ORDER NO. 04-306

ENTERED MAY 27 2004

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 531

In the Matter of	)	
	)	
VERIZON NORTHWEST INC.	)	
	)	
Petition for Arbitration of an Amendment	)	
to Interconnection Agreements with	)	ORDER
Competitive Local Exchange Carriers	)	
and Commercial Mobile Radio Service	)	
Providers in Oregon Pursuant to Section 252	)	
of the Communications Act of 1934, as	)	
Amended, and the Triennial Review Order.	)	

DISPOSITION: PETITION FOR ARBITRATION DISMISSED

Procedural History

On February 26, 2004, Verizon Northwest Inc. (Verizon) filed a petition for arbitration with the Public Utility Commission of Oregon (Commission). The petition seeks to amend interconnection agreements Verizon has executed with all competitive local exchange carriers and commercial mobile radio service providers[1] in Oregon (collectively hereafter "the CLECs"). Verizon requests that the Commission initiate a consolidated arbitration proceeding to amend the interconnection agreements to correspond to changes in the unbundling obligations of incumbent local exchange carriers (ILECs), including Verizon, promulgated by the Federal Communications Commission (FCC) in its Triennial Review Order (*TRO*).[2]

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) entered its opinion in *United States Telecom Ass'n*

[1] Verizon seeks to arbitrate with commercial mobile radio service providers only to the extent their current interconnection agreements provide for access to unbundled network elements (UNEs).

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order* or "*TRO*"), *reversed in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-0012, 00-1015, 03-1310 *et. al.* (D.C. Cir. March 2, 2004).

v. FCC (*USTA II*), vacating and remanding certain decisions made by the FCC in the *TRO*.[3] The D.C. Circuit temporarily stayed the vacatur (*i.e.*, stayed its mandate) until no later than the later of (1) the denial of any petition for rehearing or rehearing, en banc or (2) 60 days from March 2, 2004.

On March 16, 2004, the presiding Administrative Law Judge (ALJ) granted Verizon's motion to extend the time for CLECs to respond the petition. Verizon requested the extension because it anticipated amending its petition as a result of *USTA II*.

On March 17, 2004, Sprint Communications Company L.P. (Sprint) filed a motion to dismiss Verizon's petition. Sprint alleges that the petition does not comply with various Commission rules, FCC rules, and provisions of the Telecommunications Act of 1996 (the Act).[4]

On March 19, 2004, Verizon filed an updated version of its proposed amendment to the interconnection agreements. The updated amendment is intended to conform with *USTA II*.

On March 30, 2004, a telephone conference was held to discuss various procedural issues. During the conference, several parties indicated that they intended to file motions to dismiss Verizon's updated petition.

On April 6, 2004, the parties replied to Sprint's motion to dismiss. The parties also responded to a request by the ALJ to submit comments regarding the logistics of conducting the consolidated arbitration proposed by Verizon within the time frame envisioned by the FCC in ¶¶703-705 of the *TRO*.

On April 13, 2004, the CLECs responded to Verizon's petition. Several CLECs filed motions to dismiss the petition. The motions are discussed below.

On April 13, 2004, the D.C. Circuit entered an order extending the stay of its mandate through June 15, 2004.

On April 21, 2004, the parties held a telephone conference to discuss issues relating to Verizon's petition. The parties were instructed to discuss a reasonable extension of time to permit negotiations designed to limit the number of outstanding issues. No agreement was reported by the parties.

On April 27, 2004, Verizon responded to the CLEC motions to dismiss. Replies were filed by the CLECs on May 4, 2004.

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[3]*United States Telecom Ass'n v. FCC*, No. 00-1012, 2004 WL 374262 (D.C. Cir. March 2, 2004) (*USTA II*).
[4]Sprint alleges that (a) Verizon failed to negotiate in good faith as required by 47 U.S.C. §252(b)(5), and 47 C.F.R. §51.307(c)(7) of the FCC's rules; (b) the petition does not comply with the filing requirements set forth in 47 U.S.C. §252(b)(2) and Oregon Administrative Rule 860-016-0030(2); and (c) the petition does not comply with the change of law provisions in the Sprint-Verizon interconnection agreement.

On May 7, 2004, Verizon filed a motion to hold its petition in abeyance until June 15, 2004, the date on which the D.C. Circuit's mandate in *USTA II* is scheduled to issue. In support of its motion, Verizon states that holding the proceeding in abeyance will allow the parties to devote their attention to commercial negotiations without the distraction of simultaneous litigation, and also conserve the resources of the Commission and the parties. Verizon represents that New Edge Network, Inc., dba New Edge Networks (New Edge); Rio Communications, Inc. (Rio); and Electric Lightwave, LLC (ELI), do not oppose the motion. By letter filed May 13, 2004, the Competitive Carrier Coalition (Coalition)[5] responds that "it would not oppose an abeyance if Verizon would commit not to unilaterally alter the availability of UNEs during the pendency of the stay and the arbitration proceeding."

Motions to Dismiss

In addition to the motion filed by Sprint, the following parties have also moved to dismiss Verizon's petition for arbitration: Universal Telecom, Inc.; AT&T Communications of the Pacific Northwest, Inc.;[6] Priority One Telecommunications Inc.; ELI; Rio; New Edge; and the Coalition. These parties argue, *inter alia,* that Verizon's petition should be dismissed because (a) Verizon did not negotiate in good faith; (b) the petition fails to comply with procedural requirements mandated by law; (c) the petition is premature because it addresses issues on appeal and that are not ripe for arbitration; (d) the petition does not comply with the change of law provisions included in the interconnection agreements; (e) the petition violates the provisions of the Bell Atlantic/GTE merger; (f) there is no basis under the Act for arbitration; (g) the proposed arbitration would result in a waste of Commission and party resources; and (h) the petition is untimely. Verizon contends the motions to dismiss are without merit and should be denied.

Commission Decision

The Commission concludes that Verizon's petition should be dismissed for the following reasons:

I. Verizon's petition to initiate a consolidated arbitration proceeding is not the appropriate procedural vehicle for amending the interconnection agreements to incorporate a change in law resulting from the Triennial Review Order.

Verizon's petition seeks to amend the interconnection agreements it has entered into with all competitive providers in Oregon. The proposed contract

[5] The Competitive Carrier Coalition consists of: Adelphia Business Solutions Operations, Inc., dba Telcove; Allegiance Telecom of Oregon, Inc.; ICG Telecom Group Inc.; Integra Telecom of Oregon, Inc.; Pac-West Telecomm, Inc.; DSLNet Communications, LLC; Level 3 Communications, LLC; and McLeodUSA Telecommunications Services Inc.

[6] AT&T did not oppose Verizon's initial petition for arbitration. See, AT&T's Comments Regarding Sprint's Motion to Dismiss and Logistical Issues, dated April 6, 2004. AT&T has, however, filed a motion to dismiss Verizon's amended (or updated) petition. See, AT&T's Motion to Dismiss Verizon's Update to Petition, dated April 13, 2004.

amendments are designed to implement changes in ILEC unbundling obligations promulgated in the FCC's *TRO*. Although Verizon acknowledges that "the requirements that apply to a petition for arbitration under §252(b)(2) do not apply," it emphasizes "that the FCC has held that the §252(b) timetable and negotiation process apply."[7]

The interconnection agreements at issue in this proceeding include provisions that govern the procedures the parties follow in the event of a change in applicable law.[8] In paragraph 704 of the *TRO*, the FCC stated that the nine-month arbitration process set forth in §252 of the Act should guide the parties in resolving TRO-related disputes "even in instances where a change of law provision exists." The FCC stated:

> As under the default process described above,[9] we expect that the parties would begin their change of law process promptly. Once a contract change is requested by either party, we expect that negotiations and any time frame for resolving the dispute would commence immediately. We also find that the section 251(c)(1) duty to negotiate in good faith applies to these contract modification discussions, as they do under the section 252 process. Accordingly, any refusal to negotiate or cooperate with the contractual dispute resolution process, including taking actions that unreasonably delay these processes, could be considered a failure to negotiate in good faith and a violation of section 251(c)(1). Finally to the extent a contractual change of law provision envisions a state role, we believe a state commission should be able to resolve a dispute over contract language at least within the nine-month time frame envisioned for new contract arbitrations under section 252. (Footnote 9 added.) (Footnote from text omitted.)

The change of law provisions in the various interconnection agreements differ somewhat, but generally provide for good faith negotiation whenever any legislative, regulatory, judicial or other governmental decision, order, determination, action, or change in applicable law materially affects the rights or obligations of a party. If the parties cannot agree upon a conforming agreement within a designated time frame, they are entitled to pursue a remedy from the Commission, the FCC, or any court or agency of competent jurisdiction.[10]

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[7] Verizon's Opposition to Sprint's Motion to Dismiss, dated March 26, 2004 at p. 5.

[8] Pursuant to OAR 860-014-0050(1), the Commission takes official notice of the interconnection agreements on file between Verizon and the CLECs.

[9] Paragraph 703 of the *TRO* requires "incumbent and competitive LECs to use section §252(b) as a default timetable for modification of interconnection agreements that are silent concerning change of law and/or transition timing."

[10] In addition, several interconnection agreements specify negotiation, followed by binding arbitration, as the primary remedy for any controversy. These contracts contemplate binding arbitration pursuant to the

To the extent that interconnection agreements must be modified as a result of the *TRO*,[11] the procedure and timetable for dealing with those modifications is governed by the change of law provisions contained in the interconnection agreements. Although, the FCC clearly articulated its *expectation* that the §252 arbitration timetable should apply, it did not mandate that result, and, indeed, could not do so without altering the contracts themselves. Consequently, the FCC's statements regarding the appropriate timetable for implementing *TRO*-related changes must be viewed as advisory in nature and do not supplant the contractual obligations set forth in the interconnection agreements.

Moreover, the FCC's statements regarding the timetable for resolving *TRO*-related issues were made prior to the *USTA II* decision vacating portions of the *TRO* and remanding issues to the FCC. That situation is further complicated by the fact that the D.C. Circuit has suspended its mandate until June 15, 2004, creating uncertainty regarding whether the Court's decision will take effect on that date or be stayed (in whole or in part) pending rehearing or appeal to the U.S. Supreme Court. Given these circumstances, the time line originally envisioned by the FCC for resolving *TRO* issues cannot be accommodated.[12]

Although we find that *TRO*-related disputes must be resolved in accordance with the change of law/dispute resolution procedures in the interconnection agreements rather than §252 arbitration processes and time lines, the proposals by Verizon, Common Carrier Group,[13] and others[14] to deal with these issues in a consolidated proceeding warrants serious consideration. Addressing *TRO*-issues in this manner would conserve valuable time and resources and obviate the need for multiple dockets. More importantly, it would permit all carriers to participate in the discussion of *TRO*-related issues at the same time, thereby ensuring an equal opportunity for everyone to weigh in on those matters.

Commercial Arbitration Rules of the American Arbitration Association. The parties retain the right to seek relief from the Commission, the FCC, or a court of appropriate jurisdiction.

[11] Some CLECs dispute whether a change in law has, in fact, occurred. The Coalition, for example, argues that the TRO does not invalidate the terms of the the Bell Atlantic/GTE Merger Order, which imposes a separate and independent legal obligation upon Verizon to offer UNEs. See, *e.g.*, Coalition Reply to Verizon's Response to Coalition's Motion to Dismiss, dated May 3, 2004, at pp. 2-9.

[12] Verizon states that it provided notice of a change in applicable law to all affected carriers on October 2, 2003. Under the nine-month timeline envisioned by the FCC, State Commissions would be required to resolve *TRO*-related disputes by July 2, 2004. Verizon Petition at pp. 3-4.

[13] The Competitive Carrier Group (CCG) consists of Advanced Telecom Group, Inc.; Comcast Phone of Oregon LLC; Covad Communications Company; Global Crossing Local Services, Inc.; KMC Telecom V Inc.; Winstar Communications, LLC; and XO Oregon Inc. CCG objects to several aspects of Verizon's petition, but recommends, among other things, that the Commission maintain the current docket "to develop a consolidated interconnection agreement that appropriately effectuates the TRO" and other applicable requirements. CCG Response dated April 13, 2004, at p. 6.

[14] New Edge Networks; Rio Communications, Inc.; and Electric Lightwave, LLC, also propose that the Commission consider the issues raised in Verizon's petition "in the context of a generic dispute resolution proceeding, and not as an arbitration." Joint Response of New Edge Networks; Rio Communications, Inc.; and Electric Lightwave, LLC, dated April 13, 2004, at p. 2. Centel Communications, Inc.; Oregon Telecom, Inc.; and United Communications, dba UNICOM, concur with this approach. MCI takes a similar position, noting that "there may be aspects of this proceeding that might be suitable for consolidated resolution." MCI Response, dated April 12, 2004, at p. 3.

Because the parties are entitled to proceed pursuant to the terms of their respective interconnection agreements, the Commission cannot mandate that *TRO*-related issues be resolved in a consolidated proceeding. Nevertheless, it may be possible for the parties to achieve consensus that such a process is the most equitable and efficient way to address these issues. If the parties agree that the Commission should consider these matters on a consolidated basis, we will endeavor to complete our review as quickly as possible.

II. Verizon's petition does not meet the procedural requirements for a petition for arbitration.

Even if we were to conclude that a petition for arbitration was appropriate to amend the interconnection agreements,Verizon's petition does not meet the procedural requirements for a petition for arbitration. Section 252(b)(2) of the Act imposes the following duties upon a party petitioning a State Commission for arbitration:

> (2) DUTY OF PETITIONER.—
>
> (A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--
>
> (i) the unresolved issues;
>
> (ii) the position of each of the parties with respect to those issues; and
>
> (iii) any other issue discussed and resolved by the parties.

Similarly, Oregon Administrative Rule 860-016-0030(2) provides that a petition for arbitration must contain, among other things, a statement of all unresolved issues, and a description of each party's position on the unresolved issues.

Verizon's petition is procedurally defective because it does not provide the information required by §252(b)(2)(A) and OAR 860-016-0030(2). As a result, the Commission cannot determine the scope of the issues in dispute and has no information regarding the differences among the parties pertaining to the proposed contract amendments. In addition, we cannot distinguish issues that involve questions of fact (and necessitate evidentiary hearing) from those that involve questions of law (and may be resolved through briefing). These are critical shortcomings, particularly in a case such as this, where Verizon proposes that the Commission convene a consolidated proceeding involving approximately 80 carriers.

Verizon argues that, because it initiated a consolidated proceeding, it could not produce information describing the position of each party on unresolved issues. We are not persuaded by this argument. If anything, the logistical problems associated with managing issues in a consolidated proceeding make it even more essential to produce the

documentation required by §252(b)(2)(A) and OAR 860-016-0030(2). Without such information, it is virtually impossible to complete a proceeding of the magnitude contemplated by Verizon within the time constraints imposed by the Act.[15]

Verizon further states that its ability to comply with §252(b)(2)(A) and OAR 860-016-0030(2) was hampered by the fact that many carriers did not respond to its notice that the interconnection agreements would be modified as a result of the *TRO*.[16] It further argues that those CLECs should not be rewarded for their failure to negotiate in good faith. On the contrary, Sprint and a number of other CLECs maintain that Verizon did not engage in good faith efforts to negotiate the proposed contract amendments. The Commission finds that the information and affidavits submitted by the parties relating to the conduct of negotiations is inconclusive and that evidentiary hearings would be required to resolve the issues in dispute.[17] Regardless of the outcome of any such hearings, however, Verizon would still have to amend its petition to include the documentation required by §252(b)(2)(A) before the arbitration process could go forward.

Lastly, Verizon maintains that "the requirements that apply to a petition for arbitration of a new agreement under §252(b)(2)(A) do not necessarily apply to Verizon's petition to amend existing agreements." It states that the FCC held the §252(b) timetable and negotiation process apply, but did not also conclude that "all of the formal requirements of a petition for arbitration of a brand new agreement" are applicable.[18] To the extent a petition for arbitration is proper-- which is not the case here[19]-- it must meet all of the requirements of §252(b). Verizon cannot file a petition for arbitration and comply with only some of the statutory requirements in the Act.

III. Other Issues/Motion to Hold Proceeding in Abeyance.

Having concluded that Verizon's petition should be dismissed for the reasons set forth above, it is unnecessary to address the remaining arguments advanced by the parties. For the same reasons, we find that Verizon's motion to hold the proceeding in abeyance must be denied.

[15] As noted above, the Commission would be required to consume valuable time attempting to discern which issues remain in dispute among the various parties. Given the number of parties participating in the docket, that process alone could take several weeks.

[16] Verizon concedes that "some CLECs engaged in negotiations with Verizon," but offers no explanation why it did not supply the documentation required by §252(b)(2) and OAR 860-016-0030(2) for those carriers. Verizon Response to Collective Motions to Dismiss, dated April 27, 2004, at p. 9.

[17] Rather than pursue such a course of action, we believe the parties would be better served by following the negotiation and dispute resolution procedures set forth in their interconnection agreements.

[18] Verizon's Response to Collective Motions to Dismiss at p. 11.

[19] As noted above, we do not believe the FCC may supplant the terms of existing interconnection agreements by mandating that §252 procedures and timetable be substituted for the process set forth in the interconnection agreements.

ORDER

IT IS THEREFORE ORDERED that the petition for arbitration, as amended, filed by Verizon Northwest Inc., is dismissed. It is further ordered that Verizon's motion to hold this proceeding in abeyance is denied.

Made, entered, and effective _____.

_____
Lee Beyer
Chairman

_____
John Savage
Commissioner

_____
Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.