

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE JOINT APPLICATION)
OF VERIZON DELAWARE INC. (F/K/A BELL)
ATLANTIC-DELAWARE, INC.), AND MCI WORLDCOM)
COMMUNICATIONS, INC. (F/K/A MFS INTELENET),) PSC DOCKET NO. 96-174
FOR APPROVAL OF AN INTERCONNECTION)
AGREEMENT PURSUANT TO SECTION 252(e) OF)
THE TELECOMMUNICATIONS ACT OF 1996)
(FILED JULY 17, 1996)

IN THE MATTER OF THE JOINT APPLICATION)
OF VERIZON DELAWARE INC., AND MCIMETRO)
ACCESS TRANSMISSION SERVICES, LLC, FOR)
APPROVAL OF AN INTERCONNECTION AGREEMENT) PSC DOCKET NO. 02-379
PURSUANT TO SECTION 252(e) OF THE)
TELECOMMUNICATIONS ACT OF 1996)
(FILED OCTOBER 25, 2002)

FINDINGS, OPINION, AND ORDER NO. 6400

A. BACKGROUND

1. MCI WorldCom Communications, Inc. (f/k/a MFS Intelenet) ("MCI World"), and MCImetro Access Transmission Services, LLC ("MCImetro"), each hold certificates from this Commission to provide local exchange services within this State. Each has an interconnection agreement with Verizon Delaware Inc. ("VZ-DE"). The Commission approved MCI World's original agreement in 1996. PSC Order No. 4332 (Oct. 15, 1996).¹ In 2002, MCImetro adopted, as its agreement, a previously approved agreement between VZ-DE and AT&T Communications of Delaware, LLC.

2. On January 27, 2004, VZ-DE filed, for itself and both MCI World and MCImetro, separate applications asking the Commission to approve a proposed Amendment to each of their interconnection agreements;

¹The Commission later approved Amendments 1 and 2 to this Agreement. See PSC Orders Nos. 4470 (Apr. 29, 1997) & 4653 (Nov. 18, 1997).

Amendment 3 for the MCI World Agreement and Amendment 1 for the MCImetro contract.

3. Pursuant to Guideline 30 of the Commission's "Guidelines for Negotiations, Mediation, Arbitration, and Approval of Agreements Between Local Exchange Telecommunications Carriers" (as revised effective May 10, 2001), notice of the filing of the Amendment was posted on the Commission's website.

4. On February 17, 2004, Level 3 Communications, LLC ("Level 3"), filed comments in response to the notices of the proposed Amendments. Level 3 states that it was not suggesting that the amendments to the MCI agreements be rejected pursuant to the statutory standard that the Commission is bound to apply. See 47 U.S.C. § 252(e)(2)(A). According to Level 3, those statutory standards allow a state Commission to reject a negotiated amendment to an agreement only if the agreement or amendment discriminates against another carrier or if it is not in the public interest. Level 3 also acknowledges the fact that the provisions of 47 U.S.C. § 252(a)(1) specifically permit carriers to negotiate voluntary interconnection agreements (and amendments) without regard to the substantive standards set forth in subsections (b) and (c) of 47 U.S.C. § 251. Level 3 highlights two issues in the amendments that concern it. First, Level 3 suggests that the Amendments potentially may allow MCI to collect a higher rate of reciprocal compensation on dial-up Internet traffic than might be currently authorized by the FCC's rulings. Second, Level 3 focuses on the provisions in the Amendments that define Voice Over Internet Protocol ("VOIP") traffic as "Telecommunications traffic."

Level 3 suggests that in such instance, the amendments may turn out to be inconsistent with future findings or rulings by the FCC on the regulatory status of this type of traffic. Level 3 asks for a statement

by this Commission that the MCI contract Amendments, particularly if approved, at least will not serve as precedent for any arbitration brought by other parties on either of these issues.

5. VZ-DE filed comments in response to Level 3's submission on February 27, 2004. VZ-DE points out that Level 3's comments do not strictly oppose approving the MCI Amendments and, indeed, acknowledge that the Commission's grounds for rejection are statutorily limited and may not be fulfilled in this filing. VZ-DE also argues that any statement about the precedential value of the issues in this amendment would be inappropriate, speculative, and wasteful of resources, since neither of the highlighted issues are ripe for consideration at this time. Additionally, VZ-DE argues that the two amendments' proposed rate structure for ISP-bound traffic is perfectly consistent with the framework set forth by the FCC regarding compensation for Internet bound traffic. VZ-DE also reports that the FCC has initiated a rule-making on the status of VOIP traffic and, so far, has not come to any conclusive determination with respect to the types of VOIP traffic that MCI is offering. VZ-DE points out, that if, indeed, there is a change in the regulatory status of VOIP traffic, the proposed amendment provides for changes in the treatment of VOIP traffic to reflect the change in law as soon as such change might become legally effective.

6. MCI (on behalf of both MCI World and MCImetro) also filed comments on March 4, 2004, supporting the approval of both of its subsidiaries' Amendments. MCI points out: (a) that Level 3 has not asked the Commission to reject the amendments; (b) that the statutory grounds for rejection by the Commission have not been met; and (c) that 47 U.S.C. § 252(a) allows the Commission to approve voluntarily negotiated agreements or amendments even if their terms do not comply with the

Telecommunications Act or FCC rules, so long as the agreement or amendment does not violate the public interest. Additionally, MCI states that the Amendments here do not discriminate against any other carrier since the terms are available to other carriers under 47 U.S.C. § 252(i).

With regard to Level 3's concern related to compensation for ISP-bound traffic, MCI states that the FCC rules do not preclude parties from voluntarily agreeing to a reciprocal compensation rate for this type of traffic. Moreover, on the VOIP issue, MCI agrees with VZ-DE's assertion that the amendments bind the respective parties to each contract to the results of "future" federal determinations relating to the regulatory classification of or, compensation for, VOIP traffic. MCI also asks the Commission to decline to address the precedential value of the approval of these amendments.

7. The Commission considered the two Amendments to the two agreements at its meeting of April 20, 2004.

B. FINDINGS AND OPINION

8. The Commission has the authority and jurisdiction to review the Amendments to the interconnection agreements under 47 U.S.C. § 252(e) (1) and 26 Del. C. § 703(4).

9. The Commission determines that there is no reason to reject the Amendments under the review criteria set forth in 47 U.S.C. § 252(e) (2) (A).

10. That section - which pertains to review and approval of the terms of an interconnection agreement derived from negotiations - is a somewhat lenient one, although not one without some teeth. Indeed, the phrasing of § 252(e) (2) (A) presumptively favors approval of negotiated terms - it authorizes rejection of such agreed-upon terms only if the

agreement (or its terms) discriminates against a non-party carrier or if implementation of the terms would not be consistent with the public interest. This lenient standard dovetails with the express statutory authorization for carriers to negotiate interconnection terms "without regard" to the substantive obligations imposed by 47 U.S.C. § 251(b) and (c). See 47 U.S.C. § 252(a) (1).

11. Level 3 has filed comments focusing on two issues of concern in these Amendments; one related to the Amendments' reciprocal compensation rate and the other directed as the amendments' terms related to VOIP traffic. Yet, even Level 3 draws back from vigorously asserting that its concerns mandate rejection under the lenient standard of § 252(e) (2) (A). Rather, Level 3's thrust is to ensure that the terms of the agreement do not emerge later as "precedent" to be utilized in future contests over these two issues.

12. The Commission finds that the record is not sufficient to mandate that it reject the two Amendments. As the Commission has repeated in almost all of its Orders approving negotiated agreements or amendments:

the approval granted here is given under the terms of 47 U.S.C. § 252(e) (2) (A). Specifically, the Commission does not make any finding whether the terms and prices set forth in the Amendment meet the substantive requirements of 47 U.S.C. § 251 or the pricing standard under 47 U.S.C. § 252(d).

Beyond that, the question of precedential weight is usually determined in the subsequent proceeding - not the earlier one. Scrutiny in the later proceeding allows one to better examine and compare the earlier and later contexts and consider any intervening rulings or circumstances.

C. ORDERING PARAGRAPHS

Now, therefore, this 20th day of April, 2004, **IT IS ORDERED:**

1. That, the Amendment to the interconnection agreement entitled Amendment No. 3, submitted by Verizon Delaware Inc. and MCI WorldCom Communications, Inc. (f/k/a MFS Intelent), on January 27, 2004, is hereby approved under 47 U.S.C. § 252(e) (2) (A).

2. That, the Amendment to the interconnection agreement entitled Amendment No. 1, submitted by Verizon Delaware Inc. and MCImetro Access Transmission Services, LLC, on January 27, 2004, is hereby approved under 47 U.S.C. § 252(e) (2) (A).

3. That the terms and conditions set forth in prior Orders related to the interconnection agreements between Verizon Delaware Inc., and MCImetro Access Transmission Services, LLC, and MCI WorldCom Communications, Inc. (f/k/a MFS Intelenet), shall remain in force and effect.

4. That, within ten (10) days of this Order, Verizon Delaware Inc. and MCI World Com Communications, Inc. (f/k/a MFS Intelenet), shall file with the Commission a revised, complete interconnection agreement which shall incorporate Amendment No. 3. The revised agreement may substitute the new provisions or attach the amendment to the previously approved interconnection agreement. The revised agreement shall be available for public inspection and copying pursuant to the provisions of 47 U.S.C. § 252(h).

5. That, within ten (10) days of this Order, Verizon Delaware Inc. and MCImetro Access Transmission Services, LLC, shall file with the Commission a revised, complete interconnection agreement which shall incorporate Amendment No. 1. The revised agreement may substitute the new provisions or attach the amendment to the previously approved

