

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION OF DIECA)
COMMUNICATIONS INC., d/b/a COVAD COMMUNI-)
CATIONS COMPANY, D-TEL LLC, SNIP LINK LLC,)
XO COMMUNICATIONS SERVICES, INC., f/k/a)
XO DELAWARE, INC., AND XTEL COMMUNICATIONS,)
INC., FOR AN AMENDMENT TO INTERCONNECTION)
AGREEMENTS WITH VERIZON DELAWARE INC.,) PSC DOCKET NO. 05-164
PURSUANT TO SECTION 252(B) OF THE)
COMMUNICATIONS ACT OF 1934, AS AMENDED,)
THE *TRIENNIAL REVIEW ORDER* AND THE)
TRIENNIAL REVIEW REMAND ORDER)
(FILED MAY 16, 2005))

IN THE MATTER OF THE APPLICATION OF)
VERIZON DELAWARE, INC., FOR ARBITRATION)
OF AN AMENDMENT TO INTERCONNECTION AGREE-)
MENTS WITH COMPETITIVE LOCAL EXCHANGE)
CARRIERS AND COMMERCIAL MOBILE RADIO) PSC DOCKET NO. 04-68
SERVICE PROVIDERS IN DELAWARE PURSUANT TO)
SECTION 252 OF THE COMMUNICATIONS ACT OF)
1934, AS AMENDED, AND THE *TRIENNIAL REVIEW*)
ORDER (FILED FEBRUARY 20, 2004))

ORDER NO. 7144

This 20th day of March, 2007, the Commission determines and Orders the following:

I. BACKGROUND and SUMMARY

1. These two matters (previously consolidated) have apparently stalled. This Order tries to get them back on track. It remands to the designated Arbitrator the "new" disputes that have surfaced since the Commission reviewed the original arbitration award in September, 2006. The goal is to bring these further squabbles to a prompt resolution so that the Commission can perform its task to approve

modifications to the relevant interconnection agreements in light of the changed interconnection and unbundling dictates announced by the Federal Communications Commission first in its Triennial Review Order ("TRO")¹ and then in its Triennial Review Remand Order ("TRRO").²

2. As the prior Orders in these matters reflect, these proceedings began in 2004 as Verizon Delaware Inc. (now an LLC) ("VZ-DE") asked for a "global" arbitration to make modifications and amendments to all its Delaware interconnection agreements in light of the shift in unbundling rules announced in the TRO. After sorting out the parties, the matters went to an Arbitrator for resolution. In the meantime, the TRRO announced new rules that not only supplemented, but indeed in many instances superseded, the unbundling rules earlier adopted by the TRO.

3. On March 24, 2006, the Arbitrator issued her 113-page award, resolving disputes grouped under 27 "Issues." Only VZ-DE filed objections to any of her resolutions.³ VZ-DE's exceptions quarreled

¹In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Exchange Carriers, Report and Order and Order on Remand and Further NPRM, 18 FCC Rcd. 16978 (2003), vacated in part and remanded, United States Telecom. Ass'n v. FCC, 359 F.3d 554 (D.C.Cir. 2004) (subsequent certiorari history omitted).

²In the Matter of Unbundled Access to Network Elements, Order on Remand, 20 FCC Rcd. 2533 (2005), petitions for review denied, Covad Communications Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

³In light of the protracted length of the proceeding, and its "global" nature, the Commission (through its Staff) directed the parties to deviate somewhat from the process for reviewing the arbitration award set forth in the Commission's "Guidelines for Negotiations, Mediation, Arbitration, and Approval of Agreements Between Local Exchange Telecommunications Carriers." Instead, the Staff indicated that the Commission would take up any challenges to the Arbitrator's award under a process akin to "exceptions" to a Hearing Examiner's Report and Recommendations. See B. Burcat, Exec. Dir., Memo. To Service List (March 31, 2006).

with the Arbitrator's rulings on four issues that focused on implementing details.⁴

4. The Commission sat to consider VZ-DE's exceptions during its public meeting on September 19, 2006. Of the affected competitive local exchange carriers involved in the proceedings, only XO Communications Services Inc. ("XO") appeared to support the Arbitrator's award against VZ-DE's four exceptions. And XO focused only on two of VZ-DE's four exceptions.⁵ After hearing argument on the exceptions, the Commission made three modifications to the Arbitrator's award.⁶ However, it also rebuffed one of VZ-DE's challenges, choosing to sustain the terms in the award. After affirming all of the unchallenged remaining resolutions made in the award, the Commission directed VZ-DE and the CLEC parties to return within 30 days with contract language that would implement the Arbitrator's award (as slightly modified by the Commission).⁷

5. The CCG, US LEC, and VZ-DE then filed several joint requests asking for additional time to submit the implementing

⁴VZ-DE's four exceptions, and the Commission's responses to those challenges, are summarized, and memorialized, in Part II of this Order.

⁵XO was one of a handful of competitive local exchange carriers (CLECs) who had participated in the arbitration as the "Competitive Carrier Group" ("CCG"). The CCG had earlier told the Commission that the group would not file exceptions to the award and would not appear for oral argument before the Commission. Similarly, US LEC, another CLEC, had also said it would neither file exceptions nor appear. Finally, AT&T Communications of Delaware, LLC (and one of its CLEC operating subsidiaries) also reported that no exceptions would be forthcoming from them and that they would not appear.

⁶See Deliberations Transcript ("DTr.") (Sept. 19, 2006).

⁷See DTr. at 158. By requiring the parties to promptly return with conforming contract language, the Commission anticipated it could then move forward quickly to approve the amended or modified agreements under 47 U.S.C. § 252(e)(1).

contract language. However, what eventually was submitted in late November, 2006, was not agreed-upon implementing contract terms, but instead dueling briefs from CCG and US LEC and VZ-DE, arguing over the various terms that should be incorporated into any amended or modified agreements. Each brief claims that that side's contractual language - on a host of terms going beyond those challenged in VZ-DE's exceptions - are true to the governing rules and the Arbitrator's award.⁸

6. As noted before, the Commission's goal is to now re-start these lingering matters and bring them to a final resolution. In Part II, the Commission will summarize its earlier rulings on VZ-DE's exceptions from its deliberations last year. The Commission will then (in Part III) remand the matter to the Arbitrator for her to work through, and promptly resolve, any of the "newly" surfaced language disputes.

II. VZ-DE'S EXCEPTIONS

A. Transition Periods to Govern Future Wire Center "Non-Impairment" Designations

7. Under the TRRO, the FCC set forth "wire center" criteria to be used to determine when a CLEC would not be impaired without TELRIC-priced access to high capacity DS1 or DS3 loops served by that wire center.⁹ In like fashion, the FCC set forth "wire center" determinants

⁸Neither side presented with its brief any motion requesting a particular process for resolving the language and terms differences. And since the briefs were filed, the parties have not pressed for any resolution from the Commission. From all this, the Commission suspects that the quarrels in the November, 2006 briefs are not Delaware specific but reflect disputes that these carriers have pressed on a "regional" basis in TRRO amendment proceedings in other jurisdictions.

⁹See 47 C.F.R. § 51.319(a)(4) (DS1 loops), 51.319(a)(5) (DS3 loops).

to be applied to judge whether dedicated high capacity transport on routes between wire centers no longer needs to be made available to CLECs as an unbundled network element (UNE) at TELRIC prices.¹⁰ In both instances, the "wire center" criteria focuses on the presence of competitor collocators in the center as well as the number of business lines served by the particular wire center.

8. Because these new "wire center" criteria for measuring non-impairment were a departure from past rules, the FCC adopted "transition periods" to allow for an orderly process in those situations where the new wire center criteria might then (*at the time of the TRRO*) call for lifting the prior TELRIC-priced unbundling obligation.¹¹ In this matter, the Arbitrator carried forward these initial "transition periods" (in terms of length, conditions, and pricing) as the applicable "transition periods" when *in the future* - (i.e., post-TRRO) - other wire centers might be found "not to be impaired" for purposes of the availability of TELRIC-priced high-capacity loops and high-capacity dedicated transport.¹²

9. VZ-DE excepted to the use of the longer terms (one year, and more for dark fiber) from the initial "transition periods" in the context of a possible determination in the future that a particular

¹⁰See 47 C.F.R. § 51.319(e)(2)(ii) (dedicated DS1 transport), 51.319(e)(2)(iii) (dedicated DS3 transport); 51.319(e)(3) (wire center criteria for use in dedicated transport analysis).

¹¹See 47 C.F.R. § 51.319(a)(4)(iii), 51.319(a)(5)(iii) (DS1 & DS3 loops); 51.319(e)(2)(ii)(C), 51.319(e)(2)(iii)(C) (DS1 & DS3 transport).

¹²See Arbitrator Award ("Arb. Award") at ¶¶ 53-54 (high capacity loops), 60 (high capacity dedicated transport), 67, 207. The FCC had indicated that the length, terms, and conditions for "future" transition periods should be set via the negotiation (and arbitration) regime under 47 U.S.C. § 252. TRRO at ¶¶ 142 n. 399, 196 n. 519.

wire center had crossed the applicable thresholds for "de-listing" high capacity loops or transport. VZ-DE argued, as it did before the Arbitrator, that in the case of such future changes in wire center status a ninety-day transition period should be adequate for CLECs to make alternative arrangements to procure the high capacity loops and transport to continue to serve customers from the "new" non-impaired wire center.¹³ In contrast, XO urged retention of the carried-forward transition period terms for any "new" non-impaired wire center determinations.

10. The Commission chose to alter the Arbitrator's award on this issue. For future de-listings in Delaware that end the availability of DS1 and DS3 loops and dedicated DS1 and DS3 transport as UNEs at a particular wire center, the Commission believes that 180 days (or six months if the parties prefer such period) should be the appropriate "transition period."¹⁴ Delaware is a small State with a limited total number of wire centers. And the Commission does not foresee (under the current non-impairment criteria) a host of wire center "status" changes, at least over the term of present interconnection agreements. Moreover, given the small number of wire centers - and the stringency of the FCC's wire center thresholds - the

¹³VZ-DE represented that, at the time of the arbitration, no wire center in Delaware met the thresholds for non-impairment of DS1 or DS3 loops. It also said that, at such time, only three wire centers met the criteria for either Tier 1 or Tier 2 designations under the DS1 and DS3 dedicated transport rules. A check of VZ-DE's Internet website indicates that (apparently) as of _____, the Wilmington wire center is "de-listed" for purposes of DS3 loops. The wire centers for dedicated transport remain the same: Wilmington (Tier 1); Newark (Tier 2); and Dover (Tier 2).

¹⁴See DTr. at 134-35.

Commission believes that - in Delaware - CLECs will likely have a good grasp on when, and which, additional wire center might be headed towards findings of "non-impairment." With such possible foresight, CLECs should be able, during a 180-day transition period, to move forward to alternative serving arrangements.¹⁵

B. Billing Change-Over Date for Conversions Between Special Access Circuits and UNE EELs

11. In the TRO, the FCC developed criteria for when a CLEC could order a new high-capacity loop-dedicated transport UNE combination commonly called an "extended enhanced link" ("EEL") or convert a current (tariff-priced) special access circuit to such EEL or other UNE combination.¹⁶ In this case, the Arbitrator determined that in the case of such new EEL orders or new conversions, the new UNE rate would apply 30 days after the conversion order was submitted (even if the actual conversion work by VZ-DE had not then been completed). VZ-DE objected to that determination. Although VZ-DE had initially argued that the change in the billing rate (generally more favorable to the CLEC) should not accrue until the conversion order is actually provisioned (or completed), it also offered a compromise before the Commission. Under it, the EEL billing rate would apply after 30 business days, except where a project for conversions by a

¹⁵VZ-DE's exception went to the length of the future "transition periods" and did not challenge the Arbitrator's decisions to apply the terms, conditions, and pricing applicable to the FCC's initial "transition" periods to any future "transition period." The Commission leaves it to the parties (and, if need be, the Arbitrator) to define the start date for the transition period in the context of any future change in the "impairment" status of a wire center.

¹⁶See 47 C.F.R. § 51.318(b).

CLEC exceeded 100 in number. In such case, the 30 business-day rule would prevail for the first 100 conversions with the billing change-over date for those conversions beyond 100 to be subject to negotiations between the parties. In opposition, XO supported the Arbitrator's original ruling, arguing a billing change-over deadline provides incentives for VZ-DE to complete the conversions, and noting that the neighboring Pennsylvania Public Utility Commission had already rejected Verizon's "upon completion" rule.

12. The Commission declined to alter the Arbitrator's determination related to the billing change deadline for conversions related to EEL circuits. The deadline has its advantages in moving conversions forward and VZ-DE's compromise offer - where it would use the 30-day deadline for the first 100 conversions in a project - suggests the 30-day period is not unreasonable. However, at the same time, the Commission declines to accept VZ-DE's compromise in full. No one suggested that in Delaware 100 plus circuit conversion projects will be the norm, or even frequent occurrences. To impose a negotiation process to resolve deadlines for conversions above 100 seems to invite a level of carrier interaction (and squabbles) that might not be warranted, particularly if the number of anticipated 100 plus projects is small. The Arbitrator's determination setting 30 calendar days as the date for billing changes in UNE EEL new orders and conversions is affirmed.¹⁷

¹⁷See DTr. at 147-48. See also TRO at ¶ 558 (suggesting (in EEL conversion context) "pricing changes start the next billing cycle following the conversion request").

C. Arbitrator's Alternative Mechanism for Identifying "De-Listed" Wire Centers

13. In the TRRO, the FCC adopted a "self-certification and then dispute" regime as a method for identifying and resolving disputes about the availability of TELRIC-priced high-capacity loops and transport involving a particular wire center.¹⁸ Under such regime, the CLEC, after a reasonable diligent inquiry, can - when ordering a high-capacity loop or dedicated transport UNE - "self-certify" that its request is consistent with the UNE rules - i.e., that the requested UNE is available because the wire center has not surmounted the relevant "non-impaired" threshold. In response, the incumbent LEC (such as VZ-DE) must process the request. If it challenges the availability of the UNE, the incumbent LEC invokes the dispute resolution clause in the interconnection agreement, generally bringing the dispute to the relevant State Commission or another designated authority to be resolved. The FCC called its regime a "default process," suggesting that an ILEC and CLEC could negotiate alternative arrangements.¹⁹

14. In her award, the Arbitrator imposed a procedural overlay on the FCC's default self-certify, process, and then dispute regime. Looking to a process adopted by the District of Columbia Public Service Commission, the Arbitrator directed VZ-DE and the CLECs to incorporate into their interconnection agreements a process (with timing deadlines) for VZ-DE to post a listing of "non-impaired" wire

¹⁸See TRRO ¶ 234.

¹⁹See TRRO ¶ 234 n. 660.

centers (beginning with the date of the amendments to the interconnection agreement) with the opportunity for a CLEC to then investigate and challenge VZ-DE's listings. If a CLEC would challenge a wire center listing, then the listing would be initially vetted through a third-party who would promptly determine if VZ-DE's data supports its "non-impairment" determination. In turn, that third party's determination could be challenged under any dispute resolution clause in the applicable interconnection agreement.²⁰

15. VZ-DE objected to the mandatory imposition of this alternative regime for wire center "non-impairment" determinations. It noted that it already "posts" a listing of "non-impaired" wire centers and asserts that it will provide data supporting its de-listings subject to a CLEC executing appropriate confidentiality protections. It also said that in the District of Columbia several CLECs had chosen not to insist on the alternative process and instead negotiated other procedures related to wire center determinations.

16. Given that no CLEC appeared to support the Arbitrator's alternative regime, the Commission will exclude it as a mandatory term to be included in the amended interconnection agreements.²¹ The Commission is wary of imposing such an intricate process, particularly

²⁰See Arb. Award at ¶¶ 55 (outlining alternative regime and applying it to high capacity loop determinations), 60 (applying alternative regime to high capacity dedicated transport determinations).

²¹See DTr. 151-52.

where the pool of "non-impaired" wire centers (both present and potential) would appear to be small.²²

D. Use of "Letter" to Certify Eligibility For EELs and Other Similar UNE Combinations

17. Finally, the Commission determined to "funnel" the certifications surrounding CLEC requests for new EELs or new EEL conversions to VZ-DE's electronic ordering processes. The Arbitrator implied (as the FCC had repeated in the TRRO) that a CLEC could provide the necessary certification (on a circuit by circuit basis) by a simple letter.²³ The Commission, accepting VZ-DE's unchallenged representations, thought that requiring such EEL certifications to be part of the electronic ordering process (instead of stand-alone correspondence) would foster a more efficient ordering and provisioning process and mitigate the possibility that the required certifications may be lost or mis-matched with EEL Orders.²⁴ Indeed, given that no one represented that CLECs in Delaware lodge orders for new EELs or new EEL conversions outside the electronic ordering process, it seems practical to have the required certifications be filed via the same way that the accompanying order is submitted - by VZ-DE's electronic ordering processes. Such determination applies to new EEL orders or new conversions; "existing" EELs can be recertified by letter or spreadsheet.

²²This determination does not relieve VZ-DE of its obligations, and commitments, to provide CLECs with data that supports its de-listing of a wire center, subject to appropriate confidentiality protections.

²³See Arb. Award at ¶ 125; TRRO at ¶ 234 n. 658; TRO at ¶ 624.

²⁴See DTr. at 156-157.

III. Remand for Prompt Resolution of Further Disputes

18. The Commission now remands this matter to the Arbitrator to review, consider, arbitrate, and determine the "new" disputes raised by the briefs submitted in November, 2006. The Commission directs the Arbitrator to do so expeditiously so that final amended interconnection agreements can be tendered for the Commission's final approval in the near future. The Arbitrator should ensure that each of these "new" tangles about contractual language are appropriate for arbitration and are not simply attempts to re-argue issues previously resolved by her prior award. The Arbitrator shall file a supplemental award or a report on the status of these remanded proceedings within 120 days after the date of this Order.

19. It is also unclear whether the "Brief in Support of Proposed Contract Language" submitted by the Competitive Carrier Group and US LEC on November 29, 2006 represents the views of all the CLECs that might continue as parties to this proceeding. If that brief is not universal to all CLEC parties, the Arbitrator shall determine the status of the amended interconnection agreements involving the other CLECs and direct them to promptly submit such agreements for approval.

20. Lastly, the Commission suspects that given the time lag in this Delaware proceeding, Verizon and the opposing CLECs may have reached, or been given, resolutions on these "new" disputes in other jurisdictions. The Commission expects both the CLECs and VZ-DE to carefully consider how State commissions in other jurisdictions have resolved these new duels about "contract" language. All parties should ensure that if they are going to press the Arbitrator for a

resolution on one or more of these further disputes, that such dispute is pivotal for its operations in Delaware. The Commission does not want its scarce resources wasted on simply providing another forum for lawyers to argue about dueling terms when the outcome (one way or the other) would have no real impact on the competitive market in Delaware.

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

1. That, for the reasons set forth in the body of this Order, the award of the Arbitrator dated March 24, 2006 is amended in the following ways:

- (a) the "transition period" for continuing to provide high-capacity loops and dedicated high-capacity transport when, in the future, a particular wire center is determined to support a "non-impairment" determination shall be 180 days;
- (b) the specific "alternative" process for identifying present, or future, non-impaired wire centers set forth in paragraph 55 of the Arbitration Award need not be included in the amended or modified interconnection agreements; and
- (c) the eligibility certification process for ordering, or converting to, new extended enhanced links as Unbundled Network Elements shall be submitted by a carrier to Verizon Delaware LLC as part of the applicable electronic ordering process and not as a separate stand-alone "letter."

The remainder of the Arbitration Award is confirmed.

2. That, for the reasons set forth in the body of this Order, the provisions of paragraph 193 of the Arbitrator's Award related to the date for the change-over in billing for conversions to extended enhanced links as unbundled network elements are not modified.

Verizon Delaware LLC's exception to that portion of the Award is denied.

3. That these consolidated matters are remanded to Arbitrator Ruth Ann Price to resolve any further disputes between any of the parties concerning the terms or language of proposed amended interconnection agreements. Arbitrator Price shall, on or before one hundred twenty days from the date of this Order, submit a final supplemental Arbitration Award or provide a report on the status of further proceedings.

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

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Jeffrey J. Clark
Commissioner

/s/ Dallas Winslow
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary