

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE INVESTIGATION)
INTO THE COMPETITIVE PROVISIONS OF)
INTRASTATE TELECOMMUNICATIONS SERVICE) PSC REGULATION DOCKET NO. 42
THROUGH INTRALATA PRESUBSCRIPTION)
AND UNIVERSAL SERVICE FUNDING)
(FILED JANUARY 11, 1994))

ORDER NO. 6813

This 10th day of January, 2006, the Commission determines and Orders the following:

1. In 1997, this Commission directed Bell Atlantic-Delaware, Inc. ("BA-Del") to implement 1+ intrastate toll presubscription for all its local exchange customers, both current and subsequent. See PSC Findings, Opinion, and Order No. 4382 (Jan. 7, 1997) (main Order). See also PSC Orders Nos. 4491 (May 13, 1997) & 4603 (Sept. 23, 1997).¹ To move to what was then a new regime for intrastate toll calls, the Commission set forth some consumer notification and consumer contact protocols for BA-Del to follow. Some of these requirements were for the short run: to immediately alert 1997 consumers that they would now have a choice and could pre-select a preferred carrier to handle all their 1+ intraState (and hence intraLATA) toll calls. But another (and the one subject to this Order) focused not just on BA-Del's

¹Such presubscription - also called "toll dialing parity" in the jargon of the federal Communications Act - allows each local exchange customer to choose a "preferred" toll carrier that will carry that subscriber's intraState toll calls. See 47 C.F.R. § 51.209(a)-(b) (federal directive for intraLATA toll dialing parity). This Commission's directive to implement 1+ presubscription for in-State toll calls triggered 1+ presubscription for all intraLATA calls made by BA-Del's customers. See 47 C.F.R. § 51.209.

historical status as the exclusive provider of 1+ (direct access) intraLATA toll services but its role as the then pervasive provider of local exchange telephone services. Would BA-Del be able to use its role as the "gateway" for almost all local exchange service contacts to "unfairly" steer customers to choose its own intraLATA toll services? In meeting such a concern (in the context of the landscape in 1997), the Commission directed that in responding to customer contacts, BA-Del would:

provide [callers] with a neutral statement describing intraLATA presubscription and, if asked, will read the list (random and rotated regularly) of available intraLATA carriers. If a customer tells BA-Del that he or she wants a different carrier for intraLATA toll, BA-Del will process that request in the same manner and time frame that it processes [a request to change] an intraLATA PIC to BA-Del."²

This customer contact protocol has governed BA-Del, and later Verizon Delaware Inc. ("VZ-DE"), for the last 8 years.

2. VZ-DE now asks the Commission to modify, or at least clarify, the 1997 protocol about how it might proceed in describing the choices available under intraLATA presubscription in the context of customer initiated calls to it.³ VZ-DE asks for a Commission

²PSC Order 4382 at Ordering ¶ 6. Accord id. at ¶ 41. BA-Del sponsored the form of this particular protocol. It advanced it in response to arguments from the then two major interexchange carriers that the Commission should either impose a blanket prohibition on all marketing by BA-Del during all customer initiated calls or should bar any marketing by BA-Del during a customer-initiated call unless the customer might affirmatively indicate that he desires marketing information. Id at ¶ 40.

³Amended Petition of VZ-DE, PSC Reg. Dckt.No. 42 (filed Oct. 19, 2005). In an earlier submission, VZ-DE has asked to have the entire 1997 customer contact protocol lifted. In its amended request, it simply asks that it be allowed more leeway in recommending its own services during in-bound customer contacts.

Order that affirmatively declares that VZ-DE may recommend its own regional (intraLATA) toll service in context of an in-bound customer inquiry, so long as VZ-DE contemporaneously states that other carriers also provide similar regional toll service and, if asked, offers to read a list of all available intraLATA carriers (arranged in random order and rotated periodically).⁴ VZ-DE suggests that such a change is appropriate in light of: (a) the dramatically changed market and marketing conditions related to both local and toll services; (b) the increased level of consumer sophistication about the ability to choose carriers for toll (and other) services; and (c) the freedom previously allowed other, competitive, local exchange carriers to market their intraLATA toll services even though they too might be viewed as having "gateway" status.

3. VZ-DE's proposed protocol change - which would allow it to "recommend" (i.e., market) its own intraLATA toll services so long as it emphasizes the existence of other carriers and, if asked, recites all carriers' names - does have some pedigree. As VZ-DE emphasizes, a couple of years ago, the Commission did suggest that a competitive local exchange carrier could adopt just such form of protocol to explain toll dialing parity for intraLATA calls in the context of responding to in-bound calls made to it.⁵ In turn, the Commission saw

⁴Amend. Pet. at ¶ 12 & p. 7.

⁵See PSC Order No. 6304 at ¶ 10 (Aug. 5, 2003). In that Order, the Commission spoke in the context of approving the "intraLATA toll dialing parity implementation" plan submitted by the competitive local exchange carrier. See 47 C.F.R. § 51.213(b)(2) (all local exchange carriers must have an approved toll dialing implementation plan which includes methods "to enable subscribers to affirmatively select an intraLATA service provider").

that type of protocol acceptable for competitive local exchange carriers in the intraLATA toll context given what the Federal Communications Commission ("FCC") had said with regard to the comparable ability for consumers to choose a long distance, interLATA carrier. In its South Carolina § 271 Order,⁶ the FCC had signed off on just such type of "script" as a permissible way for a Bell Operating Company ("BOC") - an incumbent local exchange carrier - to describe to in-bound callers the availability of interLATA carrier choice, once such BOC had been granted authority to also offer its own interLATA services (albeit through a sibling subsidiary).⁷

4. Staff tells us that in other jurisdictions, where Verizon operating companies have similarly sought relief from "non-marketing" scripts and protocols imposed as part of those States' implementation of intraLATA presubscription in the late 1990s - the State commissions have often looked to the present market share position of the Verizon

⁶Application of BellSouth Corp., et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region interLATA services in South Carolina, 13 FCC Rcd. 539, 667-72 at ¶¶ 231-39 (FCC 1997) ("South Carolina § 271 Order"), aff'd sub nom. BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998).

⁷The script under scrutiny there read:

You have many companies to choose from to provide your long distance service. I can read from a list the companies available for selection, however, I'd like to recommend BellSouth Long Distance.

South Carolina § 271 Order, 13 FCC Rcd. At 669 ¶ 233. Earlier, the FCC had said that pre-existing, but still governing, interLATA "equal access" obligations did not preclude a BOC from "market[ing] its affiliate's interLATA services to in-bound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice." Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905, 22047 at ¶ 292 (FCC 1996). The Court of Appeals for the District of Columbia Circuit has see no reason to reject this approach to the "joint marketing" of a BOC's long distance services by the local exchange sibling. See AT&T Corp. v. FCC, 220 F.3d 607, 632 (D.C. Cir. 2000).

company in both the State's local exchange and intraLATA toll markets as a factor in deciding whether to allow a change in the earlier scripts or protocols.⁸ The record here does not provide any complete picture of VZ-DE's market shares with regard to either local exchange service or wireline intraState (or intraLATA) toll. However, the Commission does not believe it needs such information to act on Verizon's request. Nor need the Commission now determine whether dominance in either such market provides any insights about Verizon's ability to unfairly leverage its local exchange status to gain toll customers. Instead, the Commission will ground its decision on two - much simpler - "findings." First, one can hardly deny that conditions surrounding the marketing of telecommunications services to the consuming public have significantly changed since 1997. Over the last eight years, numerous competitive toll, as well as local exchange carriers, have arisen, each - through various marketing efforts - vying to provide their services to a wide range of customers. True, by now many of these new entrants might have faded from the scene. Yet their earlier efforts to sell their services surely informed the

⁸Thus, the Maine PSC denied a Verizon request to allow marketing during in-bound calls due in part to Verizon's continued dominance in that jurisdiction's local exchange market. Verizon New England Inc., D/B/A Verizon Maine InterLATA Entry Amendment to the Implementation Plan for the Introduction of IntraLATA Presubscription (ILP), Dckt No. 2002-750, Order Denying Waiver Request (Me. PSC Oct. 3, 2003) & Order Denying Request for Reconsideration (Me. PSC Dec. 5, 2003) (subsequent judicial and administrative history related to First Amendment challenge omitted). In contrast, the Florida PSC granted Verizon's request to be allowed to recommend its own services in light of the current, more competitive, status of the local exchange and toll markets. In re: Petition by Verizon Florida Inc. for approval to revise customer contact protocol, Dckt. No. 011497-TL, Notice of Proposed Agency Action and Order Approving Revision of Customer Contact Protocol, Order No. PSC-02-0362-PAA-TL (Fla. PSC March 22, 2002) (citation to subsequent confirming order omitted).

consuming public of the opportunity (and indeed legal right) to look to a variety of carriers to provide a wide variety of telecommunications services. And today the use of wireless services (where buckets of "nationwide" calling minutes render distance and "toll" services irrelevant) is commonplace, with consumers more and more utilizing those services as a substitute for traditional wireline local and "long distance" toll services. One need not put figures behind market shares to be able to assume, confidently, that since 1997 consumers have become acutely aware that they can exercise "choice" in their purchase of telecommunications services at almost every level. In itself, such a shift in consumer awareness is a sufficient basis for the Commission to now revisit the continued need for restrictions on marketing that might have been imposed on VZ-DE by the Commission's 1997 customer contact protocol.

5. Second, and just as importantly, no one has objected to the proposed change that will allow VZ-DE, during in-bound customer contacts, to recommend its regional toll services while reaffirming the customer's ability to choose another carrier for intraLATA toll. The Commission provided and published notices of VZ-DE's proposed change and sought objections or comments from other carriers, the public, or any other interested persons. PSC Order No. 6762 (Nov. 8, 2005). No carrier, toll or local, filed anything in response. The Commission believes that such silence from the toll carriers might mean either of two things: (a) that the ability of VZ-DE to "recommend" (market) its intraLATA toll services during incoming calls is an irrelevancy to the other carriers' present business models; or

(2) that VZ-DE's proposed modification will work no competitive harm to them. While the old axiom is that the Commission should seek to protect competition not competitors, the failure of competitors to voice objection to a contemplated action can often be viewed as a statement that the action will work no harm to competition. If no competitor thinks that allowing VZ-DE the ability to recommend its own intraLATA toll services during in-bound calls is worth contesting, then the Commission finds it difficult to conclude that toll competition will necessarily be injured by allowing such limited marketing ability. Moreover, looking to the consumers' perspective, the Commission notes that the Division of the Public Advocate has not intervened to object to the marketing modification proposed by VZ-DE.

6. Consequently, given the absence of objection, the Commission grants VZ-DE's amended petition to modify the customer protocol requirements imposed under paragraph 41 and Ordering ¶ 6 in Order No. 4382. Specifically, after the effective date set forth below, VZ-DE is allowed to recommend its own intraLATA toll services in new customer contacts so long as it also concurrently informs customers that they have a choice of intraLATA toll carriers and offers to read a list of other available carriers (with the list arranged in random order and rotated periodically). The Commission does not prescribe any particular revised script to be utilized by VZ-DE. The Commission would expect that the language used by VZ-DE's customer representatives for intraLATA toll choice would be akin to that "approved" for interLATA toll carrier selection in the South Carolina § 271 Order and would fall within the description of

marketing leeway announced in the FCC's earlier Non-Accounting Safeguard Order.⁹ Of course, the modification approved here does not excuse VZ-DE from obtaining sufficient authorization (supported by adequate verification) if the calling consumer eventually chooses VZ-DE's intraLATA toll services. See 26 Del. C. §§ 924-927 (2004 Supp.).

Now, therefore, **IT IS ORDERED:**

1. That, for the reasons set forth in the body of this Order, on the effective date set forth below, the requirements concerning the implementation of intraLATA toll presubscription by Verizon Delaware Inc. as set forth in Ordering paragraph 6 of the Findings, Opinion, and Order No. 4382 (Jan. 7, 1997) are hereby modified, and superceded by the obligations, requirements, and declarations set forth in Ordering paragraph 2 below. On and after the effective date, Verizon Delaware Inc. shall comply with the obligations in Ordering paragraph 2 in its responses to customer contacts involving the selection of an intrastate and intraLATA toll carrier. Until such effective date, Verizon Delaware Inc. shall continue to abide by the obligations imposed by Ordering paragraph 6 of PSC Order No. 4382 (Jan. 7, 1997). Similarly, any obligations related to how Verizon Delaware Inc. shall respond to customer inquiries that were imposed by paragraph 41 of the Findings, Opinion, and Order No. 4382 (Jan. 7, 1997) are, on the effective date, hereby modified, and superceded by the obligations, requirements, and declarations set forth in Ordering paragraph 2 below.

⁹See n. 7 above.

2. That, on and after the effective date, Verizon Delaware Inc. shall continue to inform consumers making in-bound calls requesting new local exchange services of their right to select a separate carrier of their choice to carry and handle their intrastate and intraLATA toll calls. During such in-bound call, Verizon Delaware Inc. may recommend its own intraLATA toll services, provided that Verizon Delaware Inc. also informs the calling consumer that other carriers also provide such intraLATA toll services and offers to read a list of those other carriers. If the caller requests to hear the identities of other carriers, Verizon Delaware Inc. shall read to the consumer a list of such other carriers. The listing shall list the carriers in random order and such listing shall be periodically re-arranged. Verizon Delaware Inc. shall continue to process each consumer's request for a particular intrastate, intraLATA toll carrier in the same manner and in the same time frame as Verizon Delaware Inc. processes a consumer's request to utilize its own intrastate, intraLATA toll services.

3. That the effective date for the modifications set forth in Ordering paragraphs 1 and 2 shall be March 1, 2006.

4. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

PSC Regulation Docket No. 42, Order No. 6813 Cont'd.

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary