

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

IN THE MATTER OF THE INQUIRY INTO)
VERIZON DELAWARE INC.'S COMPLIANCE)
WITH THE CONDITIONS SET FORTH IN) PSC DOCKET NO. 02-001
47 U.S.C. SECTION 271(c))
(FILED FEBRUARY 1, 2002))

ORDER NO. 5983

AND NOW, this 25th day of June, 2002, the Commission having met at its regularly scheduled meeting on June 18, 2002 to consider the Findings and Recommendations of the Hearing Examiner Regarding Verizon Delaware Inc.'s Proposed Performance Assurance Plan and Carrier-to-Carrier Guidelines; now, therefore, by the unanimous vote of Chair McRae, Vice Chair Twilley, and Commissioners Puglisi, Conaway, and Lester,

IT IS HEREBY ORDERED:

1. That the Findings and Recommendations of the Hearing Examiner Regarding Verizon Delaware Inc.'s Proposed Performance Assurance Plan and Carrier-to-Carrier Guidelines (the "Recommendations") attached to the original hereof as Exhibit "A" are hereby adopted in their entirety except as set forth in paragraph 2.

2. That the monetary liability provisions of the Performance Assurance Plan will become effective on the earlier of either November 1, 2002, or the first day of the month following the month in which Verizon Delaware Inc. receives approval, under 47 U.S.C. § 271, from the Federal Communications Commission ("FCC") to provide interLATA services from Delaware. We are persuaded by Staff's position that although Verizon Delaware Inc. will need a short time to implement the Performance

Assurance Plan, we do not believe that the time at which penalties may be imposed under the Performance Assurance Plan should be exclusively dependent upon Verizon Delaware Inc.'s receipt of Section 271(c) approval from the FCC. Non-discriminatory access and quality service take precedence over when Verizon Delaware Inc. receives Section 271(c) approval, especially since it is Verizon Delaware Inc. that essentially controls when such approval might be received based on the timing of its application.

3. Consistent with the Hearing Examiner's recommendations (now adopted) and this Order, Verizon Delaware Inc. shall, within seven days, make a compliance filing consisting of final (non-redlined) Delaware Carrier-to-Carrier Guidelines and a Delaware Performance Assurance Plan. Verizon Delaware Inc. should implement such Carrier-to-Carrier Guidelines and Performance Assurance Plan on the implementation schedule proposed by Verizon Delaware Inc., on May 23, 2002, and as adjusted by Verizon Delaware Inc.'s Reply Comments dated June 13, 2002. Under such schedule, all Carrier-to-Carrier Guidelines should be implemented by the August 2002 data month. Verizon Delaware Inc. shall provide reports under the Carrier-to-Carrier Guidelines and Performance Assurance Plan beginning with the August 2002 data month. The Performance Assurance Plan reports shall include potential liability but the actual liability for monetary payments shall not begin until the time identified in paragraph 2.

4. That the Commission may enter an Opinion in support of this Order at a later time.

5. 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/ Joshua M. Twilley
Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Donald J. Puglisi
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary

E X H I B I T "A"

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER REGARDING
VERIZON DELAWARE INC.'S PROPOSED PERFORMANCE ASSURANCE PLAN AND
CARRIER-TO-CARRIER GUIDELINES

DATED: MAY 22, 2002

WILLIAM F. O'BRIEN
HEARING EXAMINER

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William F. O'Brien, duly appointed Hearing Examiner in this Docket pursuant to 26 Del. C. § 502 and 29 Del. C. ch. 101, by Commission Order No. 5892, dated February 19, 2002, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Applicant, Verizon Delaware Inc. ("Verizon-DE" or the "Company"):

JULIA A. CONOVER, ESQUIRE,
and
WILLIAM B. PETERSEN, ESQUIRE, Verizon Delaware Inc.

On behalf of Commission Staff:

GARY A. MYERS, DEPUTY ATTORNEY GENERAL

On behalf of the other Participants:

Division of the Public Advocate ("DPA"):
G. ARTHUR PADMORE, Public Advocate

AT&T Communications of Delaware, Inc. ("AT&T"):
MICHAEL A. McRAE, ESQUIRE
and
ROBERT BARBER, ESQUIRE
and
MARK A. KEFFER, ESQUIRE, AT&T Communications of Delaware, Inc.
and
SAUL, EWING, REMICK & SAUL
BY: WENDIE C. STABLER, ESQUIRE

Cable Television Association of Maryland, Delaware & the District of Columbia ("CTA"):

JOHN F. CONWELL, ESQUIRE

Cavalier Telephone, LLC ("Cavalier"):

ALAN M. SHOER, ESQUIRE

and

MARTIN ARIAS, ESQUIRE, Cavalier Telephone, LLC

Sprint Communications Company, LP ("Sprint"):

JENNIFER A. DUANE, ESQUIRE, Sprint Communications Company, LP

MCI WorldCom, Inc.

MARC J. WILLIAMS, ESQUIRE, MCI WorldCom, Inc.

II. BACKGROUND

1. In order to gain interLATA authority to provide long distance service in Delaware, Verizon-DE must satisfy the statutory requirements of Section 271(c) of the Telecommunications Act of 1996. On February 1, 2002, Verizon-DE filed information with the Delaware Public Service Commission to establish compliance with Section 271 (c). As part of this filing, Verizon-DE requested that the Commission formally adopt the Carrier-to-Carrier Guidelines Performance Standards and Reports ("C2C Guidelines") that it had voluntarily implemented. Verizon-DE also requested that the Commission adopt a proposed Performance Assurance Plan ("PAP"), which would become effective when the FCC approves Verizon-DE's Section 271 application. Parties to the proceeding filed written testimony on or about April 8, 2002, and Verizon-DE filed responsive testimony on April 18, 2002. After two days of hearings the parties filed briefs on or about May 10, 2002.

2. In its post-hearing brief, Commission Staff requested that the Hearing Examiner issue separate reports on the C2C Guidelines, the PAP, and Section 271(c) compliance, and that Verizon-DE be ordered to implement the guidelines and PAP immediately. I respectfully submit this

initial, limited-issue report in response to Staff's request and for consideration by the Commission.

III. SUMMARY OF THE POSITIONS

A. CARRIER-TO-CARRIER GUIDELINES

3. Verizon-DE proposes to adopt C2C Guidelines to measure and monitor the quality of its wholesale service. As part of its February 2002 filing, Verizon-DE asked this Commission to formally adopt the guidelines that it had voluntarily implemented on an interim basis and then to replace them with, on a permanent basis, the guidelines that are eventually adopted by the Pennsylvania Public Utility Commission.¹ Verizon-DE provided performance reports for September, October, and November 2001, to show its performance under the voluntary guidelines. In its filing, Verizon-DE argued that some of the performance measures or metrics that it used were flawed and that the results under these particular metrics were not reliable.² In many cases, the metrics that it claimed were flawed showed relatively poor Verizon-DE performance.

4. Commission Staff did not oppose the adoption of the Pennsylvania guidelines, but did argue that Verizon-DE's one-sided interpretation of the validity of these metrics was disingenuous.³ Staff wrote: "The same set of standards cannot simultaneously provide incontrovertible proof of quality performance when met, while creating the need for a re-examination of the standard, its level, and even its necessity, when failed."⁴

1 Verizon-DE Hearing Exh. No. 1. (Measurements Declaration, filed by Julie A. Canny and Marilyn C. DeVito on Behalf of Verizon Delaware Inc., February 1, 2002.)

2 See Staff Post-hearing Brief, at 4-5.

3 Staff Hearing Exh. No. 1, at 1-69. (Testimony of Don J. Wood on Behalf of the Commission Staff, April 8, 2002.)

4 *Id.* at 18.

5. In its Reply Measurements Declaration, Verizon-DE proposed that it file the current New York guidelines - adapted for Delaware - within 30 days after the effective date of the PAP adopted by the Commission. Verizon-DE proposed these to be adopted on a permanent basis and they would not, therefore, be subject to change upon a decision of the Pennsylvania Commission.⁵

6. Staff, AT&T and the Division of Public Advocate now argue that the New York metrics should be adopted immediately in Delaware. AT&T agrees that the immediate implementation of these metrics will "...give the Commission a true picture of Verizon-DE's wholesale performance."⁶ The Public Advocate suggests that Verizon-DE should implement the New York metrics within 90 days of the Commission decision. Commission Staff makes several points supporting the immediate adoption of the New York metrics:

- Adoption of the New York guidelines avoids the problem of approving the Pennsylvania guidelines which contain some "flawed" metrics;
- Adoption of the New York guidelines will mean that the Commission will, in the near future, receive reports with data that more accurately reflect Verizon-DE's performance; and
- Prompt movement to the New York Guidelines would eliminate the inconsistency in continuing to receive monthly reports that demonstrate substandard performance by Verizon-DE, while Verizon-DE discounts those very results because they suffer "inaccuracies" caused by the use of approved, but "flawed" metrics.⁷

5 Verizon Hearing Exh. No. 2, at 1-18. (Reply Measurements Declaration on Behalf of Verizon Delaware, Inc., Declarants: Julie A. Canny and Marilyn C. DeVito, April 17, 2002.)

6 AT&T Post-hearing Brief, at 51.

7 Staff Post-hearing Brief, at 7.

7. In its post-hearing brief, Verizon-DE discussed the proposed New York Guidelines in some detail.⁸ The guidelines consist of 36 metrics and 152 submetrics and they measure performance in the areas (or "domains") of pre-ordering, ordering, provisioning, maintenance and repair, network performance, billing, operator services and databases, and access to Verizon-DE poles, ducts, conduits and rights-of-way.

8. No party to this proceeding has objected to the adoption of the New York Guidelines. Rather than waiting for the Commission to consider the entire Section 271 application, Staff proposes that the New York metrics be adopted as soon as possible, and specifically recommends that Verizon-DE be ordered to implement the guidelines within 45 days of a Commission order. If Verizon-DE encounters difficulty reporting a specific measure, then, under Staff's proposal, Verizon-DE would have an opportunity to show "good cause" to have the time extended for that particular metric.

9. Staff also proposes that the parties to the case be given 30 days to review the New York Guidelines and to offer suggestions for alterations "to the current New York standards and metrics to accommodate them to operations or conditions in Delaware differing from those prevailing in New York."⁹

B. PERFORMANCE ASSURANCE PLAN

10. Verizon-DE provided a Performance Assurance Plan (PAP) as an attachment to its Measurements Declaration, which formed part of its February 1, 2002 filing. This PAP was based on the New York PAP, with modifications for Delaware, and was proposed as an interim PAP. Verizon-DE proposed that once the Pennsylvania Commission adopted a Pennsylvania

⁸ Verizon-DE Post-hearing Brief, at 56.

⁹ Staff Post-hearing Brief, at 9.

PAP, the interim PAP would be superseded on a permanent basis by the incentive plan adopted in Pennsylvania.¹⁰

11. The other parties to the proceeding leveled substantial criticisms at the PAP submitted by Verizon-DE. Commission Staff criticized a number of features, including the total amount of money that Verizon-DE would be at risk of losing under the penalty provisions, an overabundance of mitigation clauses, and the failure to link the PAP closely enough to performance. Staff also questioned the propriety of adopting a plan that had been developed to address the circumstances of other states, rather than those of Delaware. The Public Advocate was also critical of the proposed PAP, arguing that permitting the Pennsylvania PAP to supersede the proposed interim PAP creates uncertainty in this proceeding and fails to provide a reasonable basis for adopting a Delaware PAP. The Public Advocate also expressed concern about the total dollars that Verizon-DE's filing would place at risk, the proposed ramp-up period for flow-through performance measures, and several other clauses in the PAP.

12. AT&T asserted that the PAP presented by Verizon-DE constituted a watered-down version of the New York PAP. AT&T suggested that Verizon-DE implement either the New York PAP currently in effect or the Virginia collaborative PAP, which is likely to be adopted in Virginia, Maryland and Washington, D.C.

13. In its Reply Measurements Declaration, Verizon-DE proposed the adoption of the Virginia PAP, dated April 9, 2002, which had been reached by consensus.¹¹ This Virginia PAP contains a number of significant modifications to the New York PAP. Verizon-DE stated that the version of

¹⁰ Verizon-DE Hearing Exh. No. 1, at 47. (Measurements Declaration.)

¹¹ Verizon Hearing Exh. No. 2, at 11. (Reply Measurements Declaration.)

the Virginia PAP proposed now for adoption would not serve as an interim proposal, subject to a final Pennsylvania ruling. Rather, this PAP would remain in effect, subject to its own annual review process, and any changes to the New York PAP would be submitted to this Commission within 10 days of their filing with the New York Public Service Commission for consideration by the Delaware Commission.

14. In their post-hearing briefs, Staff and AT&T expressed support for the adoption of this Virginia consensus PAP in Delaware. In addition, the Public Advocate stated that the Virginia PAP presented acceptable remedies and that he did not oppose its adoption in Delaware.

AT&T urged the immediate adoption of the consensus PAP, and argued against awaiting the FCC's approval of Verizon-DE's 271 application. AT&T noted that performance assurance plans were in place in both Pennsylvania and New Jersey before Verizon-DE submitted its application for long distance authority.¹²

15. Staff argues that the consensus PAP should be implemented contemporaneously with the New York Guidelines, stating that:

In Staff's view, VZ-DE should be prepared to submit to the Commission PAP reports on a time frame linked to VZ-DE's implementation of the New York Guidelines. Under such a scheme, PAP reports would then be available to the Commission in advance of any FCC ruling on VZ-DE's interLATA application.¹³

As noted above, to speed implementation, Staff recommended that the Hearing Examiner issue a bifurcated report, with the initial report recommending expedited approval of the C2C Guidelines and the PAP.

C. RESPONSES TO STAFF'S PROPOSAL

16. Three parties commented on Staff's proposal by letters to the Hearing Examiner dated May 16, 2002: the Public Advocate, Verizon-DE and

¹² AT&T Post-hearing Brief, at 46.

AT&T. All three agreed with the concept of bifurcation of the proceedings: *i.e.*, that it is proper to consider the guidelines and PAP separately from the 271(c) process. This bifurcation would permit Commission consideration of performance guideline and PAP issues prior to consideration of checklist compliance issues.

17. The Public Advocate agreed with Staff that the New York guidelines should be implemented immediately and that there should be a 30-day comment period after adoption to suggest alterations to accommodate the metrics to Delaware operations.¹⁴ With respect to the PAP, the Public Advocate agreed that the consensus or stipulated PAP should be adopted immediately, but with two provisos: first, that no alterations be made to the PAP unless all parties agree; and second, that the penalties be implemented immediately, rather than commencing only after the FCC's grant of 271 approval to Verizon-DE. The Public Advocate's specific concern about PAP changes is that, because the PAP was a matter of compromise, alterations could be made to which the parties to the stipulated PAP would not have agreed. Further, the Public Advocate believes that penalties should be in place immediately, because Verizon-DE's failure to provide service at the required levels harms competitors in Delaware whether or not Verizon-DE is yet providing in-region interLATA service in this state.

18. AT&T supported Staff's proposal to implement immediately the New York guidelines and the consensus PAP. AT&T did not agree, however, with Staff's proposal "to delink the PAP from the remedies for a period of four months." AT&T argued that to implement the PAP without a monetary consequence would remove "all incentive for Verizon-DE to

13 Staff Post-hearing Brief, at 13.

14 DPA letter to the Hearing Examiner, dated May 16, 2002.

provide non-discriminatory unbundled network elements as required under the terms of the Telecommunications Act.”¹⁵

19. Finally, Verizon-DE stated that it was in substantial agreement with Staff’s proposal, consistent with the following terms:¹⁶

- Verizon-DE agreed to implement the April 29, 2002 version of the New York metrics and is willing to submit a redline version by May 24, 2002. It will also submit an implementation schedule, noting that while most metrics could be implemented in 30 days, some will take 60-90 days.
- Verizon-DE asserted that 7 days is sufficient for parties to review the New York guidelines. If the 30-day time period for review is maintained, Verizon-DE asks that implementation not commence until the end of this review period. Verizon-DE further notes: “PSC Staff and Verizon DE are in agreement on the procedure for implementing future changes to the Guidelines (PSC Staff Brief at 10).”
- Verizon-DE suggested a 45-day implementation schedule for the metrics, but noted that there will be some metrics that may take a full 90 days to implement.
- Verizon-DE agreed to the immediate adoption of a Delaware PAP and further agreed to report performance under the metrics to the Commission starting with the initial month that it produces reports under the new Guidelines. However, Verizon-DE did not agree with the Staff proposal that penalties be assessed after four months. On the contrary, according to Verizon-DE, it should not be required to make payments under the PAP until it receives 271 authorization from the FCC.

IV. DISCUSSION

20. There is substantial merit in adopting the New York metrics and the Virginia PAP at the present time, as proposed by Staff. First, there is little disagreement on the relative benefits of either the New York metrics or the Virginia PAP, as compared to the other alternatives proposed at various points and by various parties to this proceeding. Second, an expedited implementation schedule will produce performance results under the metrics and will allow calculation of penalties under

¹⁵ AT&T letter to Hearing Examiner, dated May 16, 2002.

¹⁶ Verizon-DE letter to Hearing Examiner, dated May 16, 2002.

the PAP before the FCC renders its final decision on Section 271 approval for Verizon-DE in Delaware. As such, the FCC will have more information on which to evaluate Verizon-DE's performance under the metrics and to decide whether the PAP will produce sufficient incentive to Verizon-DE to keep local exchange markets open. I recommend, therefore, that the Commission condition any favorable conclusions concerning Section 271 compliance upon Verizon-DE's immediate acceptance of the agreed-upon New York metrics and Virginia PAP.

21. The parties agree that the Commission should provide a brief time period during which the parties can address any instances where the New York metrics do not sufficiently or accurately reflect unique Delaware circumstances. Various time periods have been proposed and there are differences among the parties regarding how any proposed Delaware changes should be incorporated.

22. In order to keep the delay in implementation as short as possible, I recommend that the parties be given until June 7, 2002, to provide the Commission and the other parties with any recommended changes to the redlined version of the proposed New York metrics, which Verizon-DE has agreed to submit on May 24, 2002. The parties should then respond to any proposed changes by June 13, 2002. The Commission can then vote on these issues at its June 18, 2002 meeting or can send the issues back to the parties for further filings or other procedures.

23. I agree with Staff that there is a similar need for comment from the parties relative to the stipulated PAP. However, because of the fairly late introduction of the Virginia PAP into these proceedings, I recommend the same comment and response periods for the PAP as those set forth above for changes to the metrics.

24. I am not persuaded by the Public Advocate's argument that

unanimity should be required before the Commission adopts any proposed changes to the PAP. The comment period that I have suggested above provides sufficient time for the parties to negotiate an agreement regarding any proposed changes. If no consensus arises, however, then the Commission, with assistance from its consultant, stands ready to resolve the differences. I also note that, if the Commission finds that sufficient time exists, it can send the disputed changes back to the Hearing Examiner for recommendations. In any event, just as the Commission would have resolved any remaining issues surrounding the underlying PAP and C2C Guidelines, had the parties not reached consensus, it can do the same with the disputed changes.

25. With a June 18, 2002 vote from the Commission, Verizon-DE's first monthly performance report would cover July 2002, followed by monthly reports filed thereafter. This schedule would not prejudice Verizon-DE, who should have already commenced preparation for such reporting and who stated in its May 16, 2002 letter that it could implement most metrics within 30 days. In addition, Verizon-DE will have an opportunity to propose an extended implementation schedule, with its May 24, 2002 submission, for specific metrics that will take longer. The parties may comment on the implementation schedule that Verizon-DE proposes, in accordance with the response time periods recommended above.

26. Regarding the effective date for the PAP penalty provisions, I agree with Verizon-DE that such penalties should not take effect prior to Section 271 approval from the FCC. After all, the offering of PAPs by Regional Bell Operating Companies ("RBOCs"), and the FCC's consideration of them, is solely a function of the Section 271 approval process. For the first several years under the Telecommunications Act of 1996 ("Act"), there was no discussion of PAPs. Incumbents such as Verizon-DE served

CLECs under Statements of Generally Accepted Terms ("SGATs") or interconnection agreements. There were no PAP type provisions involved, despite the fact that SGATs and interconnection agreements included damage clauses. Those damage clauses, which continue in effect for CLECs in Delaware, can be amended by agreement or through arbitration but they should not be altered by PAP penalty provisions, without Section 271 approval.

26. According to the FCC, PAPs function as an incentive to the RBOC to keep its local exchange services market open *after* it secures Section 271 approval. In contrast, the FCC has never required or even suggested the need for PAPs outside the Section 271 context. Should the parties here consider the damage provisions in existing interconnection agreements inadequate to address current circumstances, they may raise those concerns in the ways contemplated by the Act for the resolution of intercarrier differences in a wholesale service context. Therefore, I find reasonable the approach of making PAP payments effective for services rendered on and after the grant of FCC approval for Verizon-DE to enter the interLATA, interexchange market in Delaware.

V. SUMMARY OF RECOMMENDATIONS

27. In summary, and for the reasons stated above, I recommend that the Commission direct Verizon-DE to implement the consensus Virginia PAP and the New York Carrier-to-Carrier Guidelines on the following schedule:

May 24, 2002 Verizon-DE submits redlined version of the April 29, 2002 New York metrics, along with any requests to defer implementation of any specific measures.

June 7, 2002 Parties propose changes to the redlined metrics as well as to the stipulated PAP.

June 13, 2002 Parties respond to proposed changes.

June 18, 2002 Commission deliberates and votes. Adopted Guidelines and PAP become effective immediately. July 2002 data will form the basis of the first monthly performance report under the adopted metrics as well as the first PAP report.

FCC Section 271 PAP penalty provisions become effective.

Approval

28. I recognize that much of the above timeline takes place before the June 18, 2002 Commission meeting, which I have recommended as the date for Commission deliberation on these issues. Objections to the timeline, therefore, would have to be raised at the June 4, 2002 Commission meeting, which is the only scheduled meeting between now and June 18th.

Respectfully submitted,

William F. O'Brien
William F. O'Brien
Senior Hearing Examiner

Dated: May 22, 2002