. As a final point, the witnesses state that Verizon should pay Covad a missed appointment fee equivalent to the Verizon nonrecurring dispatch charge if Verizon misses additional appointment windows for that same end user.

According to Covad witness' Evans and Clancy, Verizon should be required to provide Covad either a morning (AM) or afternoon (PM) appointment window. The witnesses claim that Verizon provides such morning or afternoon appointments for its retail operations. Witnesses Evans and Clancy state that by clarifying

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[20] See Id.

[21] 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 Capability, CC Docket Nos. 98-147, 96-98, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, ¶ 632 (rel. August 21, 2003) ("Triennial Review Order").

the time that the customer needs to be available, AM or PM appointment windows would help limit the number of Verizon dispatches that result in "no access" situations, i.e., those situations where Verizon cannot gain access to the end user's premises to complete the installation.

The witnesses state that "no access" is a problem because it causes a significant delay in service installation. According to witnesses Evans and Clancy, Covad customers have to stay home more than one time for Verizon to complete its installation, which makes Covad's customers frustrated and unhappy. Subsequent appointments are often at least a week later than the original date, thus adding more delay according to witnesses Evans and Clancy. The witnesses also state that in some instances, end users report that they were indeed home when Verizon reported the "no access." Witnesses Evans and Clancy claim that such dueling allegations put Covad in a "he-said, she-said" situation with its customers.

Covad witnesses Evans and Clancy also state that Covad incurs a financial penalty from the ILEC for each "no access" situation and for the processing to generate the new date. According to the witnesses, Covad has every incentive, therefore, to reduce the "no access" problem. The witnesses also claim that while Covad has been successful in reducing "no access" situations, limiting the appointment time can further reduce instances of the problem. The witnesses state that Covad and Verizon have used the AM and PM appointment window structure in the past to help resolve technician meet problems.

Witnesses Evans and Clancy explain that, in the past, Verizon and Covad had difficulties successfully scheduling technician meets to resolve ongoing trouble reports. As a result, the witnesses state that Verizon and Covad decided to schedule these troubles as the first job in the morning or the first job after the lunch break. This "AM/PM" scheduling, according to witnesses Evans and Clancy, resulted in a significant increase in the number of instances where the appointments were met such that this is no longer considered a problem. Covad witnesses Evans and Clancy state that when the same issue arose in Verizon West, this solution, developed in Verizon East, was employed. The witnesses state that in Verizon

West, now, this scheduling is no longer an issue. As a result, witnesses Evans and Clancy claim that there is no reason why narrowing the appointment window for its customers will not also have a similar, positive result.

Although the Covad witnesses state that Covad seeks a "commercially reasonable three-hour appointment window," the witnesses later reverse their claim and state that the company is not seeking a three-hour appointment window, but is seeking the same morning or afternoon appointment windows that Verizon offers its retail customers. Witnesses Evans and Clancy state that, contrary to Verizon witness White's contentions, there is no issue of different windows for different CLECs. According to witnesses Evans and Clancy, Verizon states that four-hour appointment windows are available based on the available workforce and existing workload. Witnesses Evans and Clancy state, however, that Verizon controls the scheduling process, particularly the vacation and overtime policies for its workforce. The witnesses opine that it is hard to imagine that a Verizon retail customer desiring a four-hour appointment window would not be provided one. The witnesses conclude as a result that Verizon should be required to provide a morning or afternoon appointment window unless it can demonstrate that workforce considerations preclude use of such a window.

Covad witnesses Evans and Clancy state Covad is seeking to provide Verizon the same incentive to meet the appointment window as Covad has to ensure its customer it is available. Witnesses Evans and Clancy claim Covad currently faces a tremendous incentive to ensure that its customer is present for the installation. Covad witnesses Evans and Clancy explain, stating that not only are "no access" situations excluded from performance metrics, but Covad has to pay a penalty if its customer is not present. According to Covad, inclusion of an equivalent penalty on Verizon for failure to meet appointment windows would provide an equivalent incentive for Verizon to meet those appointments. The witnesses state that the party that will ultimately benefit from such a penalty is the end user who hopefully will enjoy timely installation of their service.

Covad states in its post hearing brief that this issue has narrowed to the charge to be paid by Verizon for failure to meet

the appointment window. We note that Covad made no mention of the sub-issue of appointment windows in its post-hearing brief position statement on this issue.

Covad proposes the following language be added to its interconnection agreement with Verizon to resolve the remaining narrow issue:

> If a dispatch does not occur (other than if the Covad end user was not available or upon the request of Covad), Covad may request a new appointment window outside of the normal provisioning interval by contacting Verizon's provisioning center directly and Covad shall not be required to pay the non-recurring dispatch charge for such appointment. Moreover, each additional instance in which the Verizon technician fails to meet the same customer during future scheduled windows, Verizon will pay to Covad the missed appointment fee that will be equivalent to the nonrecurring dispatch charge that Verizon would have assessed to Covad had the Verizon technician not missed the appointment.

According to Verizon witnesses Kelly and White, CLEC employees obtain the same pre-ordering information from the same underlying OSS as Verizon retail representatives. Witnesses Kelly and White state that, depending upon the type of service ordered, installation appointments for retail and wholesale service are available either in standard, minimum fixed intervals or based upon the demand volume and the work force available at the desired time of installation.

Verizon witnesses Kelly and White explain that, for services that are provisioned based on a standard interval, Verizon offers an all-day window on the installation day. While the appointments are based on the standard intervals and are offered on a business-day basis, the Verizon witnesses state that CLECs may request that Verizon provide installation of these fixed interval products on a four-hour-window basis in the manner described below. The witnesses state that Verizon will attempt to accommodate this request; however, it cannot guarantee that it can do so.

Verizon witnesses Kelly and White state that for retail products and UNEs that do not have standard, fixed provisioning intervals, Verizon's OSS provide installation due date availability through a labor force management system that is available to both Verizon retail representatives and CLEC employees using one of the wholesale pre-ordering interfaces that Verizon offers. Appointments set through this labor force management system are available on a first-come, first-served basis to CLEC customers and Verizon customers alike, according to the Verizon witnesses. Witnesses Kelly and White claim that CLECs are given the opportunity to select the same four-hour windows described above during the pre-ordering process, in the same manner in which Verizon retail representatives can.

Verizon witness Raynor claims that as part of Issue 22, Covad has proposed that penalties should apply if Verizon misses the appointment window. Witness Raynor opines that Verizon's position with respect to that aspect of this issue is that any such penalties should be established under industry-wide performance measurements and performance assurance plans.

Verizon witness Raynor states that under the measurements that Verizon currently uses to report its performance in Florida, the missed appointment performance measurements exclude instances where a Verizon technician misses an appointment because of reasons attributable to the CLEC or the CLEC's end-user customer, such as where the technician cannot obtain access to the premises. In addition, witness Raynor states Verizon currently can be required to make remedy payments, based on the company's performance on the missed appointment measurements, under the performance assurance plan adopted as part of the conditions for the FCC's approval of the Bell Atlantic-GTE merger. The witness states that this Commission is currently considering whether to adopt a performance assurance plan that similarly would require remedy payments based on Verizon's performance. As noted above, the witness states that our staff's recommendation in Docket No. 000121C-TP is that no such remedy payments be adopted at this time, but that the issue be revisited during the six-month review.

Verizon witness Raynor argues that Covad's proposal is inconsistent with the current treatment of this issue. According

to witness Raynor, Covad's proposed language appears to require Verizon to pay a penalty whenever it misses an appointment, no matter the cause. Secondly, according to the Verizon witness, Covad has proposed, in effect, a remedy plan for itself, even though our staff has proposed deferring creation of such a plan at least until the six-month review.

Appointment Window

Initially arguing for a three-hour appointment window for delivering loops, Covad witnesses Evans and Clancy later revised their position and stated that Covad is actually seeking the same morning or afternoon appointment windows Verizon offers its retail customers. The Verizon witnesses claim that Verizon offers both its retail and CLEC customers AM and PM appointment windows, or first/last appointment of the day. We note that Covad does not dispute these claims by Verizon's witnesses. We further note that Covad states in its post hearing brief that this issue has narrowed to the charge to be paid by Verizon for failure to meet the appointment window. Also, Covad made no mention of the sub-issue of appointment windows in its post-hearing brief position statement on this issue. That omission infers that Covad considers the sub-issue of availability and scheduling appointment windows now moot.

Applicable Penalty

Covad's remaining sub-issue regards its argument to charge Verizon for failure to meet the appointment window. We equate Covad's language with a penalty provision for Verizon's failure to meet performance expectations. With respect to any penalties, they should be established under industry-wide performance measurements and performance assurance plans. The issue of penalties can be addressed through the future performance measure reviews in Docket No. 000121C-TP. There is nothing to prohibit Covad from petitioning us in the future regarding a penalty plan for Docket No. 000121C-TP.

Decision

Covad shall be offered the same appointment window for the installation of loops as Verizon provides for itself. Verizon

shall not be ordered to pay a penalty to Covad for missed appointment windows. Any such penalty should be established under industry-wide performance measurements and performance assurance plans in Docket No. 000121C-TP. If Covad believes that the intervals set in Order No. PSC-03-0761-PAA-TP are inappropriate, Covad is encouraged to participate in future performance measure reviews. The appropriate venue for modifying Verizon's performance metrics is in Docket No. 000121C-TP.

XII. TECHNICAL REFERENCES FOR THE DEFINITION OF THE ISDN AND HDSL LOOPS

Arguments

Covad witnesses Evans and Clancy argue that ILECs and carriers no longer are confined to one state and typically operate in a number of territories, thus necessitating the use of national industry standards for interconnection. The witnesses believe that the use of Verizon's TR 72575 will create the possibility of misinterpretation and confusion, and that Verizon could unilaterally change its TR 72575 to the detriment of Covad; therefore, they contend that only ANSI standards should be used.

Verizon witness Clayton argues that TR 72575 is a reference document that "define[s] the ISDN and HDSL loops in Verizon's network and provide[s] complete information about Verizon's UNE loop products." Where differences may arise between ANSI standards and TR 72575 witness Clayton says "Verizon has offered to research the standard and area of conflict."

During her deposition, our staff asked Verizon witness Clayton whether the application of Verizon's TR 72575 would disqualify any loops from meeting ANSI standards. Witness Clayton replied that Verizon's Technical Reference "takes a compilation of a lot of the industry's standard information and we build it into one document. There is no one single ANSI or national standard that would describe Verizon's UNE loop product offerings." Both parties are in agreement that ANSI standards are the national industry standards and should be utilized. The application of TR 72575 and Verizon's ability to revise this technical reference from time to time is the point where the

parties differ. Covad seeks to strike any reference to Verizon's TR 72575, claiming "Verizon's use of in-house definitions, which it may unilaterally revise and change, creates the potential for conflicts."

While responding to the factual basis for its position on Issue 23, Covad failed to provide any specific instances where the application of TR 72575 caused any conflicts; rather, it appears Covad's view is based on its "notion" that national industry standards are the best means of defining technical terms for purposes of interconnection agreements. The FCC has found that "referencing applicable standards is preferable to actually articulating the standards in a contract, because the standards may change over time."[22] The fact that changes will and do occur to ANSI standards and what impact the changes have on the technical definitions currently in use within the interconnection agreement is not addressed. It is not unlikely that one company could be operating with revised ANSI standards where another may not. It seems logical that a company should have a blueprint as to how a particular ANSI standard, such as ISDN, ADSL or HDSL, is being implemented within its network. Verizon accomplishes this through its use of TR 72575. It is probable that the American National Standards Institute, periodically, will make revisions to its technical references. It is in Verizon's best interest to ensure that it does not cause interconnection problems with the circuits that are defined within TR 72575 and that are currently provisioned or are in the process of being provisioned for its wholesale or retail customers. In addition, Covad has not provided any specific instances where Verizon's TR 72575 did not meet the applicable ANSI standards for ISDN, HDSL or xDSL, or any circumstances where changes to the technical reference occurred that resulted in interconnection problems. The inclusion of the technical reference which acts as a blueprint applying the industry standards will not be a detriment to Covad.

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[22] *Petition of WorldCom, Inc. 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 Expedited Arbitration,* CC Docket Nos. 00-218 &00-249, Memorandum Opinion and Order, DA 02-1731,¶ 480.

Decision

The agreement should reference Verizon's Technical Reference 72575.

XIII. NOTIFICATION TO VERIZON OF SERVICES DEPLOYED ON UNE LOOPS

Arguments

The testimony provided by Covad witnesses Evans and Clancy indicated that this issue involved the anticipation of changes to the law concerning spectrum management, and that the Bona fide Request (BFR) process was "entirely unreasonable and burdensome." However, in response to our staff's Interrogatory 25, Covad indicated Issue 27 had "narrowed" and the parties were in agreement on the issue except for the cost of converting previously ordered loops. In its post-hearing brief, Covad indicated the parties have resolved this issue for the most part. The applicable portion of the interconnection agreement is provided below.

> With respect to option (a), if Verizon subsequently creates a new type specifically for the new loop technology Covad agrees to convert previously-ordered loops to the new loop type, at no cost, and to use the new loop type on a going-forward basis. (Emphasis in original)

The negotiation process has, apparently, made the majority of the testimony of Covad witnesses Evans and Clancy no longer germane since their testimony covered spectrum management and the reference to applicable law.

Covad's dispute now concerns its proposed agreement language to convert previously ordered loops to a new loop type but, "at no cost." It believes Verizon wants to penalize Covad for its speed to market by requiring Covad to "pay again" for loops that have already been provisioned simply because Verizon has created a new loop designation to accommodate Covad's new technology.

Verizon's initial testimony for Issue 27 concerned two disputes. The first was whether Covad is required to notify

Verizon of which advanced services it deploys over the loops that it obtains from Verizon. The second dispute involved what process Covad must use when ordering new loop types or technologies. Verizon indicated Issue 27 had become a dispute over whether Covad "must pay the generally applicable, TELRIC-based rate that applies when it submits a local service request to convert a loop from one type to another, or whether Verizon must perform those conversions at no cost to Covad." Thus, the testimony provided by Verizon witness Clayton is no longer germane because it pertained to advanced service notification obligations and spectrum management, which both parties have resolved. Verizon's post-hearing brief indicates that "the parties' disputes with respect to this issue have been almost entirely resolved." Verizon elaborated that it "does not develop new loop types unilaterally; instead, the necessary codes are developed collaboratively by national, industry-wide bodies." Additionally, Verizon noted that Covad "benefits in multiple ways from the creation of a new loop type" and that the processing of the orders to convert Covad's loops from one loop type to another imposes costs on Verizon.

Decision

As both parties have noted above, the remaining dispute regarding this issue is whether or not Verizon should be allowed to charge Covad when Covad converts previously-ordered loops to a new loop type. While Verizon contends it is appropriate to assess its standard TELRIC-based rate, Covad asserts that such conversions should be performed at no charge. the record on this issue is quite sparse and there is little more than statements of competing positions. Although there is little if any indication of the nature of the costs that Verizon will incur associated with such conversions, it appears to be undisputed that there will be costs. Covad has not adequately explained why Verizon should absorb costs that Verizon incurs on Covad's behalf. Absent some basis to the contrary, we believe that it is reasonable for Verizon to assess charges for loop conversions. Verizon shall be allowed to charge Covad for the loop conversions that it performs for Covad.

XIV. COOPERATIVE TESTING OF LOOPS PROVIDED TO COVAD - TERMS AND CONDITIONS

Arguments

Covad witnesses Evans and Clancy assert cooperative testing assists in the timely and efficient provisioning of functioning loops and that Verizon should not charge for cooperative testing until Verizon demonstrates it can consistently deliver working loops to Covad. The witnesses state that the cooperative testing procedures were defined within the New York DSL Collaborative and further refined during the Massachusetts 271 proceedings between Covad, Verizon, and the Massachusetts Department of Telecommunications and Energy, and that Covad seeks to document the current process and refinement that has occurred which employs an Interactive Voice Response Unit (IVR). They explain the utilization of the IVR allows the Verizon technician access to Covad's remote test unit in order to test newly provisioned stand alone loops. The witnesses claim that when cooperative testing was not performed, Verizon's performance during provisioning was "abysmal."

Witness White says the issue involves xDSL capable loops and Verizon's requirement to follow certain testing procedures that are spelled out in the interconnection agreement for the xDSL loops that Covad orders. Verizon witness White disputes the procedures a Verizon technician must follow when provisioning an xDSL capable loop and takes the position that cooperative testing of loops is an operational matter subject to change and should not be spelled out in interconnection agreements. In addition, witness White opposes Covad's language because it defines a process that requires manual testing which he perceives is inefficient and burdensome. Verizon witness White elaborates that the procedures developed in the former Bell Atlantic Region for the New York DSL Collaborative are not used in Verizon's former GTE jurisdiction such as the state of Florida. The witness continues by saying that Covad makes no mention of the IVR unit in its proposed language and appears to be requiring a "manual cooperative test. . . ."

The phrase "cooperative testing," implies that both parties are testing in cooperation with one another. Notably, Verizon

restricts the section of the interconnection agreement to the former Bell Atlantic Region. Verizon's revised Proposed Language Matrix-Florida, Section 3.13.13, concerning Issue 30 is in part:

> In the former Bell Atlantic Service Areas only, Covad may request Cooperative Testing in conjunction with its request for an xDSL Compatible Loop or Digital Designed Loop. "Cooperative Testing" is a procedure whereby a Verizon technician, either through Covad's automated testing equipment or jointly with a Covad technician, verifies that an xDSL Compatible Loop or Digital Designed Link is properly installed and operational prior to Verizon's completion of the order. When the Loop test shows that the Loop is operational, the Covad technician will provide the Verizon technician with a serial number to acknowledge that the Loop is operational. If the Parties mutually agree to modify the existing procedures such procedures shall be effective notwithstanding anything in this section. Charges for Cooperative Testing are as set forth in the Pricing Attachment.

Verizon's language restricts the availability of cooperative testing to the former Bell Atlantic Service Area only. This places Covad in the position of not being able to request cooperative testing from Verizon in the state of Florida.

Verizon witness White explains that Covad has recently deployed an IVR unit that allows remote testing of xDSL loops and it is not mentioned within Covad's proposed language dealing with cooperative testing. He describes a testing process whereby Covad is providing the IVR test unit and Verizon technicians are provisioning, via remote testing, the loops that Covad has ordered. Witness White also refers to cooperative testing as a manual process because it requires a Verizon and Covad technician to jointly verify that a loop is properly installed and operational. The use of Covad's IVR unit in the provisioning of xDSL loops demonstrates that both parties are benefitting from improvements to the cooperative testing process.

Covad witnesses Evans and Clancy state that they are providing anecdotal information concerning operations in other

states, in an effort to prevent previous cooperative testing problems from occurring in Florida. In addition, witnesses Evans and Clancy's statement that Verizon should perform cooperative testing without charge until it demonstrates it can deliver properly provisioned loops to Covad is without merit because the information they provide is "anecdotal," and they fail to provide any specific instances of cooperative testing problems involving Verizon Florida.

The testimony of Covad witnesses Evans and Clancy and Verizon witness White indicate that cooperative testing is in a transitional phase, and both parties are taking steps to automate testing in order to improve the provisioning of xDSL loops. Covad should not, however, be deprived of cooperative testing in Florida and should be able to request cooperative testing from Verizon for a reasonable fee because of the benefit cooperative testing provides. Also, the inclusion of the cooperative testing procedures within the interconnection agreement is not appropriate, as evidenced by the fact that all the witnesses say within their testimony that changes have occurred to the process and it is continuing to change. This would be compounded by the placement of two different snapshots of the cooperative testing procedure within the proposed interconnection agreement by both parties. Verizon's testing procedure is spelled out in its "Cooperative Testing" procedures above and Covad's is provided below for reference:

> . . . Cooperative testing is a procedure whereby a Verizon technician and a Covad technician jointly perform the following tests: (1) Loop Length Testing; (2) DC Continuity Testing; (3) Foreign Battery/Conductor Continuity Testing; (4) AC Continuity Testing; and (5) Noise Testing.

Whether through Covad's IVR unit or manual testing, the cooperative testing of the xDSL loop should be accomplished by the most efficient means available in the state of Florida, and remote systems such as Covad's IVR should be utilized with manual testing as the fallback procedure. The inclusion of the cooperative testing procedures within the interconnection agreement, is not appropriate and, instead, is best developed and defined in mutually agreed upon operational procedures. Each of

the testing processes (automated or manual) has specific operating procedures and whichever system is available should be employed, keeping in mind the move is towards automation, ease of use, and efficiency in the provisioning of xDSL loops.

Decision

Verizon Florida shall perform, for a reasonable fee and at Covad's request, cooperative testing for the loops Covad orders. Specific procedures for cooperative testing shall not be detailed within the interconnection agreement.

XV. TERMS, CONDITIONS AND INTERVALS APPLYING TO A MANUAL LOOP QUALIFICATION PROCESS

Arguments

Addressing the terms, conditions, and intervals that should apply to Verizon's manual loop qualification process, Covad witnesses Evans and Clancy state that Covad should be able to submit either an extended query (the extended query request was later withdrawn by Covad) or a manual loop qualification request in instances when the Verizon customer listing is defective, not just in cases where the Verizon database does not contain a listing.

Covad witnesses Evans and Clancy state that, given that Verizon Florida does not offer extended query, Covad now proposes that the following language be included in Section 3.13.5 of the Verizon Florida Agreement:

> If the Loop is not listed in the mechanized database described in Section 3.11.2 or the listing is defective, Covad may request a manual loop qualification at no additional charge prior to submitting a valid electronic service order for an ADSL, HDSL, SDSL, IDSL, or BRI ISDN Loop. Verizon will complete a manual loop qualification request within one business day.

Verizon witness White states that, with respect to this issue, the parties disagree as to whether or not the

interconnection agreement should contain language setting forth terms, conditions, and intervals that would apply to Covad's manual loop qualification requests. Witness White states that Covad has proposed such language. Verizon witness White explains, however, that Covad's proposed language pertains to the loop qualification process in effect - not in Florida - but in the former Bell Atlantic jurisdictions. As a result, witness White concludes that the additional language proposed by Covad is generally inapplicable to Verizon's systems and processes in Florida.

According to Verizon witness White, in former Bell Atlantic jurisdictions, Verizon offers CLECs access to loop qualification information in four ways:

(a) LiveWire
(b) Manual (Extended Query)
(c) Loop Make-up Inquiry via Loop Facilities Assignment and Control System (LFACS)
(d) Engineering Query (Engineering Record Request)(TR 124-125)

Verizon witness White further states that in Florida, as in Verizon's other former GTE jurisdictions, Verizon offers CLECs a single, mechanized loop qualification inquiry. According to the witness, this transaction provides CLECs with information contained in its Wholesale Internet Service Engine (WISE) database. According to Verizon witness White, the WISE database is the same database accessed by Verizon's retail representatives in Florida, and contains all the loop qualification information available in the LiveWire database used in the former Bell Atlantic territory, as well as information normally available only through one or more of the other loop qualification transactions offered in those areas.

Verizon witness White claims that in spite of providing this wealth of information via an automated process, Verizon will, on an exceptions basis, when a CLEC makes a specific request to its account manager, manually investigate loop qualification information on particular loops. According to the witness, Verizon provides this information in the same time and manner as it would provide this information to itself.

Verizon witness White further claims that Covad's proposed additional interconnection agreement language does not apply to the process in place in Florida. Witness White provides the following example to illustrate his point:

> Covad has proposed that it should be able to submit an Extended Query in certain instances. But this is not a transaction used in Florida or Verizon's other former GTE jurisdictions. In addition, Covad has proposed that Verizon should respond to its manual loop qualification requests in one business day. As noted above, Verizon does not have a manual loop qualification process. And, even when Verizon manually investigates loop information for a particular loop on an exceptions basis, the appropriate standard is that Verizon provide Covad with that information in the same time and manner that it provides the information to itself.

Since Covad acknowledges that Verizon's extended query process in not available in Florida, that sub-issue is resolved, leaving the sub-issues of Covad's proposed revised additional language, manual loop qualification and the interval for manual loop qualification.

Witnesses Evans and Clancy state that Covad should be able to submit a manual loop qualification request in instances when the Verizon customer listing is defective, not just in cases where the Verizon database does not contain a listing. The applicable standard for this portion of the issue is parity. As explained in its arguments above, Verizon Florida has no manual loop qualification system in place to service either its retail or wholesale operations. That being the case, Verizon should not be required to provide such a system to its CLEC customers. The process Covad refers to is applicable only to the former Bell Atlantic territory. Verizon has explained that in certain instances it can, on an exceptions basis, manually investigate loop qualification information for Covad. However, conducting such investigations as an exception does not translate into Verizon having an established manual loop qualification process.

Covad further asserts that Verizon should be required to perform manual loop qualifications at no additional charge when it has been proven that the information in Verizon's electronic database is defective. Verizon refutes Covad's claim and cites the *Virginia 271 Order ¶34* stating the FCC "has never required incumbent LECs to ensure the accuracy of their loop qualification databases." Verizon reasons, therefore, that there is no basis for Covad's asserted right to obtain loop qualification information manually when electronic database information is shown to be defective.

Since Verizon Florida's retail operations access the same database as do its CLEC customers, whenever Verizon submits a query for loop qualification it is subject to the same data quality conditions as its CLEC customers. Whenever Verizon obtains inaccurate data from that database, it incurs additional costs inherent in obtaining correct data. As it stands, both Verizon and its CLEC customers are subject to the same data integrity and cost issues relating to receiving bad data. Verizon is not in the business of selling loop information for profit, but is required to provide this information, as stated, from the same database it uses. If Verizon were in such a business, we might take a different stance regarding who should bear additional cost in repairing a defective product.

Finally, Covad argues that Verizon should be required to return loop information within intervals proposed in its arguments. Our discussion of Issue 13 regarding establishment of intervals for LSCs largely applies to this issue. The intervals ordered by the Commission in Docket No. 000121C-TP should continue to apply to this issue. Covad was a party to that docket and was a signatory to the resulting performance measures settlement agreement with Verizon.

Decision

We agree, first, that Verizon has no manual loop qualification process that applies in Florida. Second, as with other issues regarding performance intervals, such intervals should be set on an ILEC-by-ILEC basis in the state. That process would provide equal standards for the parties, as well as provide results that enable comparison across CLECs. Finally,

the standard of performance by Verizon should be parity; Verizon should not be required to provide Covad, or other CLECs, with intervals shorter than what it provides to itself.

The terms, conditions and intervals that apply to Verizon's manual loop qualification process with Covad shall be governed by Verizon Florida's current loop qualification processes, and by the intervals contained in Commission Order No. PSC-03-0761-PAA-TP. If Covad believes that the intervals set in Order No. PSC-03-0761-PAA-TP are inappropriate, Covad is encouraged to participate in future performance measure reviews. The appropriate venue for modifying Verizon's performance metrics is in Docket No. 000121C-TP.

XVI. CONTESTING THE PREQUALIFICATION REQUIREMENT FOR AN ORDER OR SET OF ORDERS

Arguments

Covad offered no direct or rebuttal testimony on this issue; however, in its post-hearing brief, Covad states that for certain order types, Verizon has agreed to accept Covad service orders without regard to whether they have been prequalified. As a result, Covad is seeking the inclusion of language in its interconnection agreement with Verizon that would preserve its right to contest the prequalification "requirement" for an order or set of orders. In its post-hearing brief, Covad states that it seeks this remedy because Verizon's order prequalification tool has proven to be unreliable on certain order types.

As an added measure Covad states that, in the event Covad uncovers significant and pervasive problems with Verizon's prequalification tool for an order or sets of orders, it seeks to reserve its right to contest any requirement that such orders must pass prequalification. Covad reiterates this position in its post hearing brief and adds that it should not be forced to use this tool, particularly when it often incorrectly precludes Covad from ordering loops.

In its post hearing brief, Covad also states that there is no basis for Verizon to require that CLECs prequalify loops. According to Covad, in the UNE Remand Order, the FCC stated that:

> [we] clarify that pursuant to our existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgement about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install.

Covad argues that the FCC appears to contemplate expressly that prequalification by the ILEC is not a prerequisite for ordering a loop. Covad offers that the FCC has determined that if a CLEC wanted to use raw data from an ILEC's databases to construct its own loop prequalification tool, the CLEC should be free to do so. Covad further offers that in addressing a request for arbitration of SBC's obligations under the SBC/Ameritech Merger Conditions, the Common Carrier Bureau of the FCC stated that "the question of implementing an enhancement to SBC's OSS that would allow CLECs to skip the loop qualification process for loops less than 12,000 feet in length appears to be a question of fact, i.e., whether SBC is capable of delivering such an enhancement across its 13-state region in response to CLEC requests during the collaborative sessions." Covad opines that this suggests that if bypass of prequalification were technically feasible, the FCC (via Common Carrier Bureau decision) would authorize it. Covad argues that the FCC Common Carrier Bureau gave no indication that prequalification of orders was mandated for CLECs. Covad points out that when Verizon implemented its mechanized loop qualification charge, Verizon waived the charge for CLECs that chose not to consult the database before placing their orders. Covad argues that Verizon was therefore recognizing the optional nature of prequalification.

Covad sums up stating there is clearly no basis for Verizon to require that Covad prequalify orders, and there is no doubt that Covad should have the right to contest the prequalification requirement for an order, or set of orders, if Covad finds problems with Verizon's prequalification tool for an order, or set of orders. Covad argues that Verizon already allows Covad to bypass the prequalification requirement for certain types of orders. According to Covad, there is then no reason that Verizon should mandate prequalification for all orders.

Verizon witness White states that this issue pertains to Covad's obligation to prequalify its xDSL-capable loop orders. The witness states that Verizon has agreed that Covad may challenge Verizon's determination that a particular loop, or set of loops, is not qualified for the xDSL type that Covad seeks to deploy on that loop. However, witness White asserts that Covad has proposed changing this language to allow it to contest the very requirement that it prequalify its xDSL-capable loop orders.

Verizon witness White states that in order for a CLEC to provide xDSL service over a loop, it is essential that the loops possess the appropriate technical capabilities. The witness contends that the prequalification process, described in his discussion of Issue No. 32, provides CLECs with information on the technical capabilities of those loops, including all the information necessary for the CLEC to determine whether the loop can support the particular xDSL type that it seeks to deploy. The Verizon witness concludes that Verizon expects that CLECs have prequalified their xDSL orders before submitting them.

Witness White again notes that Covad may dispute Verizon's determination that a particular loop or set of loops does not meet the necessary technical specifications to handle the advanced services that Covad seeks to provide. The witness observes that in the event that Covad does dispute Verizon's determination, Verizon has further agreed that, at Covad's option and where available facilities exist, Verizon will provision any such contested order or set of orders, except where it will impair voice service to the end user, pending resolution of the parties' dispute via the dispute resolution procedures in the parties' agreement.

The Verizon witness contends that although Covad has proposed to change only one word in the provision at issue, its proposal would dramatically change the purpose of this provision, by allowing Covad to argue that the prequalification requirement for a particular class of xDSL loops – or for all xDSL loops – should be eliminated. The witness states that Covad's claimed justification for this change is that "Verizon's prequalification tool has proven to be unreliable on certain orders types." Witness White asserts that even if Covad is correct and it is not (nor is it clear whether Covad is referring to WISE or to the

LiveWire database used in the former Bell Atlantic jurisdictions) that would not change the fact that a substantial percentage of the loops in Verizon's network cannot support any xDSL type. If Covad is not required to prequalify its xDSL-capable loop orders, witness White claims that Verizon will routinely be required to attempt to provision Covad's xDSL-capable loop orders where no xDSL-capable loop is available and, in some cases, perform work that would degrade voice service.

Verizon witness White argues that it is essential that orders for advanced services be provisioned on loops that possess the appropriate technical capabilities. We agree. The witness further states that Verizon has agreed that Covad may challenge Verizon's determination that a particular loop, or set of loops, is not qualified for the xDSL type that Covad seeks to deploy on that loop. However, witness White contends Covad has proposed changing this language to allow it to contest the very requirement that it prequalify its xDSL-capable loop orders. Verizon has a process in place for Covad to challenge a determination on a particular loop.

Decision

It is essential that orders for advanced services be provisioned on loops that possess the appropriate technical capabilities. Verizon has given Covad the right to challenge a ruling of disqualification made by Verizon. We find no compelling reason to recommend a change in the wording of the agreement.

XVII. INTERVAL FOR PROVISIONING LOOPS

Arguments

According to Covad witnesses Evans and Clancy, Verizon should provision loops within the shortest of either: (1) the interval that Verizon provides itself; (2) the Commission-adopted interval; or (3) ten business days for loops needing conditioning, five business days for stand-alone loops not needing conditioning, and two business days for line shared loops not needing conditioning. Witnesses Evans and Clancy assert that

these intervals are reasonable and ensure that Covad receives reasonable and nondiscriminatory access to UNE loops.

Covad witnesses Evans and Clancy state that with respect to line sharing, Verizon's current business target of provisioning loops within three days is outdated and should be significantly shortened. Witnesses Evans and Clancy state that if Verizon is claiming that it provides good performance on loop provisioning intervals, then it should be the goal of the Commission to continually seek to raise the bar and have the intervals shortened in order to bring advanced services to Florida consumers more quickly. This concept was explored by the New York DSL Collaborative and in Technical Conferences related to New York Case 00-C-0127 in July and August 2000 according to witnesses Evans and Clancy. The witnesses state that the participants discussed starting the Line Sharing interval at three days and revisiting the interval to progressively reduce it, first to two days, and possibly to a single day. This reduction was based upon the significant difference in the amount of work required to deliver a line shared service rather than a stand-alone service, according to witnesses Evans and Clancy.

Witnesses Evans and Clancy argue that for line sharing, the loop already exists and is working since the voice line is in service. The Covad witnesses state they have become aware that the hot-cut process calls for all the pre-wiring to be completed within two days. The witnesses argue that since the cross-wiring and assignment requirements for line sharing are less than those required for hot cuts, and there is no coordination requirement, Verizon should recognize these facts and reduce the line sharing interval to two days. As support for their argument, the witnesses point to a reduction in the line sharing provisioning interval to two days by Verizon in cases where the splitter is ILEC-owned and requires an additional assignment step.

In discussing Verizon's current interval for line-shared loop orders, Verizon witnesses Kelly and White state that if no facility modifications are necessary, Verizon's standard provisioning interval is three business days. This same three business day interval applies to retail orders, according to the witnesses, because line-shared loops are offered on a standard-interval basis, and Verizon cannot adjust the due dates

for these orders based on its workload and its available work force. Witnesses Kelly and White state that the three business day interval provides Verizon with needed time in which to reallocate its work force to meet spikes in demand for both line-shared loops and all of the other wholesale and retail products and services that must be provisioned in Verizon's central offices each day. According to the Verizon witnesses, when a CLEC orders a line-shared loop, Verizon personnel in a central office receive that order on "Day 1." Any necessary work force management tasks can take place on "Day 2," in order to enable Verizon to meet the provisioning interval on "Day 3." Witnesses Kelly and White state that if the interval for line-shared loops were reduced to two business days, as Covad witnesses propose in their testimony, Verizon would be required to prioritize line-sharing orders over other orders - including orders for voice service - in order to meet the shortened standard interval. The Verizon witnesses acknowledge that Verizon does, on occasion, complete a CLEC's order for a line-shared loop within two business days, in which case Verizon informs the CLEC that the provisioning work has been completed.

Covad was asked by our staff why Verizon should provision loops at an interval unique to Covad. Covad responded that because Verizon consistently meets its performance standard in this area, that is evidence that Verizon is being allowed too much time to provision loops. Covad indicated that for line-shared loops, shorter intervals are warranted. We do not believe the mere fact that Verizon is meeting its current interval demonstrates that Verizon's intervals are too long.

Decision

Intervals for the provisioning of loops should be those set forth in Commission Order No. PSC-03-0761-PAA-TP establishing the metrics contained in the settlement agreement as Verizon's permanent performance measures applicable to all of Verizon's CLEC customers in Docket No. 000121C-TP. These intervals should not be contained within the parties' interconnection agreement. Again, if Covad believes that the intervals set in Order No. PSC-03-0761-PAA-TP are inappropriate, Covad is encouraged to participate in future performance measure reviews. The

appropriate venue for modifying Verizon's performance metrics is in Docket No. 000121C-TP.

XVIII. LINE AND STATION TRANSFERS ("LSTs") TO PROVISION COVAD LOOPS

Arguments

Covad did not provide any testimony on Issue 35, and in responding to discovery, Covad said it "considers the resolution of Verizon and Covad's differences over Issue 35" to be purely legal in nature and will be briefed at the conclusion of the hearing. In its brief, Covad points out that should we allow Verizon to impose a charge for the LST, the first step for Verizon in the performance of an LST should be Covad's approval for the LST. Covad believes it should be given a choice of "whether or not it wants the LST conducted." According to Covad, LSTs should be provided at no charge because Verizon's retail customers are not charged for the LST. Covad also includes in its brief a description of a "forward-looking network" where loops carry both voice and DSL-based traffic, eliminating the need for LSTs. According to the Pennsylvania Public Utilities Commission's Tentative Order, 2002 WL 31664693, Covad says the PUC was not convinced "that the costs proposed for line station transfer are not duplicative of costs already recovered on a recurring cost basis" and that there is added concern that "such charge could be discriminatory in that it imposes an additional cost on customer migration."

Verizon also "considers Issue 35 to involve a purely legal dispute" and did not provide any testimony on the issue. In its post-hearing brief, Verizon indicated that Covad, among other CLECs, had participated in the New York DSL Collaborative. In the DSL Collaborative, the parties had developed a process for conducting LSTs and had agreed "[t]his new process will be applied to all cases where Verizon encounters the customer on DLC and where Verizon can automatically reassign the customer to a spare copper facility. This effort involves additional installation work, including a dispatch, and will require an additional charge." Verizon continues in its brief and says it is collaborating with Covad and other CLECs in the development of a process whereby a requesting CLEC may "indicate on an order-

by-order basis, whether they wish to have an LST performed." In addition, Verizon alleges Covad "should remain bound to the terms of the agreement reached through the DSL Collaborative, which does not permit Covad to request LSTs for particular orders." Also, Verizon's brief states Covad agreed that LSTs "will require an additional charge" and that Covad is mistaken in its belief that Verizon does not charge its own customers for LSTs. Verizon states that it assesses the same charge for an LST, however, the fact that it elects to not pass on those charges to individual retail customers is irrelevant; Covad is able to charge its customers the same rate regardless of whether or not an LST was involved.

A line and station transfer (LST) may be necessary under some circumstances for the deployment of xDSL and is brought into play when a customer must be relocated from an existing digital loop carrier (DLC) to a spare or freed up non-loaded copper facility. The parties' arguments above indicate the LST process was developed by Verizon and a collaborative of CLECs in New York. In that regard, Covad was asked to explain why it should not be subject to the collaborative agreement reached in New York concerning LSTs. Covad responded that LSTs were being performed by Verizon to provide xDSL service when Verizon's DLCs were not upgraded to provide xDSL capabilities and that initially Verizon did not charge for LSTs. However, Covad elaborated that Verizon had asked the New York Commission to reconsider the cost of performing an LST, and the New York Commission had done so with the cost of LSTs to be developed in UNE proceedings. Covad's statements indicate it was aware LSTs involved additional costs, and the fact Verizon did not initially charge for LSTs is not applicable because Verizon asked for and received reconsideration on that very issue. Additionally, when Covad alleges that LSTs should not be subject to additional charges because loop costs are derived from Total Element Long Run Incremental Cost (TELRIC) principles and are already included in the development of the incumbent LEC's line charges, it fails to provide any such TELRIC cost studies. Also, when Covad cites the Pennsylvania PUC's tentative order that indicated the PUC was not convinced that the costs proposed for line station transfers are not duplicative, it failed to provide how LSTs were duplicative and already being recovered. In addition, Covad's allegation that Verizon should not be able to assess LST charges because it does not do so for

its own customers was explored by staff in an interrogatory, and staff believes Covad may elect to not pass on the costs associated with an LST in the same manner as Verizon.

Regarding the performance of an LST, Verizon's position is weakened when it alleges that Covad has already agreed to LSTs being performed in all cases and then includes a process being developed in coordination with Covad and other CLECs, whereby a CLEC may request to have an LST performed on a case-by-case basis. The inclusion of the LST process under development allows greater flexibility to a CLEC in the provisioning of xDSL services. Since the parties recognize that LSTs impose additional charges on CLECs, they should approve whether or not the LST should be performed.

Decision

Reiterating, it is appropriate for Verizon to charge for LSTs. Covad does not have to pass on the cost of the LST to a particular customer and Covad may request an LST on a case by case basis since Covad incurs an additional cost for an LST and should be able to control whether or not it wants the LST performed. Accordingly, Verizon-Florida, for a reasonable fee, shall perform line and station transfers (LST)s following Covad's approval.

XIX. LINE SHARING WHERE AN END-USER CUSTOMER RECEIVES VOICE SERVICES FROM RESELLER

Arguments

Verizon provided no direct or rebuttal testimony on this issue; instead, Verizon chose to establish its position with transcripts from other state commission hearings and with its responses to interrogatories and deposition questions, all of which have been entered into the record as exhibits in this proceeding. Similarly, while Covad filed direct testimony, it provided no rebuttal testimony on this issue. Alternatively, Covad also chose to further establish its position with transcripts from other state commission hearings and with its responses to interrogatories and deposition questions; all of which have been entered into the record as exhibits in this

proceeding. Covad witnesses Evans and Clancy believe that Verizon should be obligated to provide line sharing where the customer receives voice service from a reseller of Verizon's services. They refer to this form of line sharing as "line partitioning." Witnesses Evans and Clancy state that "there is no reason to deny competitive DSL service to end users who chose to purchase local voice services from a reseller, rather than Verizon." They assert that there are no logical or technical reasons to deny competitive DSL service to end users who choose to purchase local voice services from a reseller, rather than Verizon.

Covad witnesses Evans and Clancy point out that Verizon offers resold DSL over resold voice lines to its resale customers. Further, witnesses Evans and Clancy note that in order for this combination to be provisioned, Verizon must write an order to cross connect the office equipment that provides dial tone for the voice service and to the splitter termination for the Verizon DSLAM. The Covad witnesses add that "this requires the same work functions be performed that would be performed to write an order to direct a central office technician to perform a similar cross connection to wire the exact same office equipment to a different termination that would be a CLEC splitter termination. The exact same work function to provision resold DSL would be executed to provision Line Sharing on a resold line that Covad refers to as 'Line Partitioning'." Witnesses Evans and Clancy believe that this work function is the same work function to provision the addition of retail DSL to retail voice, line sharing. "Covad is asking that Verizon make the voice services it provides over the voice grade portion of the loop available on a resale basis at the same time that it makes the high frequency/xDSL portion of the loop available to Covad as a network element via line sharing."[23]

Covad witnesses Evans and Clancy maintain that Verizon's line partitioning policy is unreasonable, discriminatory, and anti-competitive. The Covad witnesses contend that Verizon's policy on line sharing limits consumer choice and the business partnership selection available to Verizon voice resellers. The

[23] EXH 3, p. 37.

witnesses claim that Verizon's policy has been to the detriment of Florida consumers seeking competitive alternatives and is therefore "blatantly anti-competitive." Moreover, they contend that Verizon's discriminatory treatment of resellers is currently affecting many requests for service that Covad is receiving in Florida and could potentially increase as consumers move to competitive alternatives.

In the Pennsylvania Hearing Transcript, Verizon counsel Panner defines line sharing as when Verizon provides the voice and then the high frequency portion of the loop is unbundled for the purposes of a CLEC providing data services. In addition, counsel Panner defines line partitioning as when a CLEC is reselling Verizon's voice service. Verizon counsel Panner believes that whether Verizon has an obligation to unbundle the high frequency portion of the loop where there is resale of voice is a "pure issue of law." Counsel Panner maintains that Verizon has not been held to have that obligation.

Verizon's reasoning for its line partitioning policy was proffered. Verizon indicates that its decision not to provide line partitioning is based on its lack of legal obligation to do so, not on any technical reasons. Verizon notes that line partitioning involves a third party, the voice reseller. Verizon maintains that it can not permit an ALEC to obtain unbundled access to the High Frequency Portion of the Loop (HFPL) where a reseller was providing voice service without the reseller's consent. Verizon suggests that in the matter of line partitioning, detailed rules need to be developed with respect to Verizon's responsibilities toward ALECs and that any such procedure is more appropriately developed on an industry-wide basis, not in a bilateral arbitration.

In the Pennsylvania hearing, Verizon counsel Panner indicated he did not believe that Verizon's line partitioning policy is discriminatory or anti-competitive. Counsel Panner contended that if a reseller is providing voice service the customer can get DSL service because Verizon makes DSL service available for resale. Verizon counsel Angstreich added that Covad can resell Verizon's DSL service; however, they cannot get DSL service as an unbundled network element.

Pursuant to the prohibition against discriminatory conditions or limitations and the provisioning requirements for the resale of telecommunications service set forth in section 251(c)(4) of the Act, Covad reasons that we should have Verizon make the voice services it provides over the voice grade portion of the loop available on a resale basis at the same time that it makes the high frequency/xDSL portion of the loop available to Covad as a network element via line sharing. Covad witnesses Evans and Clancy claim that Verizon's current line partitioning policy is discriminatory and anti-competitive because it limits the business partnerships available to Verizon voice resellers and limits consumer choice.

Decision

However, the FCC stated in Verizon's Virginia 271 Order that "we disagree with Covad that Verizon is obligated to provide access to the high frequency portion of the loop when the customer's voice service is being provided by a reseller, and not by Verizon. Our rules do not require incumbent LECs to provide access to the high frequency portion of the loop when the incumbent is not providing voice service over the loop."[24] Additionally, the FCC has made similar findings elsewhere limiting the ILECs' obligation to provide line sharing to those instances where the ILEC is the voice provider on the loop.[25] Moreover, we do not believe Verizon's current line partitioning policy is discriminatory or anti-competitive because Verizon does permit the resale of its DSL service over resold voice lines so that customers purchasing resold voice are able to obtain DSL

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[24] Memorandum Opinion and Order, Application by Verizon Virginia Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region, InterLata Services in Virginia, FCC 02-297, ¶ 151 (October, 30, 2002)("Virginia 271 Order").

[25] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999)("Line Sharing Order"), vacated and remanded, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), limited stay granted, Nos 00-1012, et al. (D.C. Cir. Sept. 4, 2002).

services from a provider other than Verizon.[26] Therefore, Verizon is not obligated to provide line sharing where an end-user customer receives voice services from a reseller.

XX. INTERVAL FOR COVAD'S LINE SHARING LOCAL SERVICE REQUESTS

Arguments

Covad witnesses Evans and Clancy state that if a loop is mechanically pre-qualified by Covad, Verizon should return a Local Service Confirmations (LSC) formerly referred to as Firm Order Confirmations (FOC) within two business hours for all Covad LSRs. Witnesses Clancy and Evans claim that this interval is reasonable and would ensure that Covad is provided reasonable and nondiscriminatory access to Verizon's OSS.

According to Covad, FOCs are critical to its ability to provide customers with reasonable assurance regarding the provisioning of their orders. According to Covad, a LSC from Verizon confirms that Verizon will deliver what Covad requested and allows Covad to inform a customer that the service they requested will be delivered. Covad further states that a LSC date is also critical for the provisioning process of stand-alone loops in that it identifies the date Verizon will schedule its technician to perform installation work at the end user's address. According to Covad, the end user is required to provide access to their premises, and potentially to negotiate access to shared facilities, where Verizon's terminal is located, at their premises. Covad states that providing an LSC within a single day facilitates its ability to contact end users, and assure they will be available. This capability, according to Covad, assists in resolving one of the inefficiencies that remains in the provisioning process: "No Access" to the end user's premises for the Verizon technician. According to Covad, if the end user is not able to provide access on the originally scheduled LSC date, Covad can communicate with the end user and get back to Verizon to reschedule the LSC. Covad contends that the efficiency gained by providing a LSC within a single day will provide significant savings to both Verizon and Covad, while significantly improving the customer experience.

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[26] Verizon's FCC Tariff No. 20, Part III, Section 5.2.

Covad states that with respect to line sharing, Verizon's current business target of provisioning loops within three days is outdated and should be significantly shortened. Covad states that if Verizon is claiming that it provides good performance on loop provisioning intervals, then it should be the goal of the Commission to continually seek to raise the bar and have the intervals shortened in order to bring advanced services to Florida consumers more quickly. According to Covad, this concept was explored by the New York DSL Collaborative and in Technical Conferences related to New York Case 00-C-0127 in July and August 2000. Covad states that the participants discussed starting the Line Sharing interval at three days and revisiting the interval to progressively reduce it, first to two days and possibly to a single day. According to Covad, this reduction was based upon the significant difference in the amount of work required to deliver a line shared service rather than a stand-alone service.

Witnesses Evans and Clancy argue that for line sharing, the loop already exists and is working since the voice line is in service. The Covad witnesses state they have become aware that the hot-cut process calls for all the pre-wiring to be completed within two days. The witnesses argue that since the cross-wiring and assignment requirements for line sharing are less than those required for hot cuts, and there is no coordination requirement, Verizon should recognize these facts and reduce the line sharing interval to two days. As support for their argument, the witnesses point to a reduction in the line sharing provisioning interval to two days by Verizon in cases where the splitter is ILEC-owned and requires an additional assignment step.

Verizon witness Raynor states that Verizon takes the position that the intervals for these confirmation notices should be set in Docket No. 000121C-TP, where our staff has proposed to adopt the intervals, business rules, and performance standards contained in the similar measurements established as a condition of the FCC's approval of the Bell Atlantic-GTE merger. According to witness Raynor, Covad has proposed to establish specific intervals in its interconnection agreement that differ from those our staff has proposed.

Verizon witness Raynor states that our staff's proposal in Docket No. 000121C-TP, like the measurements under which Verizon currently reports its performance in Florida, contains, in

pertinent part, the following intervals and performance standards:

(a) Fully Electronic/Flow Through Orders:

95% within 2 system hours

(b) Orders That Do Not Flow Through:

UNE non-designed < 10 lines 95% within 24 clock hours

UNE designed < 10 lines 95% within 48 clock hours

UNE non-designed or designed >= 10 lines 95% within 72 clock hours

The witness points out that the business rules in our staff's proposal also contain a number of exclusions, such as for non-business days and delays caused by customer reasons.

Verizon witness Raynor argues that Covad's proposal here is very different from that in staff's proposal in Docket No. 000121C-TP. Witness Raynor states that Covad has proposed that, for stand-alone loops, LSCs should be returned within 2 business hours for all electronically pre-qualified local service requests for stand-alone loops and line sharing orders, and within 24 hours for all local service requests for stand-alone loops that are subject to manual pre-qualification. According to the Verizon witness, Covad's proposal appears to require 100% of Verizon's LSCs to be returned in the intervals that Covad prefers, as compared to the 95% on-time standard in staff's proposal. Witness Raynor further argues that Covad's proposal also does not provide a longer interval for electronically pre-qualified orders that do not flow through, which our staff's proposal does. The Verizon witness points out that Covad's proposal does not provide for longer intervals for orders of 10 or more lines, which our staff's proposal does.

Verizon witness Raynor points out that neither Covad nor any other CLEC suggested any changes to our staff's proposal with respect to a measurement of LSC timeliness as part of Docket No. 000121C-TP. According to witness Raynor, as with Issue 4, Covad is again seeking performance measurements that are unique to it and that cannot easily be modified.

In discussing Covad's proposals for including LSC intervals in the parties' interconnection agreement, Verizon witness Raynor

notes that Covad witnesses Evans and Clancy claim the "intervals proposed by Covad are identical to those set forth in New York's current guidelines." The Verizon witness states that aside from the fact that the intervals proposed in their testimony here are not the same as those contained in Covad's proposed language for inclusion in the parties' agreement, there is no reason for the Florida Commission to include the intervals set out in the New York guidelines in the parties' agreement. Witness Raynor observes that we recently adopted performance measurements that apply to Verizon's performance for all CLECs in Florida, and those are the performance standards that govern Verizon's performance in Florida today.

According to Verizon witness Raynor, even if Covad were seeking to include in the parties' interconnection agreement the Florida measurements pertaining to LSC intervals, witnesses Evans and Clancy would still be wrong in claiming that Covad "is not seeking to change the industry-wide performance standards." Witness Raynor states that Covad's proposal apparently would include in the agreement only the intervals in which LSCs are to be returned, but not also the accompanying performance standards (e.g., 95% on time), business rules, and exclusions, all of which are an integral part of the measurements that this Commission adopted.

The intervals that should be in effect for Verizon with Covad are the intervals ordered by us in Docket No. 000121C-TP. The only practical way to monitor Verizon's performance is to monitor and analyze the level of service provided to all its CLEC customers. In doing so, intervals and other measures of service would by necessity have to be the same for each CLEC if the results are to have any comparative value.

The processing of CLECs' Local Service Requests (LSRs) could become unmanageable if different timeliness standards were applied to each CLEC's LSRs. Both Covad's and Verizon's initial arguments in their testimony regarding intervals are largely moot at this point. These initial arguments were based either on a preliminary proposal by our staff in Docket No. 000121C-TP, or on other staff recommendations or FCC measures that pre-dated our final order in Docket No. 000121C-TP, which established performance measures for Verizon.

Decision

Now that we have approved a settlement agreement between Verizon and its major CLEC customers, including Covad, in Docket No. 000121C-TP, we have established a comprehensive set of performance metrics by which Verizon must abide. We approved the settlement agreement and also ordered that the performance measures contained in the agreement be set as the uniform performance metrics by which Verizon is to abide for all its CLEC customers, including Covad. It would be fundamentally unfair for us to require Verizon to provide levels of service quality solely to Covad that would be superior to those provided to its other CLEC customers.

The intervals that will apply for Covad's line sharing Local Service Requests shall be those Covad agreed to in the settlement agreement made with Verizon regarding Verizon's performance metrics in Docket No. 000121C-TP, and which we ordered in Order No. PSC-03-0761-PAA-TP. If Covad believes that the intervals set in Order No. PSC-03-0761-PAA-TP are inappropriate, Covad is encouraged to participate in future performance measure reviews. The appropriate venue for modifying Verizon's performance metrics is in Docket No. 000121C-TP.

XXI. PROVIDING ACCESS TO UNTERMINATED, UNLIT FIBER AS A UNE

Arguments

Covad witnesses Evans and Clancy state "[t]he Agreement should clarify that Verizon's obligation to provide UNE dark fiber applies regardless of whether any or all of the fiber(s) on the route(s) requested by Covad are terminated." In support, the witnesses assert that the FCC includes both terminated and unterminated dark fiber in its definition of dark fiber. The witnesses also state, "[f]iber facilities still constitute an uninterrupted pathway between locations in Verizon's network whether or not the ends of that pathway are attached to a fiber distribution interface ("FDI"), light guided cross connect ("LGX") panel, or other facility at those locations."

Additionally, witnesses Evans and Clancy purport that fiber termination ". . . is a simple and speedy task." The witnesses offer that if Verizon's termination requirement remains, Verizon would be able to bar a competitor from using every strand of dark

fiber by leaving it unterminated until called into service by Verizon.

Witnesses Albert and Shocket assert that it is Verizon's understanding that " . . . fiber must be physically connected to Verizon's network and easily called into service before it is a network element that Verizon must provide to ALECs on an unbundled basis." The witnesses argue that ". . . a terminated fiber optic strand is a strand that is connected to an accessible terminal at both ends." Accessible terminals typically include hardware such as Fiber Distribution Frames, fiber patch panels, and LGX equipment. These terminals are specifically designed to permit rapid and repeated connection and disconnection of fiber optic strands, as well as provide a location for initial acceptance testing and subsequent repair testing activities. More specifically, a terminated interoffice fiber strand is a continuous strand that is connected to a central office Fiber Distribution Frame at both ends.

In contrast, the witnesses assert that a terminated loop fiber strand is a continuous strand that is connected to a central office Fiber Distribution Frame (at one end) and an accessible terminal (either at a Digital Loop Carrier field electronics site or at a customer premises) at the other end. The witnesses state,

> [t]erminated fibers may be used by either Verizon or ALECs without any further construction activities. They have been tested (and accepted) as conforming to Verizon's engineering design at the time they were initially constructed (terminated on both ends). Terminated fibers are placed into service by Verizon by issuing internal optical orders, or ALEC service orders, and are activated (connected to their associated fiber optic electronics) by making fiber optic cross-connects.

According to the witnesses, there are situations in which fiber strands have not been terminated on both ends. The witnesses assert that is what some CLECs call "unterminated" fiber. Typically, this occurs when loop fiber strands still are under construction, a process which can take several years or more to complete. The witnesses state, ". . . Verizon does not endorse the use of this term as it implies that Verizon has

intentionally left fiber in an 'almost complete' state in an effort to 'hide' it from ALECs."

Witnesses Albert and Shocket allege that CLECs have apparently applied the label "unterminated fiber" to at least three distinctly different network configurations. These include (1) a loop fiber strand that is only terminated at one end (in a Verizon central office); (2) a loop fiber strand that is only terminated at one end in the loop fiber feeder network (but not at the Verizon central office); and (3) a loop fiber strand that is not terminated on either end. The witnesses contend that the first configuration describes the most frequent occurrence of "unterminated" fiber optic strands in Verizon's network. The second and third configurations occur less frequently, with the third being the most rare.

For each of the configurations described above, witnesses Albert and Shocket state, "Verizon would normally have to engineer, place, and/or splice additional loop fiber optic cables from the "unterminated" end(s) of the fiber optic cable to an accessible terminal(s), and then perform fiber strand acceptance testing as described above." The witnesses contend that there is additional construction remaining to terminate the fiber, and it is not simply terminating fibers at one end of an accessible terminal, as Covad would have the Commission believe. Rather, the witnesses allege Verizon would be required to perform additional splicing and placement of new fiber cables to extend the fibers from one accessible terminal to another.

Witnesses Albert and Shocket state,

> . . . Verizon does not construct new fiber optic facilities to the point where the *only* remaining work item required to make them available and attached end-to-end to Verizon's network is to terminate the fibers onto fiber distributing frame connections at the customer premises. Verizon's new fiber optic facilities are constructed in stages, over a number of years. (emphasis in original)

According to the witnesses,

> [t]his involves major construction activities such as: (1) obtaining easements, permits, and right-of-way, (2)

> constructing pole lines, manholes, and conduit, (3) placing multiple sections of new fiber cable, (4) burying fiber optic cables, (5) splicing fiber optic cables together, and (6) placing terminating equipment in central offices, huts, controlled environmental vaults, and customer premises. It is *not* simply a matter of terminating the fibers on terminating equipment at the customer premises. (emphasis in original)

In other words, the witnesses contend that Verizon does not fully construct fiber optic cable routes between two terminal locations and simply leave fibers "dangling" at the terminals.

Witnesses Albert and Shocket contend that fibers that are not yet terminated at both ends at an accessible terminal do not satisfy the FCC's definition of dark fiber. According to the witnesses, these fibers are not "physically connected to facilities that the incumbent LEC currently uses to provide service," and they cannot be used by CLECs or Verizon "without installation" by Verizon. Therefore, it is fiber which is not "easily called into service." Additionally, partially constructed, or "unterminated" fibers are not included in Verizon's assignable inventory of fiber. These fibers cannot be assigned to fill a CLEC dark fiber order nor can they be assigned to a new Verizon lit fiber optic system.

Covad is essentially seeking access to fiber that has been installed in the network but either has not been fully installed or terminated at accessible terminals. According to the record, that includes fiber that does not go anywhere and has not been spliced all the way through. Accordingly, it appears that Covad would like to have Verizon terminate those fibers for it, including splicing fiber end to end. In support, Covad's witnesses offer that the FCC's definition of dark fiber includes both terminated and unterminated dark fiber. On the other hand, Verizon argues that Covad's description is "vague and ambiguous" and that Verizon's proposal is consistent with the FCC's regulations and orders regarding dark fiber.

Verizon's witnesses contend that the fiber that Covad desires is not dark fiber under the FCC's definition. In fact, witnesses Albert and Shocket assert that it is Verizon's understanding that " . . . fiber must be physically connected to

Verizon's network and easily called into service before it is a network element that Verizon must provide to ALECs on an unbundled basis." The *UNE Remand Order* defines dark fiber as "unused loop capacity that is physically connected to facilities that the incumbent LEC currently uses to provide service; was installed to handle increased capacity and can be used by competitive LECs without installation by the incumbent." (FCC 99-238, ¶174, n.323) The unused fiber in question here cannot be used by Verizon, Covad, or anyone else without additional work, and it is not currently "physically connected" to Verizon's facilities.

Additionally, although splicing is specifically addressed in Issue 43, and will not be taken up here, we do need to address the complexity surrounding splicing and how it relates to the "easily called into service" argument presented in the current issue. Verizon's witnesses purport that the FCC's Wireline Competition Bureau agreed with Verizon's position in the *Virginia Arbitration Award.*[27] In that decision, the FCC's Wireline Competition Bureau agreed with Verizon's characterization that dark fiber that has to be spliced is not a UNE and said very specifically that Verizon is not required to splice dark fiber.[28] The Bureau went on to state that "[i]t is construction of the UNE and it's not required to splice dark fiber in the field." (Id.)

We believe that splicing is inherently complex and accept Verizon witness White's statement in Pennsylvania that, "[e]verybody makes it look very simple but it is actually very complex and very dangerous to go into working cables and to open them up and to splice them without damaging other cables." Again, we agree with Verizon and note that even though splicing is done, Verizon apparently does it as little as possible. (Id. at p.121) In support, witness White contends that fiber is not designed to be entered, stating,

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[27] Memorandum Opinion and Order, *Petition of WorldCom, Inc. 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 Expedited Arbitration*, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002).

[28] *Virginia Arbitration Order* ¶¶451 -453, 457 ("We do not require Verizon to splice new [dark fiber] routes in the field. . . .").

> . . . you are talking about microscopic activities that have to happen. And when you try to do that in the field and if there are any of those that are working you have a high, high risk of causing damage. (Id.)

In Pennsylvania, Covad witness Clancy questions Verizon witness White's statements and Verizon's fiber termination logic, stating,

> . . . the only question I have is then why if you do it as little as possible would you have unterminated fiber in the cable vault . . .. Why would you have that if it is dangerous to have it. Why wouldn't you splice it all to something in the CO and terminate it to something in the CO, a point of interconnection in the CO, if it is dangerous to go in there and mess with it after that. Why would you do that?

Responding to these questions, Verizon witness White states that with fiber ribbon, "[w]hen you leave things unterminated you don't leave a couple of pairs unterminated." He states,

> [i]f you have a ribbon of 12 or 24 you terminate the entire 12 or 24. You don't ever terminate 11 out of the 12. You terminate the entire ribbon.

Moreover, in situations where a minimum cable size might be 24, Verizon may only energize 12 of the 24. When that occurs, witness White states, " . . . if we had spliced those back to the central office and they are available here we will add that termination on the other 12 and we will provide that to you." On the other hand, " . . . if it is not spliced, if it was just the increment of the size of cable, we are not going to go into multiple manholes and try to piece these fibers together."

According to the Verizon witness in Pennsylvania, of the 24, 12 are terminated in the CO and 12 are left in the cable vault. The 12 in the cable vault that are hanging in the manhole are essentially dead. Witness White contends that Verizon's inventory would show a 24 ribbon cable, 12 spare, 12 dead. The 12 that are terminated are used to provide service and are unavailable. The remaining 12 are unused, unavailable, and "dead." In any case, ribbon size is based on " . . . engineering construction decisions to optimize inventory and minimize costs."

Moreover, the ability of the fiber to be activated depends on whether it was left in the manhole or whether it was spliced back to the central office. Witness White states,

> [i]f it was left out in the manhole there may not be any fiber. There may be two 24s meeting a 24 going back to the central office. There may not be any fiber from that manhole to the central office.

Covad witness Clancy asks, " . . . in the instance where you do have a cable where you use 24 and 12 are just laying here in the building and laying back in the cable vault back in the CO, could you put them back in service?" Verizon witness White responded " . . . the ones in the CO, if they were spliced back all the way to the CO we would terminate those to the CO." He goes on to state,

> [e]verything we put in the building would be terminated in the building on the fiber patch panel in the building. . . . If you inventory it at one end you want to inventory it at the other end. . . . We would terminate on both ends.

The only thing that is unterminated is what is laying out in the manhole.

In another volley at Verizon's logic in Pennsylvania, Covad witness Evans asks,

> Since you have made this investment and for engineering reasons or whatever you've got stuff out there that you can't use, it's unterminated for whatever reason, why would you not want to allow others to have access to it and pay you for it? It's not like we want to just steal it and walk away. We are willing to pay you for it. It's just that we want to get access to it. And it is only by your engineering design that you designed it and left it dead out there. That's not my fault.

Decision

While it is not Covad's fault, neither is it Verizon's responsibility to build a fiber network specifically to Covad's requirements. Having said that, the parties are free to negotiate beyond Verizon's current obligations. In fact, we would encourage such. Based on Verizon's testimony, unless there

is a construction job in process or something similar, there is no fiber that goes from a central office all the way to a customer premise that is not terminated on either end. The fiber has been installed and the only thing left to do is to terminate it. Those are precisely the types of things that Verizon would pick up on the engineering review.

Verizon witness White was asked in the Pennsylvania proceeding, " . . . would there ever be an instance where fiber is built ostensibly for under the inter-office network design, whatever requirements are there, that it would be unterminated on either end?" Witness White responded, "[w]e have not found one unterminated." In fact the witness asserts that, by design, Verizon would " . . . build them and terminate them." Based on the record and the preceding analysis, we do not believe Verizon intentionally designs its network to leave fiber unterminated, or in an almost complete state to keep it from being used by Covad or any other CLEC. Verizon is under no obligation to provide Covad access to unterminated, unlit fiber as a UNE, nor should the dark fiber UNE include unlit fiber optic cable that has not been terminated on a patch panel at a pre-existing Verizon Accessible Terminal.

XXII. ACCESS DARK FIBER IN TECHNICALLY FEASIBLE CONFIGURATIONS THAT DO NOT FALL WITHIN THE DEFINITION OF A DARK FIBER LOOP, DARK FIBER SUB-LOOP, OR DARK FIBER IOF

Arguments

Covad witnesses Evans and Clancy state, "Verizon's attempt to limit access to dark fiber at central offices and via three defined products would diminish Covad's rights to dark fiber under Applicable Law." The witnesses assert that Covad's access to dark fiber should be granted at any technically feasible point. The witnesses contend that the "technically feasible point" is the only criterion adopted by Congress for access to the incumbent's network.

Verizon witnesses Albert and Shocket contend that "[t]he only technically feasible method we know of to provide access to dark fiber *(i.e.,* to connect Verizon's fibers to an ALEC's fibers) is at an accessible terminal using fiber optic 'jumper' cross-connections." According to the witnesses, this arrangement allows dark fiber services to be "easily and repeatedly" connected and disconnected, and provides for adequate

maintenance, testing, and network reliability. In fact, witnesses Albert and Shocket argue that the agreed-upon language in the Interconnection Agreement specifically states, "Covad may not access a Dark Fiber Loop, Dark Fiber Sub-Loop or Dark Fiber IOF at . . . a splice point or case" and that "Verizon will not introduce additional splice points or open existing splice points or cases to accommodate Covad's request."

The Verizon witnesses assert that despite the previously mentioned language, Covad continues to claim that Verizon's definition of the three dark fiber UNE products - Dark Fiber Loops, Dark Fiber Subloops, and Dark Fiber IOF - would diminish its rights to dark fiber under Applicable Law. Witnesses Albert and Shocket contend that Covad's argument improperly expands the definition of the dark fiber UNE. With the caveat "[a]lthough we are not lawyers . . .," the witnesses purport that "dark fiber" is not a separate, stand-alone UNE under the FCC's rules. The witnesses go on to state,

> [t]o the contrary, dark fiber is available to a[sic] ALEC only to the extent that it falls within the definition of specifically designated UNEs set forth in 47 C.F.R. §51.319(a) and (d) - in particular, the loop network element, subloop network element, or interoffice facilities ("IOF").

According to the witnesses, Verizon's proposed contract language allows Covad to obtain access to dark fiber loops, subloops, and IOF, as those network elements are specifically defined by the FCC. Witnesses Albert and Shocket contend that Covad's proposed UNE Attachment §8.1.5, which expands Covad's right to dark fiber beyond the loop, subloop, or IOF network elements to "other technically-feasible configurations," is inconsistent with the FCC's description of dark fiber UNEs.

In addition, witnesses Albert and Shocket assert that Covad has proposed a change to the language in §8.1.1 by deleting the word "continuous" from the definition of a dark fiber loop. The witnesses allege that the change would require Verizon to place and/or splice fiber optic cables to essentially construct new dark fiber. As such, the witnesses argue that these work activities are not required by the FCC. The witnesses state "[i]f a fiber optic strand is not continuous between two accessible terminals, it cannot be used by Verizon (for lit fiber

optic systems), or by an ALEC (as dark fiber) without performing additional construction work."

Both parties have proposed language related to Issue 42 in §8.1.5 of the Revised Proposed Language Matrix, much of which is identical. Both parties include the following language in their proposals: "Verizon shall provide Covad with access to Dark Fiber in accordance with, but only to the extent required by, Applicable Law." (Revised Proposed Language Matrix, p.16) In addition, Verizon contends that Covad has also proposed language that purports to entitle it to obtain unbundled access to dark fiber in any "technically-feasible configuration," regardless of whether such a dark fiber "configuration" is one of the enumerated network elements that must be unbundled under the FCC's rules. Covad's additional proposed language states, "[t]he description herein of three dark fiber products, specifically the Dark Fiber Loop, Dark Fiber Sub-loop, and Dark Fiber IOF products, does not limit Covad's rights to access dark fiber in other technically-feasible configurations consistent with Applicable Law." (Revised Proposed Language Matrix, p.16)

The argument here is whether Covad's proposed language goes beyond what is required under the FCC's rules. Verizon believes that the addition of such language is " . . . contrary to federal law and must be rejected by this Commission." Verizon contends that its proposed contract language allows Covad to obtain access to dark fiber loops, dark fiber subloops, and dark fiber IOF, as the FCC defined those network elements. Moreover, Verizon asserts, "[t]hat is all that applicable law requires." Covad, on the other hand, insists that Verizon's interpretation is inconsistent with the FCC's rules, and its assertions are incorrect. In fact, Covad asserts that Verizon defies FCC rule 51.309(a) by seeking to limit Covad's legal right to access dark fiber. Covad notes that the FCC has rejected similar arguments made by Verizon with respect to a number of similar issues where Verizon's proposed contract language limited CLEC options to interconnect or access UNEs.

Covad asserts that its proposed language is consistent with Applicable Law and is therefore, " . . . simple, reasonable, and comports with the Act and FCC rules." Furthermore, Covad asserts that its proposed language is not only consistent with Applicable Law, but also comports with the FCC's findings in the *Virginia*

Arbitration Award.[29] Covad adds that the FCC's Wireline Competition Bureau noted that contract language that references access to UNEs or interconnection at any technically feasible point is lawful. Moreover, Covad notes that reference to "Applicable Law" is consistent with the FCC conclusion that such a reference is appropriate and properly protects rights and obligations of the parties.

Covad supports its position, offering that Section 251(c)(3) of the Act and FCC Rule 51.307(c) specifically provide that ILECs shall provide, ". . . nondiscriminatory access to network elements on an unbundled basis at *any technically feasible* point" on terms and conditions that are just, reasonable, and nondiscriminatory." (emphasis in original) According to Covad, under the FCC definition of "technically feasible," access to unbundled network elements at a point in the network "shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier . . . for such access, or methods." Based on Covad's proposed language and through additional argument in its post-hearing brief, it is apparent that even where dark fiber is not a loop, subloop, or IOF network element, Verizon would be compelled to provide access to that dark fiber whenever it is "technically feasible" to do so. We are troubled by such a requirement.

Verizon witnesses Albert and Shocket contend that "dark fiber" is not a separate, stand-alone UNE under the FCC's rules. Verizon asserts that Covad not only ". . . puts the cart before the horse," but that its proposal is also contrary to federal law and must be rejected by this Commission. According to Verizon's argument, "dark fiber" is available to a CLEC *only* to the extent that it falls within the definition of specifically designated UNEs set forth in 47 C.F.R. § 51.319(a) and (d) – in particular, the loop network element, subloop network element, or interoffice facilities (IOF). We agree. Moreover, Verizon contends that before an ILEC has an obligation to provide unbundled access to a particular network element under § 251(c)(3), the FCC must

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[29]Memorandum Opinion and Order, *Petition of WorldCom, Inc. 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 Expedited Arbitration*, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002).

first apply the "necessary" and "impair" standards under § 251(d)(2) to determine which network elements must be unbundled. Only after that undertaking does the question of at which "technically feasible point" may a CLEC access those network elements should be asked. Again, we agree. According to Verizon's post-hearing brief, the Supreme Court has rejected the same argument that Covad advances here, holding that ILECs are *not* required to provide unbundled access to a network element merely because it is "technically feasible" to do so.[30]

Decision

Verizon has made a good-faith effort to address Covad's concerns in §8.1.5 of the UNE Attachment by agreeing to include language stating that Verizon will ". . . provide Covad with access to Dark Fiber in accordance with, but only to the extent required by, Applicable Law." Dark fiber is available to Covad, but only to the extent that it falls within the definition of one of the specifically designated UNEs set forth in 47 C.F.R. § 51.319(a) and (d). Verizon's proposed language ensures that Covad's right to access dark fiber under the Interconnection Agreement is coextensive with Applicable Law, neither expanding nor contracting either party's legal rights. This is all Covad is entitled to in an interconnection agreement arbitration under §252.

Accordingly, Covad's access to dark fiber in technically feasible configurations shall be limited to dark fiber that falls within the definition of a Dark Fiber Loop, Dark Fiber Sub-Loop, or Dark Fiber IOF, as specified in the Agreement.

XXIII. DARK FIBER THAT WOULD REQUIRE A CROSS CONNECTION BETWEEN TWO STRANDS OF DARK FIBER IN THE SAME VERIZON CENTRAL OFFICE OR SPLICING IN ORDER TO PROVIDE A CONTINUOUS DARK FIBER STRAND ON A REQUESTED ROUTE

Arguments

Covad witnesses Evans and Clancy state, "[t]he Agreement should clarify that Verizon's obligation to provide UNE dark fiber includes the duty to provide any and all of the fibers on any route requested by Covad regardless of whether individual segments of fiber must be spliced or cross connected to provide

[30] See also, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), 391-92.

continuity end to end." Witnesses Evans and Clancy assert that because Verizon splices fiber for itself when provisioning service for its customers and affiliates, Verizon should do the same for Covad. Additionally, the witnesses contend that according to usual engineering practices for carriers, ". . . two dark fiber strands in a central office can be completed by cross-connecting them with a jumper." The witnesses purport that the procedure is a simple and speedy one.

In response to Verizon witnesses Albert and Shocket's assertion that Verizon will provide fiber optic cross-connects to join dark fiber IOF strands at intermediate central offices, Covad's witnesses assert that such cross-connects are required in order to implement the FCC's decision in the Virginia Arbitration Award. The Covad witnesses assert that the Virginia Arbitration Award provides ". . . that Verizon must route dark fiber transport through two or more intermediate central offices for ALECs without requiring collocation at the intermediate central offices."

In order to implement the FCC's finding in the current Agreement, the Covad witnesses proposed the following contract language for §8.2.4:

> Verizon shall perform all work necessary to install (1) a cross connect or fiber jumper from a Verizon Accessible Terminal to a Covad collocation arrangement or (2) from a Verizon Accessible Terminal to Covad's demarcation point at a Customer's premise or Covad Central Office; *or (3) install a fiber cross connect or fiber jumper in order to connect two dark fiber IOF strands at intermediate central offices.* (emphasis in original)

Witnesses Albert and Shocket assert that this issue, as characterized by Covad, raises two distinct questions: (1) whether Verizon should be required to splice fiber together to create new continuous routes for Covad, and (2) whether Verizon will cross-connect two existing, fully-terminated dark fiber IOF strands for a CLEC at an intermediate central office without requiring Covad to collocate at the intermediate central office.

With respect to the first issue, the witnesses argue that the fiber optic strand must be a continuous (completed) uninterrupted path between two accessible terminals. The

witnesses state, "[i]f Verizon must perform splicing work, the fiber is still under construction and not available as a UNE." The second issue addresses whether Verizon should combine two separate, terminated dark fiber UNEs for Covad by cross-connecting them at a central office to create a new fiber route. In other words, the issue is whether Verizon will provide an indirect fiber route running through intermediate offices. Verizon originally proposed that Covad " . . . would have to order dark fiber on a route-direct basis and combine the two separate, terminated strands at its collocation arrangement." Witnesses Albert and Shocket note that this is conceptually different from the question whether fiber is "continuous." Witnesses Albert and Shocket assert that Verizon is willing to cross-connect fibers at intermediate central offices for Covad, although it will not splice fiber to create a new continuous route for Covad. In fact, Verizon has proposed new contract language for § 8.2.5 of the Interconnection Agreement that would allow Covad to order dark fiber on an indirect route basis, without having to collocate at intermediate central offices.

Witnesses Albert and Shocket contend that Verizon typically places "ribbon" fiber optic cables because they are the most economical to construct and maintain. The witnesses assert that these cables are permanently spliced (i.e., welded) together using mass-fusion splicing. A typical Verizon fiber optic cable sheath will usually contain one or more ribbons of glass fiber strands, with 12 glass fibers in each ribbon. Before Verizon used ribbon fiber optic cables, Verizon used fiber cables known as "loose tube" fiber cables. With loose tube fiber cables, a cable sheath contained a number of individual fiber "buffer tubes," which typically contained 12 individually coated or protected glass fiber strands.

Witnesses Albert and Shocket assert that splicing is performed as part of the construction of the network and involves welding the fibers together. Cross-connecting fibers, on the other hand, involves placing an optical cross-connect jumper between two already fully spliced and terminated fiber optic strands. The witnesses assert that the cross-connect can be connected and disconnected at the accessible terminal without disturbing the fibers or opening a splice case.

If, however, splicing is necessary, witnesses Albert and Shocket argue that there are numerous steps and procedures to be

followed. Once again, the witnesses state, "[i]f Verizon must perform splicing work, the fiber is still under construction and not available as a UNE." Typically, Verizon's underground fiber optic cables are joined (spliced) together in a manhole, whereas aerial fiber optic cables are joined (spliced) together at a telephone pole. The witnesses state, "[t]o perform a fusion splice on fiber optic cables, Verizon uses a splicing truck, which essentially is a mini-laboratory 'clean room' environment on wheels." To do the same for underground splicing, the witnesses assert that Verizon personnel routinely encounter and must resolve " . . . a number of safety and quality control concerns before any splicing can begin." According to the witnesses, these concerns include the time needed to establish a safe work area for Verizon's technicians (as well as pedestrians and motorists). This time includes setting up traffic cones and signs, coordinating traffic management measures with the local police department, purging the manhole of any standing water, ventilating the manhole, and testing the manhole for the presence of gas. Only after preparing the manhole may the detailed splicing procedure commence.

Witnesses Albert and Shocket also assert that " . . . it is our understanding that, in the FCC's Wireline Competition Bureau's handling of the Verizon Virginia arbitration, the Bureau did not require the ILEC (Verizon Virginia) to perform splicing in the field (the outside plant portion of the network)." The witnesses contend that Covad's proposed change to the language in §8.1.1, where they delete the word "continuous" from the definition of a dark fiber loop, expands Verizon's obligations and is inconsistent with activities required by the FCC. The witnesses purport that this change would require Verizon to place or splice fiber optic cables to construct new dark fiber for Covad. The witnesses argue that these work activities are not required by the FCC. Additionally, the witnesses state, "[i]f a fiber optic strand is not continuous between two accessible terminals, it cannot be used by Verizon (for lit fiber optic systems), or by an ALEC (as dark fiber) without performing additional construction work."

As initially presented, Issue 43 raised two distinct issues: (1) whether Verizon is required to splice new end-to-end fiber routes for Covad, and (2) whether Verizon would provide fiber optic cross-connects between two separate dark fiber network

elements at an accessible terminal in a Verizon central office without requiring Covad to collocate in that central office. With respect to the second issue, Verizon has indicated in its post-hearing brief that it will cross-connect dark fiber IOF strands at intermediate central offices for Covad, and that the parties have agreed to contract language to accommodate such a request. Moreover, in the Pennsylvania proceeding, witness Shocket stated, "[w]e will do the cross-connections at intermediate offices." Accordingly, we only address here whether Verizon should be required to splice new end-to-end fiber routes for Covad. Much of the limited record related to this issue focused on cross-connects as opposed to the splicing of new end-to-end fiber routes. The parties also raised additional factual arguments in their post-hearing briefs.

The issue here is whether Verizon is required to splice dark fiber in order to provide a new continuous dark fiber strand on a requested route. In the Pennsylvania proceeding witness Shocket testified that Verizon ". . . will not splice to provide a continuous route between an A and Z location." On the other hand, Covad witnesses Evans and Clancy purport that because Verizon splices fiber for itself when provisioning service for its customers and affiliates, Verizon should do the same for Covad. There is no reference in this record where Verizon ever claims it does not splice for itself. However, Verizon's witnesses in Pennsylvania asserted that ". . . we don't generally do it for ourselves . . ." To the contrary, Verizon specifically references the splicing it does for itself as relating to the construction of its network. Moreover, in Pennsylvania Verizon witness White stated, "Fiber is spliced. There is no question about it."

Even though Verizon does not dispute that it splices for construction purposes, when it comes to splicing at other times, Verizon witness White stated, "[w]e do not want to go into that ribbon when there is a working circuit." As the name suggests, construction splicing occurs " . . . before there are working circuits."

According to Covad, at issue here is the situation where Covad goes outside the central office and distribution splicing might be required to get to an end-user premises. Covad witness Clancy offers the following scenario:

> . . . I want to get to this building and Verizon says, well, I can't get you there because I don't go back to the central office. Level 3 might go back to the central office and they might pass this building. So I may want to splice into that cable that comes into this building with Level 3's fiber. So I may want to splice Level 3's fiber into the Verizon fiber that comes into this building.

Despite Covad's wishes, in the Pennsylvania proceeding Verizon witness White asserted that this issue had been clearly addressed by the FCC and the Pennsylvania Public Utility Commission. Witness White contended that access at splice points is ". . . not required, period." (emphasis added)

Moreover, in the Pennsylvania proceeding witness Shocket asserted that splicing was addressed in the Virginia Arbitration Award,[31] which concluded that splicing to create a continuous route is not required of the incumbent LEC.[32] In the Virginia Arbitration Award, the FCC's Wireline Competition Bureau agreed with Verizon's characterization that dark fiber that has to be spliced is not a UNE and said very specifically that Verizon is not required to splice dark fiber. In that decision, the Bureau went on to state that "[i]t is construction of the UNE and it's not required to splice dark fiber in the field." We agree. According to witness Shocket, Verizon argued before the FCC that " . . . splicing is not technically feasible, that it is dangerous, there is a large chance of risk to other services that are on that fiber and we don't generally do it for ourselves and it's not something that we would consider doing for others." Whether the basis for Verizon's decision is legal or technical, it was and continues to be Verizon's to make. Verizon is under no obligation to create a new fiber route for Covad through splicing.

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[31] Memorandum Opinion and Order, *Petition of WorldCom, Inc. 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 Expedited Arbitration*, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002).

[32] *Virginia Arbitration Order* ¶¶451 -453, 457 ("We do not require Verizon to splice new [dark fiber] routes in the field. . . .").

Additionally, Covad witness Clancy states that splicing fiber "is simple and easy . . . ." Witness Evans goes on to state,

> I would just add that it's considered routine. So it's not abnormal, it's not a unique task. It's basically considered a normal day-to-day function. (Id. at pp.10-11)

Conversely, Verizon witness White asserted in Pennsylvania that splicing is a difficult task. In part due to the inherent difficulty, witness White asserts that splicing ". . . is fully construction and we do it in a minimal amount." Moreover, the witness contends,

> . . . it isn't like putting a drop wire to a house. It's like brain surgery . . . .

Although we are not in full agreement that splicing can be equated with "brain surgery," we nonetheless believe that it is a very precise and fragile process. In addressing the complex nature of splicing, witness White states,

> [y]ou got to understand that we are aligning 12 fibers and those fibers themselves are the thickness of a hair, which is about 100 nanometers, and the centers, which are seven nanometers of that 100 -- so envision one-tenth of the thickness of your hair -- have to be lined up perfectly on 12 fibers. And it is glass. And we use electronics to line it up and fuse it and melt it together so that light will continue to pass through it. That level of precision is what you are going through when you are working on the brain.

And,

> if any of these fibers were even bent too much . . . you will dump thousands -- many, many thousands of circuits get dumped. . . . It is not something we take lightly.

Even though splicing appears to have become much more "routine" through the years, we believe that splicing fiber can still be a difficult, tedious, and time-consuming process at best.

The fiber that Covad desires is not "dark fiber" under the FCC's definition. In fact, witnesses Albert and Shocket assert

that it is Verizon's understanding that " . . . fiber must be physically connected to Verizon's network and easily called into service before it is a network element that Verizon must provide to ALECs on an unbundled basis." We agree, noting the *UNE Remand Order* defines dark fiber as "unused loop capacity that is physically connected to facilities that the incumbent LEC currently uses to provide service; was installed to handle increased capacity and can be used by competitive LECs without installation by the incumbent." (FCC 99-238, ¶174, n.323) The unused, unterminated fiber in question here cannot be used by Verizon, Covad, or anyone else without additional work (splicing), and it is not currently "physically connected" to Verizon's facilities. Additionally, partially constructed, or "unterminated" fibers are not included in Verizon's assignable inventory of fiber. These fibers cannot be assigned to fill a CLEC dark fiber order, nor can they be assigned to a new Verizon lit fiber optic system.

We agree with Verizon's statement that, "[i]f Verizon must perform splicing work, the fiber is still under construction and not available as a UNE." Additionally, "[i]f a fiber optic strand is not continuous between two accessible terminals, it cannot be used by Verizon (for lit fiber optic systems), or by an ALEC (as dark fiber) without performing additional construction work." We also agree with Verizon that outside of construction splicing, when there are no active circuits, splicing is a "dangerous" task and that the risk of damage to other services on that fiber increases dramatically.

The FCC's recent *Triennial Review Order* does not alter our findings here. Although there may be some uncertainty in the Order as it relates to dark fiber, we are comfortable with our analysis, based on the record. We do, however, understand the *Triennial Review Order* to expand an ILEC's obligation to make routine network modifications to <u>existing dark fiber facilities</u> for a competitor. The FCC states in ¶ 632,

> We require incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility <u>has already been constructed</u>. By "routine network modifications" we mean that incumbent LECs must perform those activities that incumbent LECs regularly

> undertake for their own customers. (FCC 03-36)(emphasis added)

In addition, the FCC mandates that the requirement set forth above apply not only to copper loops, but also applies " . . . to all transmission facilities, including dark fiber facilities." (FCC 03-36, ¶638) As such, "[i]ncumbent LECs must make the same routine modifications to their existing dark fiber facilities for competitors that they make for their own customers - including the work done on dark fiber to provision lit capacity to end users." (Id.) Even though the FCC did not list required activities in the detail it did for DS1 loops, the FCC gave the state commission's the following guidance in ¶638:

> Although the record before us does not support the enumeration of these activities in the same detail as we do for lit DS1 loops, we encourage state commissions to identify and require such modifications to ensure nondiscriminatory access. (FCC 03-36)

Decision

Accordingly, Verizon shall not be required to splice dark fiber in order to provide Covad a continuous dark fiber strand on a requested route.

XXIV. PROVISION OF DETAILED DARK FIBER INVENTORY INFORMATION

Arguments

Covad witnesses Evans and Clancy assert that Verizon should be required to provide Covad detailed dark fiber inventory information. The witnesses argue that in order to develop its business and network plans and to "meaningfully utilize" dark fiber, Covad needs to know where and how much dark fiber exists in Verizon's network. Moreover, the witnesses assert that Covad is only requesting the same detailed information that Verizon itself possesses and uses.

Additionally, the Covad witnesses assert that Verizon's testimony misrepresents Covad's position on this issue. Despite Verizon's assertions, they contend that Covad " . . . merely seeks what federal law already requires." Witnesses Evans and Clancy assert that Covad does not seek information that resides outside Verizon's records, databases, and other sources. The

witnesses also contend that Covad does not seek a "snapshot" of all dark fiber. Rather, the witnesses state,

> . . . Covad merely seeks parity access to the same up-to-date pre-ordering and ordering information regarding dark fiber UNEs that is available in Verizon's backoffice systems, databases and other internal records, including but not limited to data from the TIRKS database, fiber transport maps, baseline fiber test data from engineering records or inventory management, and field surveys.

Covad's witnesses purport that "Verizon cannot, as it has done in the past, limit an ALEC's access to this information simply because it is inconvenient or contrary to Verizon's competitive interest to provide the information."

Instead, Covad witnesses Evans and Clancy contend that Verizon is obligated under federal and state law to provide CLECs:

> . . . nondiscriminatory, parity access to fiber maps, including any fiber transport maps for the entire specified dark fiber route, TIRKS data, field survey test data, baseline fiber test data from engineering records or inventory management, and all other available data regarding the location, availability and characteristics of dark fiber.

Moreover, they contend that Verizon should be required to provide the same information that the New Hampshire and Maine Commissions have already required Verizon to provide to CLECs. Based on those decisions and in order to address its concerns here, Covad proposed the following contract language for section 8.2.5.1 of the UNE Attachment in lieu of its original proposal:

> Verizon shall provide Covad nondiscriminatory and parity access to fiber maps, including any fiber transport maps showing a portion of and/or the entire dark direct and indirect dark fiber routes between any two points specified by the ALEC, TIRKS data, field survey test data, baseline fiber test data from engineering records or inventory management, and all other available data regarding the location, availability and characteristics of dark fiber.

> Further, within 30 days of Covad's request Verizon shall provide, at a minimum, the following information for any two points comprising a dark fiber route specified by Covad: a map (hand-drawn, if necessary) showing the spans along the most direct route and two alternative routes (where available), and indicating which spans have spare fiber, no available fiber, and construction jobs planned for the next year or currently in progress with estimated completion dates; the total number of fiber sheaths and strands in between points on the requested routes; the number of strands currently in use or assigned to a pending service order; the number of strands in use by other carriers; the number of strands assigned to maintenance; the number of spare strands; and the number of defective strands.

Verizon witnesses Albert and Shocket argue that Covad's proposed §8.2.5.1 demands "maps of routes that contain available Dark Fiber IOF by LATA for the cost of reproduction." The witnesses assert that Verizon does not maintain maps as described above for its own use and cannot therefore reproduce them. Furthermore, the witnesses state, "[t]he availability of dark fiber at specific locations changes on a day-to-day basis depending on the needs of Verizon, ALECs, interexchange carriers, and other customers for lit fiber services, as well as ongoing construction activities." Moreover, a route-by-route determination of records must be done to determine dark fiber availability. The witnesses purport that to produce such a map would be unduly burdensome and costly, not to mention the fact the map would be "outdated" and "useless" before it could be received by Covad. The witnesses add that Covad could not assume that dark fiber referenced on the map would still be available at the time of order placement. In support, the witnesses offer:

> [l]ike dark fiber, there is limited availability of other types of High Speed IOF and loop UNEs (e.g., DS3s, OC3s, and OC12s, which are analogous to Dark Fiber in many respects). And, like dark fiber, there is no blanket statewide list of all locations where such UNEs are available. In both cases, publishing such a list makes no sense from a practical perspective.

According to Verizon witnesses Albert and Shocket, Verizon currently provides fiber information to CLECs through dark fiber inquiries, wire center fiber maps, and field surveys. The witnesses state,

> [t]his variety of information satisfies ALEC needs for general network planning information; availability checks for specific spans/routes/locations; and the detailed engineering optical transmission design for the ALEC's fiber optic electronics. Wire center fiber maps provide street level information on Verizon's fiber routes within a wire center so that ALECs can determine the location of fiber routes in Verizon's network and, thus, where dark fiber might potentially be available.

Using the options currently available, the witnesses assert that a CLEC is provided with street level information on the fiber routes within a wire center area and specific dark fiber availability between the A and Z points. Witnesses Albert and Shocket state, "[t]he dark fiber inquiry is provided for a fixed price and is the required first step in ordering a dark fiber circuit." On the other hand, the field surveys and wire center fiber maps are optional engineering services available on request for time and materials. The witnesses contend that combining these three methods allows Covad to determine dark fiber availability. More importantly, they mirror the process that Verizon uses to determine fiber availability for its own lit fiber services. According to the witnesses, each of these three methods is outlined in revised contract language that Verizon has proposed to Covad.

Verizon's witnesses assert that, ". . . Verizon will create and make available to ALECs fiber layout maps," despite the arguments above, and the fact that witnesses Albert and Shocket contend this goes beyond what Verizon does for itself. As such, Verizon proposed eliminating §8.2.8 of the UNE Attachment and inserting a new §8.2.20, and proposed the following language to address Covad's concerns:

> §8.2.20 Covad may request the following, which shall be provided on a time and materials basis (as set forth in the Pricing Attachment):

§8.2.20.1 A fiber layout map that shows the streets within a Verizon Wire Center where there are existing Verizon fiber cable sheaths. Verizon shall provide such maps to Covad subject to the agreement of Covad, in writing, to treat the maps as confidential and to use them for preliminary design purposes only. Covad acknowledges that fiber layout maps do not show whether or not spare Dark Fiber Loops, Dark Fiber Sub-Loops, or Dark Fiber IOF are available. Verizon shall provide fiber layout maps to Covad subject to a negotiated interval.

Although the issue as worded is broad, the dispute in Issue 46 really revolves around dark fiber maps, and what, if anything, Verizon must provide Covad. The parties appear to have reached agreement on much of what was originally being arbitrated under this issue, specifically language related to dark fiber inquiries and field surveys. Accordingly, we focus our efforts on the fiber maps that Covad is requesting Verizon to provide.

Although Covad has made numerous allegations regarding Verizon's refusal to provide information, and certain "stonewalling tactics," we find no basis for such claims here in Florida. Verizon witnesses Albert and Shocket state, "Covad has not submitted any Dark Fiber Inquiries in Florida." This position was also repeated in their deposition. Covad acknowledged the same in response to our interrogatory, stating, "[n]one of the dark fiber applications . . . were made in Florida . . . ."[33] As such, we dismiss Covad's allegations of Verizon's "stonewalling tactics" and its "failure to provide information" with regards to dark fiber in this docket. Covad has yet to submit a dark fiber inquiry to Verizon in this state, and we will not address Covad's allegations without detailed documentation of Florida-specific problems.

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[33]"After fifty (50) dark fiber applications were submitted to Verizon North, with significant charges incurred by Covad for each submission, and came back "no fiber found", Covad made no further efforts to obtain dark fiber from Verizon, in Florida or elsewhere." (EXH 3, p.34)

Covad witness Evans contends that Covad does not need maps of fiber from the central office (CO) to a customer's premises as Verizon has proposed. Instead, Covad's needs appear to address fiber information from CO to CO. In response, in the Pennsylvania proceeding Verizon witness White contends that the information Covad witness Evans is describing, and ultimately requesting, does not exist. In fact, witness White states "[w]e don't have dark fiber maps." According to Verizon witness White, Verizon has other fiber maps available, but in order to determine what is actually dark fiber, Verizon would have to look to information regarding its inventory. In Pennsylvania, witness Shocket adds that Verizon's maps,

> . . . provide where the fiber is. It does not say what is dark and available.

Additionally,

> [t]he maps that we have available would be the wire center fiber layout maps which present a schematic of the actual fiber that would be in the streets or area within a serving wire center. And we would upon request prepare these. We have to prepare them. They are not something that we have off the shelf or on the shelf.

Verizon does not dispute that inventories of dark fiber by location do exist; however, determining what is dark " . . . is an interactive process" according to witness White. In support, the witness states, "[w]e may have central offices that are connected by fiber but you have to peel back to figure out what is working and what is spare, what is available, and those aren't on the maps, ..." Moreover, witness White asserts that this "interactive process" requires Verizon engineers to accomplish a variety of activities, stating,

> [t]he engineer would look at, yes, I have to get from A to B. He may look at a map. He may look at records information. He will look at jobs in progress. We will see what is on the inventory. Not everything that has been built is on the inventory. He will do all those things and then present back to COVAD [sic] this is what we have. And it is a snapshot at a point in time.

Witness White states, "[y]ou've got to remember that this is not provisioning." As such, the witness acknowledges,

> [t]his isn't something that you would want to do just from a quick records check. You would want to make sure that you have got the fiber on the air and assigned.

We agree with Verizon's position that details on fiber deployed and its availability can change on a frequent basis. Nothing in the record indicated Covad had information to the contrary. In fact, there are numerous activities that could potentially affect the availability of dark fiber, including, but not limited to, new connections, construction, and the use of maintenance spares. Moreover, much of the information Covad is requesting here is the same type of information that the parties have already agreed to with respect to the dark fiber inquiry process and field surveys. For instance, witness Shocket states in Pennsylvania,

> [t]he dark fiber inquiry process is a realtime evaluation of our records to determine whether there is actual fiber available. We do it on the loop plant and we do it on the inter-office plant. Under the new terms and conditions and the contracts, a CLEC, COVAD, can present to us an A to Z route no matter how far that route goes within a LATA and we will do the search to see what dark fiber is available, you know, between those A and Z points.

Covad witness Hansel in Pennsylvania acknowledges a Verizon 271 proceeding in Virginia where Verizon admitted on the stand that hand-drawn diagrams were being given to a CLEC. The witness states, " . . . based on Virginia . . . Verizon said 'we will provide a hand-drawn map.'" Not surprisingly, the witness points out that if that is the case, then Verizon is already giving Cavalier " . . . what we are asking for here." The "here" actually refers to Pennsylvania, and the dark fiber issues in the Pennsylvania proceeding mirror what the parties are arbitrating in Florida. Given that, it appears that Verizon has provided dark fiber maps at some basic level in the past, despite the fact that Verizon has asserted it doesn't provide dark fiber maps or possess them itself.

Although not disagreeing with Covad witness Hansel's statements in the Pennsylvania proceeding, witness Shocket clarifies Verizon's position adding,

> . . . under certain circumstances we would work with a CLEC specifically if they were doing a large network build and we would sit down with them and provide information about office routes, inter-office routes, either on a hand-drawn map or some other way, not necessarily a map but it could be some other information provided on a segment by segment basis.

Based on the statements above and through additional comments made by the witness, it appears that even though Verizon does not possess "dark fiber maps" as a rule, it has exhibited a willingness to provide fiber layout maps and to a limited extent very basic dark fiber maps on a segment by segment basis. In fact, witness Shocket specifically states, " . . . we will do that." (emphasis added)

We do not disagree with Covad that in order to "meaningfully utilize" dark fiber, it needs to know where and how much dark fiber exists in Verizon's network. We cannot, however, impose an additional obligation on Verizon, especially when we believe that language adequately addressing Covad's concerns has already been proposed. We agree with Verizon's argument that dark fiber inquiries and field surveys " . . . provide specific dark fiber availability between particular A and Z points on the maps at a given point in time." Moreover, when the two are combined with wire center fiber maps, Verizon claims that the methods " . . . are more than sufficient to permit Covad to determine dark fiber availability . . . ." More importantly, they " . . . mirror the process that Verizon uses to determine fiber availability for its own lit fiber services."

On the other hand, to the extent that dark fiber maps can be provided as part of the dark fiber inquiry and field survey processes, they should. We do not expect these maps to contain the detailed level of information proposed in Covad's §8.2.5.1 where it requests in part:

> . . . construction jobs planned for the next year or currently in progress with estimated completion dates; the total number of fiber sheaths and strands in between points on the requested routes; the number of

> strands currently in use or assigned to a pending service order; the number of strands in use by other carriers; the number of strands assigned to maintenance; the number of spare strands; and the number of defective strands.

Decision

As stated previously, similar information can be obtained through the use of wire center fiber maps, dark fiber inquiries, and field surveys that Verizon offers.

Based on the above, Verizon shall provide Covad with dark fiber maps to the extent that the maps can be provided as part of the dark fiber inquiry and field survey process.

XXV. EFFECTIVE DATE OF UNE RATES NOT CURRENTLY CONTAINED IN EFFECTIVE FCC OR FPSC ORDER OR STATE OR FEDERAL TARIFF - RETROACTIVITY - INACCURACIES

Arguments

Covad argues that unless Verizon is given approval by the FCC or the Commission, it should not be allowed to make changes to the rates it charges Covad for services. It is Covad's position that any charges Verizon assesses for services under the Agreement should be Commission or FCC approved charges and should be accurately represented and warranted in Appendix A to the Agreement to the extent such rates are available. Covad believes that this would prohibit Verizon from making any unilateral rate changes by simply making a tariff filing.

In its brief, Covad also states that when certain charges have been approved by the FCC or Commission, Verizon should be required to apply them retroactively starting at the effective date of the Agreement, and Verizon should provide a refund to Covad of over-charges if necessary. Covad maintains that it must be able to rely on the rates established by the Commission and contained in the Agreement. Covad's brief references the arbitration in Virginia:

> Significantly, in the Virginia Arbitration Award, the FCC's Wireline Bureau stated that "a carrier cannot use tariffs to circumvent the Commission's determinations

> under section 252."[34] With its proposed contract language, Verizon seeks to do just that, and therefore, the Commission should reject Verizon's proposed language.

In summary, Covad asserts "the Agreement is clear that Verizon can only assess Commission or FCC approved charges that are set-forth in the tariff and nothing else. For the foregoing reasons, the Commission should adopt Covad's proposed contract language."

In addressing this issue, Verizon's proposal has a 4-tier hierarchy of rates:

> 1. Rates shall be those stated in Verizon's tariffs. *See* Verizon Response Attach. A at 93 (Pricing Attach. § 1.3).
>
> 2. In the event that there is no tariffed rate, the rate shall be as stated in Appendix A. *See id.* (Pricing Attach. § 1.4).
>
> 3. In the event that a rate stated in Appendix A were to apply, that rate would be superseded by a rate in a later-filed tariff or in an order of this Commission or the FCC. *See id.* (Pricing Attach. § 1.5).
>
> 4. Additional provisions provide that, if a rate for a service is found in neither Verizon's tariff nor Appendix A, the rate shall be (in descending order of preference) the one expressly provided for elsewhere in the agreement, the FCC- or Commission-approved charge, or a charge mutually agreed to by the parties in writing. *See id.* (Pricing Attach. §§ 1.6-1.8). (emphasis in original)

In its brief, Verizon states that "Covad has not raised a dispute with respect to *any* of the rates contained in Appendix A." (Emphasis in original) It is Verizon's position that since Covad has not objected to the rates in Appendix A, the rates become "binding," even if they are not the approved Commission or FCC rates. Therefore, as the rates in Appendix A are binding, any currently approved rates cannot be retroactively applied.

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[34] *Virginia Arbitration Order* ¶ 602.

Verizon argues that "Covad cannot short-circuit the 1996 Act process by placing on Verizon the burden of warranting that provisions to which Covad raises no objections comply with the requirements of the Act."

Verizon also addresses Covad's proposal to delete the provision stating that subsequent tariff filings will supersede rates listed in Appendix A.[35] Verizon believes this proposal contradicts the previous findings this Commission made in an arbitration between Sprint and Verizon (Docket No. 010795-TP). In the Sprint/Verizon arbitration the Commission concluded that it is appropriate to include provisions in interconnection agreements that make specific reference to a tariff, so that subsequent tariff amendments also modify the interconnection agreement.[36] Verizon further describes this Commission's findings as:

> This Commission explained that an ALEC should not be able to place itself "in the unique position of not . . . being bound to Verizon's revised . . . tariff, while other ALEC competitors, who have not adopted the Sprint/Verizon agreement, would be bound by such revisions."[37] Moreover, this Commission "disagree[d]" with Sprint's claim that it would not have an adequate remedy if its agreement were subject to modifications to Verizon's tariff, noting that Sprint "may petition this Commission to cancel any subsequent Verizon . . . tariff revisions" and that this Commission "can require a refund if the tariff is determined not to be in compliance."[38]

Verizon also points out where we dealt with a similar issue in the recent Verizon-US LEC arbitration (Docket No. 020412-TP). This Commission approved its staff's recommendation that states "subsequent tariff filings" should not "modify non-tariffed rates

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[35]*See* Revised Proposed Language Matrix at 19-20 (Pricing Attach. § 1.5).

[36]*See Sprint-Verizon Arbitration Order* at 36-37.

[37]*Id.* at 36.

[38]*Id.* at 37.

in the parties' final interconnection agreement." Verizon's brief further states:

> Verizon's proposed language – which is the same, with respect to this issue, as its proposed language here (although Covad's proposed changes differ from those US LEC proposed) – "would undermine the purpose of the parties signing a negotiated final agreement in which the parties have agreed to non-tariffed rates." *Id.* Covad, however, has not sought to negotiate rates unique to its agreement; instead, the rates contained in Appendix A are the standard rates that Verizon offers to all ALECs in Florida, which reflect Verizon's attempt to conform the rates to the requirements of applicable law.

In summary, Verizon states "the rates contained in Appendix A are the standard rates that Verizon offers to all ALECs in Florida, which reflect Verizon's attempt to conform the rates to the requirements of applicable law." Verizon states it will update Appendix A accordingly, if it later files a tariff modifying one of these non-tariffed rates. Verizon notes that "[t]herefore, unless those tariffed rates also apply to Covad's agreement, Covad could game the system by maintaining the rates in its older interconnection agreement, if they are more favorable than those available to all other ALECs in Florida under the current tariff."

We agree with Verizon's argument that because there have been no objections to the rates contained in Appendix A, those rates will be binding on the parties. Because the rates in Appendix A are binding, any currently approved rates cannot be retroactively applied. Verizon clearly states that the rates contained in Appendix A are the standard rates offered to all CLECs in Florida by Verizon.

In regards to how the filing of subsequent tariff amendments will affect the Agreement, our rationale in the Sprint/Verizon arbitration (Docket No. 010795-TP) is equally applicable in this issue. Because the Agreement is subject to modifications to Verizon's tariff, Covad may petition this Commission to cancel any subsequent Verizon tariff revisions, and we could require a refund if the tariff is found not to be in compliance. This language will address Covad's concerns dealing with tariff

amendments superseding both tariffed and non-tariffed rates contained in Appendix A.

Decision

For those rates which are contained in Appendix A and cross-referenced to Verizon's tariff, any subsequent amendment to tariffed rates are automatically binding on the parties. For those rates that have been approved by the FCC or us, the parties are free to apply the "change in law" provision in their agreement and negotiate any rate changes which are always prospective, not retroactive. A newly applied rate does not automatically invalidate a previously established rate.

As the current rates in Appendix A are binding on the parties, Covad shall not be entitled to retroactive application of the effective FCC or FPSC rate. A subsequently filed original tariff or non-tariffed rate (including an FCC or FPSC approved rate), when effective, shall not supersede the UNE rates in Appendix A to the Pricing Attachment. However, an amendment (i.e., revision) to a tariff referenced in the parties' agreement will supersede the UNE rates in Appendix A.

XXVI. INDIVIDUALIZED NOTICE OF TARIFF REVISIONS AND RATE CHANGES

Arguments

Covad witnesses Evans and Clancy argue "it is vital for Covad's business to receive sufficient notice of rate changes to its interconnection agreement." The public notice that Verizon does provide is insufficient because it is usually sent out after the rates become effective. "Without sufficient notification, both Covad, and other CLECs, will continue to face difficulties when trying to verify, reconcile, and compare charges on the bill to the products and services it has ordered."

In addressing Verizon's claim that providing such notice would be "unduly burdensome," witnesses Evans and Clancy state:

> It is Covad's understanding that Verizon's billing tables are already maintained in its systems on a CLEC-by-CLEC basis. Therefore, it should not be unreasonably burdensome for Verizon to follow Covad's proposal . . . Having a commitment to notify a party to

> an agreement, when the other party to the agreement has a desire to change the agreement, seems reasonable.

Covad witnesses Evans' and Clancy's testimony also addresses Covad's desire to have Verizon update the Appendix on an informational basis when the Commission orders new rates. "Additionally, the rate elements and their descriptions differ from state to state, jurisdiction to jurisdiction, and do not specifically map to the elements described in Appendix A." Covad proposes that Verizon should forward the proposed changes to Covad, which would allow Covad the opportunity to either challenge the change, or accede to the change. "Given this, there is no reason why Verizon cannot send out a revised Appendix A attached."

In its brief, Covad states "it is evident that one of the major reasons there are billing problems between the Parties stems from Verizon's failure to properly inform Covad that it intends to start billing Covad for such services." Covad asserts that "advance actual written notice" of changes will help to alleviate some of the aforementioned problems. Covad summarizes its position on whether Verizon should provide an updated Appendix by stating:

> By providing Covad and possibly Verizon's own billing group with a revised Appendix A that reflects the non-tariffed rates that will be assessed, Verizon would be putting a precautionary measure in place that would potentially serve to correct many of [the] billing problems Covad faces with Verizon or at a minimum ease the potential for billing inaccuracies and prolong[ed] billing disputes.

It is Verizon's position that "the other provisions of the agreement already obligate Verizon to provide such notice." In its brief, Verizon outlines these already established obligations:

> 1. Appendix A, which both expressly sets forth prices and also cross-references Verizon's tariffs, could be changed by amending Appendix A. As Covad would be a party to the change, there is no need for advanced notice to the change.

> 2. To the extent the agreement contains provisions that permit Verizon to establish new charges without filing a tariff, those provisions already independently offer Covad advance notification of such charges. For example, the agreement provides for the establishment of new charges if "required by any order of the Commission or the FCC, approved by the Commission or the FCC, or otherwise allowed to go into effect by the Commission or the FCC." Covad would clearly have independent notice of the Commission or FCC action approving such charges.

Verizon also rejects Covad's proposed language that would require Verizon to update Appendix A when a change takes place. "Covad is as able as Verizon to make informational updates to Appendix A, and Verizon should not be required to perform such administrative tasks on Covad's behalf." Furthermore, Verizon argues that there is no reason to require Verizon to notify Covad after rate changes take effect because Covad will receive notice before they take effect.

To summarize, Verizon's position is that there is no need for "advance actual written notice" of rate changes as there are other provisions that require Verizon to provide such notice. Verizon describes the notion of providing an updated Appendix when a change is made as an "administrative task" that Covad should provide for itself.

The testimony of witnesses Evans and Clancy highlight the effects of rate changes without sufficient notice on billing. According to witnesses Evans and Clancy, without said knowledge of rate changes CLECs will face difficulties when reconciling charges to products and services they have ordered. However, CLECs have the resources to obtain rate change information themselves. Notice of tariff changes are publicly available, meaning Covad has access to the information. Non-tariffed revisions are negotiated between the parties. Therefore, as Covad would be a party to the negotiations, there would be no need for individualized notice. We agree that billing disputes may include disagreements over rate changes and that those disputes can be avoided with sufficient notice. We do not agree, however, that it is the responsibility of the billing party to provide that notice when the billed party has the ability to obtain the necessary information themselves.

It is Verizon's position that there are other provisions in the Agreement that require Verizon to provide such notice. However, there is nothing that prevents Verizon from offering "advance actual written notice" of tariff revisions and rate changes as a service to Covad. Establishing a fee, to be negotiated between the parties, would provide Verizon compensation for its efforts in providing advance notice. We view the notion of "advance actual written notice" as a convenience more than a necessity for Covad. We also believe that if advance notice "is vital for Covad's business", then it should be open to negotiation for treating this issue as a service provided by Verizon rather than a Commission-ordered requirement.

Decision

We reject Covad's request for Verizon to provide an updated Appendix whenever a change takes place. Updating the Appendix after a change takes place is an administrative matter. Covad can obtain the necessary information and update the Appendix itself.

Verizon will not be required to provide Covad individualized notice of tariff revisions and rate changes. Notice of tariff revisions and rate changes are publicly available and non-tariffed revisions are negotiated between the parties making the issue moot.

XVII. CONCLUSION OF LAW

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of Section 251, the provisions of FCC rules, applicable court orders and provisions of Chapter 364, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the issues for arbitration identified in this docket are resolved as set forth with the body of this Order. It is further

ORDERED that the parties shall submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order. It is further

ORDERED that this docket shall remain open pending our receipt and approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 13th Day of October, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.