

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 28, 2004

PETITION OF

CAVALIER TELEPHONE, LLC

CASE NO. PUC-2002-00088

For Injunction Against Verizon
Virginia Inc. for Violations
of Interconnection Agreement
and For Expedited Relief to Order
Verizon Virginia Inc. to Provision
Unbundled Network Elements in Accordance
with the Telecommunications Act of 1996

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DOCUMENT CONTROL

FINAL ORDER

On April 19, 2002, Cavalier Telephone, LLC ("Cavalier"), filed the above-captioned petition with the State Corporation Commission ("Commission"). Cavalier operates in Virginia as a competitive local exchange carrier ("CLEC"). Cavalier complained of the "no facilities" policy asserted by Verizon Virginia Inc. ("Verizon") in refusing to provision certain orders for DS-1 unbundled network element ("UNE") loops.

On May 10, 2002, Verizon responded to Cavalier's petition and requested that it be dismissed. On October 28, 2002, the Commission issued an Order Directing Investigation, which denied Verizon's motion to dismiss and directed the Staff of the Commission ("Staff") to investigate Verizon's policies and practices in the provisioning of DS-1 UNE loops to Cavalier. A procedural schedule also was established.

Motions to intervene were filed by Allegiance Telecom of Virginia, Inc. ("Allegiance"), NTELOS Network Inc. and R&B Network Inc. (jointly "NTELOS"), Covad Communications Company ("Covad"), and AT&T Communications of Virginia, LLC ("AT&T"). NTELOS, in its motion, requested that the Commission expand its investigation to include Verizon's UNE provisioning practices as they relate to digital subscriber lines ("DSL") and voice grade loops.

The Commission, in our Order Granting Interventions dated November 26, 2002, granted the intervention requests of Allegiance, NTELOS, Covad, and AT&T but denied NTELOS' request to expand the investigation to include DSL and voice grade loops. The Order Granting Interventions also modified the procedural schedule originally set forth in the Commission's Order Directing Investigation of October 28, 2002.

On December 13, 2002, XO Virginia, LLC ("XO"), filed a Motion to Intervene. The Commission, in its Order of January 24, 2003, granted XO's motion.

On January 30, 2003, the Staff filed its Report as directed by the Commission.¹ The Staff concluded that, for all practical purposes, Verizon had changed its DS-1 UNE loop provisioning policy and practices in the mid-2001 timeframe. The Staff contended that Verizon had altered the meaning of what constitutes construction to include non-construction activities. Further, the Staff asserted that Verizon's DS-1 UNE loop provisioning policy conflicts with the Total Element Long Run Incremental Cost ("TELRIC") pricing assumptions adopted by the Commission in its Final Order in Case No. PUC-1997-00005 (April 15, 1999) ("UNE Pricing Order").

The possible remedies identified by the Staff include: (1) requiring Verizon to construct and rearrange DS-1 UNE loop facilities in accordance with the underlying assumptions of TELRIC; (2) if the Commission decides that Verizon is not obligated to construct new plant to fulfill DS-1 UNE loop requests, redetermining TELRIC prices to reflect the absence of that obligation; and (3) setting special access rates at TELRIC prices.

¹ The Staff Report also included a legal brief that addressed the potential preemption of the Commission's jurisdiction and authority by federal law, assessed the effect of the Federal Communications Commission's ("FCC") then-pending Triennial Review Order ("TRO"), and discussed the pertinent state law applicable to this proceeding.

On February 13, 2003, Allegiance, AT&T, Cavalier, and Verizon each filed reply comments to the Staff's Report. Allegiance, AT&T, and Cavalier recommended that the Commission adopt the first possible remedy. AT&T opposed the second possible remedy. Verizon opposed all of the possible remedies, disputed the Staff's conclusions, asserted that the Staff's Report and legal brief were "seriously flawed," asked the Commission to dismiss Cavalier's complaint, requested an evidentiary hearing, and asked for the opportunity to brief legal issues raised by the pending TRO.

On March 25, 2003, the Commission issued an Order Establishing Hearing that, among other things, set this matter for hearing, identified specific questions to be addressed at the hearing, and permitted the participants to file testimony and exhibits relevant to such questions. On April 3, 2003, Verizon filed a Motion to Amend Order Establishing Hearing. Cavalier and AT&T filed responses on April 10, 2003, and Verizon filed a reply on April 14, 2003. On April 16, 2003, the Commission issued an Order Granting in Part, and Denying in Part, Motion to Amend Order Establishing Hearing, which further limited the scope of testimony and exhibits for the hearing and established a separate briefing schedule for certain questions.

By Order issued on May 19, 2003, the Commission granted a Motion to Intervene filed on April 7, 2003, by WorldCom, Inc. ("WorldCom").

WorldCom filed a brief on May 22, 2003. Verizon, Cavalier, and AT&T filed briefs on May 23, 2003. The Staff filed a response on June 6, 2003. Verizon, Cavalier, and AT&T filed reply briefs on June 13, 2003.

The evidentiary hearing was held on June 17 and 18, 2003. Pursuant to the schedule established at the conclusion of the hearing, Verizon filed the surrebuttal testimony of Robert W. Woltz, Jr., Howard A. Shelanski, and Gary E. Sanford on July 11, 2003. Letters were filed on

July 23, 2003, by NTELOS and on July 25, 2003, by Cavalier and AT&T, not objecting to the inclusion of such testimony in the record.²

On September 29, 2003, the Commission issued an Order Scheduling Post-Hearing Briefs. The Commission stated that post-hearing briefs may address any issue raised in this proceeding, including the effects, if any, of the TRO released by the FCC on August 21, 2003.³ Post-hearing briefs were filed on October 31, 2003, by Verizon, Cavalier, Allegiance, Covad, NTELOS, AT&T, and the Staff.

Verizon states that the TRO adopted new rules governing the provisioning of UNE loops. Verizon explains that it has changed its DS-1 UNE loop provisioning policy and, as required by the FCC's new rules, will perform routine network modifications upon the signing of interconnection agreement amendments implementing the new rules. Verizon asserts that its current DS-1 UNE loop rates do not compensate it for network modifications it must perform under the new FCC rules and that it is entitled to negotiate a rate. Verizon also contends that it did not assume an obligation to build new facilities on demand in Case No. PUC-1997-00005. Verizon concludes that the Commission need take no further action in this case. Verizon requests that the Commission dismiss Cavalier's petition and allow the parties to negotiate – and potentially arbitrate – an amendment to its interconnection agreements in accordance with the process set forth in the TRO.

² The surrebuttal testimony of Robert W. Woltz, Jr., Howard A. Shelanski, and Gary E. Sanford, filed on July 11, 2003, will be admitted into the record as Exhibit Nos. 22, 23, and 24, respectively.

³ See In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003).

Cavalier states that the TRO thoroughly rejected all arguments advanced by Verizon to justify its "no facilities" policy, leaving the Commission free to enforce its prior Order on this matter in Case No. PUC-1997-00005. Cavalier asserts that Verizon has continued its "no facilities" policy after the TRO by requiring an amendment to existing interconnection agreements in a purported attempt to incorporate provisions of the TRO. Cavalier states that Verizon's proposed amendment includes a \$1,000 charge for DS-1 network modifications and for unspecified time and materials charges for unidentified "other required modifications." Cavalier concludes that the Commission need not enforce the TRO. Cavalier requests that the Commission: (1) order an immediate halt to Verizon's UNE DS-1 "no facilities" policy; and (2) order Verizon to refund to all CLECs the difference between the UNE DS-1 charges that those CLECs should have paid and the special access rates that Verizon's "no facilities" policy required them to pay.

Allegiance asserts that the Commission should order Verizon to provision UNE DS-1s in a manner consistent with the TRO and to perform routine network modifications for CLECs that it performs for its own customers free of charge. Allegiance also requests that the Commission order Verizon to withdraw its demand that CLECs execute a "routine modification" amendment to its interconnection agreement and pay a \$1,200 surcharge as a condition of securing Verizon's compliance with federal law.

Covad states that the TRO fully addresses Verizon's ongoing federal legal obligation to perform for competitors the same loop modification functions that the incumbent local exchange carriers routinely perform for their own customers.⁴ Covad asserts that Verizon has now chosen

⁴ Covad states that this includes, but is not limited to: "rearrangement or splicing of cable; adding a doubler or repeater; adding an equipment case; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer" (citing TRO para. 634).

to force competitors to adopt new interconnection agreement amendments in which Verizon purports to change its provisioning practices to conform with the TRO. Covad states that the Commission should use this proceeding to enforce Verizon's compliance with its legal obligations to provision high capacity loops. For example, Covad asserts that the Commission should issue an immediate injunction requiring Verizon to rescind its "no facilities" policies and to provision UNE high capacity loops pursuant to state law and the TRO and making clear that no interconnection agreement amendments are necessary.

NTELOS states that Verizon's policies for provisioning DS-1 UNEs were rejected in the TRO. NTELOS contends that Verizon should be required to refund to CLECs the additional charges paid as a result of being forced to order special access service upon wrongful rejection of DS-1 UNE orders. NTELOS urges the Commission to ensure that Verizon promptly changes its DS-1 UNE provisioning policies. NTELOS objects to Verizon's proposed new charge of \$1,000 for each DS-1 UNE for "Network Modifications" and asserts that the current DS-1 UNE rates in Virginia already compensate Verizon for the routine network modifications discussed in the TRO.

AT&T states that the TRO addressed and rejected Verizon's discriminatory high capacity UNE loop practices, which are the same practices that were litigated in this proceeding. AT&T asserts that the Commission need not and should not abdicate to the FCC, because Virginia CLECs require and deserve a Virginia forum for enforcing Verizon's obligations with respect to the provisioning of high capacity UNE loops in Virginia. AT&T requests the Commission to rule that: (1) Verizon must make routine network modifications – that is, it must perform those activities that it regularly undertakes for its own retail, resale, and special access customers –

consistent with the TRO; and (2) the costs of such routine network modifications are included in the TELRIC rates for high capacity UNE loops and that additional charges are not justified.

The Staff states that the TRO unequivocally declares Verizon's "no facilities" policy unlawful insofar as making routine network modifications. Staff asserts that pursuant to the Commission's UNE Pricing Order (Case No. PUC-1997-00005), TELRIC rates were determined and ordered to be applied prospectively in existing Verizon arbitrated interconnection agreements. The Staff contends that the Commission's adopted TELRIC cost study and TELRIC pricing established in the UNE Pricing Order: (1) address all of the activities required of Verizon to provision DS-1 UNE loop orders; and (2) are in full compliance with FCC pricing rules. The Staff recommends, at a minimum, that Verizon be enjoined to provision immediately all CLEC DS-1 UNE loops requiring existing network modifications in accordance with the TRO and applicable rules at TELRIC pricing.

NOW THE COMMISSION, having considered the record, the pleadings, and the applicable law, is of the opinion and finds as follows.

Cavalier filed its petition in this proceeding in opposition to the "no facilities" policy asserted by Verizon in refusing to provision certain orders for DS-1 UNE loops. The TRO, however, answers this question by rejecting Verizon's "no facilities" policy and requiring Verizon to perform routine network modifications as addressed in the TRO. The Commission need not enforce the FCC's TRO and will not issue an injunction in this proceeding.

The current interconnection agreement between Verizon and Cavalier is binding on the parties until amended or replaced by another interconnection agreement. Moreover, the TELRIC pricing established in our UNE Pricing Order remains applicable to the current interconnection agreement between Verizon and Cavalier. Verizon asserts, however, that the TELRIC rates

established by the Commission in our UNE Pricing Order do not compensate Verizon for performing routine network modifications required by the TRO. Cavalier and the other participants in this case disagree with Verizon's assertion.

Based on the record before us, we find that the activities required to provision DS-1 UNE loop orders have been addressed in the TELRIC pricing established in our UNE Pricing Order. We are not, however, deciding whether current TELRIC pricing fully compensates Verizon today. Rather, we conclude that the costs for routine network modifications have been addressed in the TELRIC rates previously established by the Commission for high capacity UNE loops. Accordingly, Verizon is required to provision DS-1 UNE loops to Cavalier, pursuant to the parties' existing interconnection agreement, under existing TELRIC rates until the FCC or the Commission establishes new pricing, or until the interconnection agreement is amended or replaced.

Finally, although we conclude that Verizon violated its interconnection agreement with Cavalier by refusing to provision certain DS-1 UNE loop orders, we find no authority in this case to establish that it is appropriate for the Commission to order refunds in this proceeding.

Accordingly, IT IS HEREBY ORDERED THAT:

(1) The surrebuttal testimony of Robert W. Woltz, Jr., Howard A. Shelanski, and Gary E. Sanford, filed on July 11, 2003, are admitted into the record as Exhibit Nos. 22, 23, and 24, respectively.

(2) The Federal Communications Commission's Triennial Review Order, released on August 21, 2003, addresses the routine network modifications that Verizon is required to perform in provisioning DS-1 UNE loops.

(3) Verizon is required to provision DS-1 UNE loops to Cavalier under existing TELRIC rates until the Federal Communications Commission or the State Corporation Commission establishes new pricing, or until the interconnection agreement between Verizon and Cavalier is amended or replaced.

(4) Cavalier's request for refunds is denied.

(5) This matter is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

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