



Zsuzsanna E. Benedek
Senior Attorney

240 North Third Street, Suite 201
Harrisburg, PA 17101
Telephone (717) 236-1385
Fax (717) 236-1389

June 28, 2004

**DOCUMENT
FOLDER**

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Investigation into the Obligations of Incumbent Local Exchange
Carriers to Unbundle Network Elements - Docket No.- I-00030099

Dear Secretary McNulty:

Attached please find an original and three (3) copies of the Objection of Sprint Communications Company, L.P. (hereinafter "Sprint") to the Petition to Withdraw and Close Proceeding of Verizon Pennsylvania Inc. and Verizon North Inc. Petition in the above-captioned matter.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Sue Benedek

ZEB/jh
enclosures

cc: Certificate of Service (via electronic mail and first-class mail)

SECRET
2004 JUN 28 PM 2:36
RECEIVED

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to) Docket No. I-00030099
Unbundle Network Elements)

SECRETARY'S BUREAU
2004 JUN 28 PM 2:36
RECEIVED

**OBJECTION OF SPRINT COMMUNICATIONS COMPANY, L.P.
TO VERIZON PENNSYLVANIA INC.'S
AND VERIZON NORTH INC.'S PETITION
TO WITHDRAW PETITION AND CLOSE PROCEEDING**

DOCKETED
JUL 22 2004

On June 16, 2004, Verizon Pennsylvania, Inc. and Verizon North Inc. (collectively "Verizon") filed its Petition to Withdraw and Close Proceedings ("Verizon's Petition"). Pursuant to 52 Pa. Code Section 5.94(a), Sprint Communications Company, L.P. (hereinafter "Sprint") submits this Objection to Verizon's Petition.¹

The withdrawal of a pleading – and, in the instant matter, the withdrawal and close of an already completed evidentiary record and a summary thereof – is not guaranteed as a matter of right. After considering such a petition, any objection thereto, and the public interest, the presiding officer or the Commission in its discretion determines whether the withdrawal will be permitted.²

For the reasons set forth below, Verizon's Petition simply does not justify the need for the Commission to exercise its discretion at this time. Verizon's Petition should be denied.

**DOCUMENT
FOLDER**

¹ Verizon did not in its pleading reference the appropriate Commission regulation in support of its pleading.
² *West Penn Power Industrial Intervenors et al. v. Allegheny Power Company*, 1997 Pa. PUC LEXIS 95, Order entered November 21, 1997.

First, Verizon's Petition is premature. Verizon cites to the *USTA II* stay effective date of June 16, 2004 in support of the position that "there is no longer any lawful delegation of authority under which the Commission may continue this 9-month proceeding in Pennsylvania."³ However, while the *USTA II* stay expired effective June 16, 2004, the *USTA II* decision is still subject to further appellate review on the merits. The due date for filing a petition for a writ of *certiorari* to the United States Supreme Court is June 30, 2004.⁴ It is not likely to be known whether the United States Supreme Court will take *certiorari* of the case until Fall, 2004. If *certiorari* is granted, a decision cannot be expected until perhaps Spring, 2005. Verizon's Petition prematurely assumes that the United States Supreme Court does not grant *certiorari* or, if granted, that any appeal of *USTA II* will be in Verizon's favor. In either case, Verizon's assumptions do not justify closing the Commission's TRO proceeding.⁵ Verizon's Petition should be dismissed on this basis alone.

Second, the FCC has indicated that it intends to implement interim rules. It is conceivable that the evidentiary record compiled to date by the Commission may have some fact-finding value to the FCC. The FCC has indicated that it may release interim rules to deal with issues including transition issues related to the UNEs vacated by *USTA II*. Assuming that the Supreme Court does not alter the result of *USTA II*, those interim rules or any final rules adopted by the FCC could call on state commissions to develop factual

³ Verizon Petition at ¶ 6.

⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16798 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003) ("TRO"), *affirmed in part and reversed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

⁵ The Commission should guard against relying upon Verizon's assumptions and interpretations of *USTA II*. Verizon's Petition at paragraph 6 specifically lists high-capacity loops as no longer subject to UNE availability due to *USTA II*'s holding on the state delegation of authority issue. Yet, this is not what the Court in *USTA II* found. Verizon's take on *USTA II* regarding this particular and important UNE clearly demonstrates the need for the Commission to be cautious when reviewing Verizon's claims.

records related to CLEC impairment and non-impairment for particular UNEs. The factual record could then be submitted to the FCC for final decision-making authority.⁶

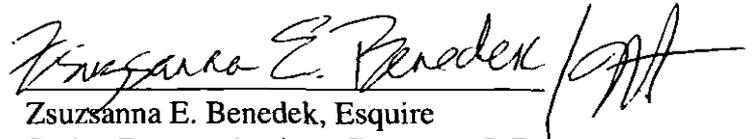
Verizon's Petition also requests that the Commission refrain from preparing or releasing a Summary of Record. On June 24, 2004, the Office of Administrative Law Judge issued that Summary. Comments to the Summary of Record are to be filed within 30-days of the date of its issuance.

No harm arises to Verizon relative to the Commission's Summary. Indeed, Verizon's Petition fails to assert that it would be disadvantaged by a Summary of the Record. Since there are several scenarios under which the record compiled could be useful and no countervailing disadvantages to retaining and summarizing the evidence, the Commission must deny Verizon's Petition.

⁶*See, USTA II*, 359 F.3d at 587 (Delegation to the state commissions of a fact finding role on enterprise switching where the state commission gathers evidence and can petition the FCC if it feels that a finding of non-impairment is unjust is not affected by the Court's decision regarding unlawful subdelegation of decision making authority to state commissions.)

WHEREFORE, for the reasons set forth above, Sprint submits that the Commission should deny Verizon's Petition and request to Withdraw Petition and Close Proceeding.

Respectfully submitted,



Zsuzsanna E. Benedek, Esquire
Sprint Communications Company, L.P.
240 North Third Street, Suite 201
Harrisburg, PA 17101
Phone: (717) 245-6346
Fax: (717) 236-1389
e-mail: sue.e.benedek@mail.sprint.com

**On behalf of Sprint Communications
Company, L.P.**

DATED: June 28, 2004

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to) Docket No. I-00030099
Unbundle Network Elements)

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of June, 2004, served a true copy, via electronic and first-class mail, of the foregoing Objection, in accordance with the requirements of 52 Pa. Code §1.54:

Julia A. Conover, Esquire
Suzan D. Pavia, Esquire
William B. Peterson, Esquire
Verizon Pennsylvania, Inc.
1717 Arch Street, 32NW
Philadelphia, PA 19103

Angela Jones, Esquire
Office of Small Business Advocate
300 North Second Street
Commerce Building, Suite 1102
Harrisburg, PA 17101

Kandace Melillo, Esquire
Pennsylvania Public Utility Commission
Office of Trial Staff
400 North Street
Harrisburg, PA 17120

Norman Kennard, Esquire
Hawke, McKeon, Sniscak and Kennard, LLP
100 North Tenth Street
Harrisburg, PA 17101

Ross A. Buntrock, Esquire
Genevive Morelli, Esquire
Heather T. Hendrickson, Esquire
Kelley, Drye and Warren, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Alan Kohler, Esquire
Wolf, Block, Schorr and Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101

Michelle Painter, Esquire
MCI WorldCom, Inc.
22001 Loudoun County Parkway, E2-3-507
Ashburn, VA 20147

Phillip McClelland, Esquire
Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1923

Robert C. Barber, Esquire
AT&T Communications of PA
3033 Chain Bridge Road
Oakton, VA 22185

Phillip J. Macres, Esquire
Swidler, Berlin, Shereff and Friedman, LLP
3000 K Street, NW
Washington, DC 20007-5116

RECEIVED
JUN 28 PM 2:36
SECRETARY'S BUREAU

Enrico C. Soriano, Esquire
Steven A. Augustino, Esquire
Darius B. Withers, Esquire
Kelley, Drye and Warren, LLP
1200 19th Street, NW
Washington, DC 20036

Debra M. Kriete, Esquire
Rhoads and Sinon, LLP
One South Market Street
12th Floor
Harrisburg, PA 17101

Renardo L. Hicks, Esquire
Anderson, Gulotta and Hicks, PC
1110 North Mountain Road
Harrisburg, PA 17112

Jeanne Price
Marvin Hendrix
CEI Networks
PO Box 458
130 East Main Street
Ephrata, PA 17522

Jeffrey J. Heins
Telecove Communications, Inc.
712 North Main Street
Coudersport, PA 16915

Rebecca Sommi
Vice President, Regulatory
Broadview Networks, Inc.
400 Horsham Road
Horsham, PA 19044

Thomas Koutsky, Vice President
Law and Public Safety
Z-Tel Communications, Inc.
1200 19th Street, NW, Suite 500
Washington, DC 20036

Peggy Rubino
Z-Tel Communications, Inc.
601 South Harbour Island Boulevard
Suite 220
Tampa, FL 33602

Richard U. Stubbs, Esquire
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Rogelio E. Pena, Esquire
1375 Walnut Street
Suite 220
Boulder, CO 80302
(via electronic mail only)

William E. Ward
CTC Communications Corporation
115 Second Avenue
Waltham, MA 02451

Respectfully Submitted,



Zsuzsanna E. Benedek, Esquire
Sprint Communications Company, L.P.
240 North Third Street, Suite 201
Harrisburg, PA 17101
Phone: (717) 245-6346
Fax: (717) 236-1389
E-Mail: sue.e.benedek@mail.sprint.com



ORIGINAL

Robert C. Barber
Senior Attorney

Room 3D
3033 Chain Bridge Road
Oakton, VA 22185
703 691-6061
FAX 703 691-6093
EMAIL rbarber@att.com

June 28, 2004

BY OVERNIGHT MAIL

DOCUMENT RECEIVED
FOLDER JUN 28 2004

Mr. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: Investigation Into Obligations Of Incumbent
Local Exchange Carriers To Unbundle Network Elements
Docket No. I-00030099

Dear Mr. McNulty:

Please find enclosed for filing in the above-captioned proceeding the original and three (3) copies of AT&T Communications of Pennsylvania, LLC's Opposition to Verizon Pennsylvania Inc.'s and Verizon North Inc.'s Petition to Withdraw Petition and Close Proceeding.

Please do not hesitate to contact me with any questions regarding the enclosures.

Very truly yours,

Robert C. Barber

Enclosures

cc: (w/ encl)
The Honorable Michael Schnierle
The Honorable Susan Colwell
Service List (w/ encl)

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to)
Unbundle Network Elements)

Docket No. I-00030099

DOCKETED
JUL 22 2004

AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC'S
OPPOSITION TO VERIZON PENNSYLVANIA INC.'S
AND VERIZON NORTH'S
PETITION TO WITHDRAW PETITION AND CLOSE PROCEEDING

Verizon has demonstrated since the inception of the Triennial Review process that the last thing it wanted was for this Commission to engage in a thorough, fully-informed examination of the status of competition in Pennsylvania. This was evident in the overly-simplistic approach Verizon took in its effort to eliminate the unbundled network elements-platform ("UNE-P") in Pennsylvania, an approach which would have had the Commission ignore such critical factors as the minimal extent of unbundled loop ("UNE-L") competition for residential customers and the competitive consequences for consumers of the loss of UNE-P based alternatives. It became even more apparent in the course of the evidentiary proceedings, which saw Verizon, among other failings, recklessly depict data concerning the state government contract as evidence of mass market competition.

Verizon's instant petition is the latest manifestation of this pattern of disregard for this Commission and its critical role in ensuring the irreversible establishment of full and fair competition throughout the Commonwealth. Contending that under the D.C. Circuit's decision in *USTA II*,¹ "[t]here is no longer justification or legal basis for taking further action

¹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

DOCUMENT
FOLDER

in this matter,” Verizon has moved to have the docket closed.² Moreover – and tipping its hand as to its real motives in bringing this petition -- Verizon specifically requests that the Commission “refrain from preparation or release of a ‘summary of the record’” by the Administrative Law Judges who presided over the case.³

In other words, Verizon wants to act as if this case, and the incalculable effort and expense that the parties already have incurred in litigating it, never happened. Just as important, it effectively wants to eradicate the extensive record that has been developed. This should come as no surprise, given that it is a record that conclusively demonstrates that CLECs are impaired in Pennsylvania without access to unbundled mass-market switching, high-capacity loops and dedicated transport.

The Commission should reject Verizon’s clumsy effort to discard that record. Contrary to Verizon’s claims, even after *USTA II* -- or, perhaps more to the point, especially after *USTA II* – this Commission still has a critical, ongoing role in developing an accurate, granular picture of the extent of competition in Pennsylvania, and in conveying that picture to the FCC in any future rulemaking proceeding. Preservation of the record in this case, developed on the basis of extensive discovery, written testimony, and detailed cross-examination under oath, is necessary to help fulfill that role. Just as important, this record will also serve as an evidentiary baseline for evaluating and maintaining the UNE-P obligations imposed on Verizon under the *Global Order*.

As an initial matter, the specific relief Verizon sought through this petition – that is, preventing the preparation and issuance of a summary of the record in this case – is moot.

² Petition to Withdraw Petition and Close Proceeding of Verizon Pennsylvania Inc. and Verizon North Inc., June 16, 2004 (“VZ Petition”), at 1.

³ *Id.* at 5.

Pursuant to the Commission's Secretarial Letter of June 3, 2004, Administrative Law Judge Schnierle issued a Summary of the Record Evidence on June 22. The contents of that report help explain Verizon's eagerness to suppress it, given that it describes, among other problems, Verizon's failure to distinguish between residential and business UNE-L competition, its effort to portray DS0s provided to enterprise business customers as evidence of mass market competition, and its attempt to pass off tens of thousands of lines attributable to the state government's telecommunications contract as mass market service.⁴ That toothpaste cannot now be squeezed back into the tube.

Moreover, Verizon's challenge to the preparation of this summary is baseless. According to Verizon, it would be "improper" for the Commission to summarize a record "that was developed under illegal rules using the wrong substantive test."⁵ This contention, however, grossly overstates the reach of the *USTA II* decision. That decision did not invalidate the Telecommunication Act's basic "impairment" standard for unbundling. Nor did it invalidate the granular approach the FCC must use to assess impairment.

To the contrary, any impairment analysis the FCC undertakes pursuant to the *USTA II* remand must continue to be "granular" under the requirements of *USTA I*.⁶ In *USTA I*, the D.C. Circuit Court of Appeals found that the Act requires "a more nuanced concept of impairment than is reflected in findings ... detached from any specific markets or market categories."⁷ It reaffirmed this requirement throughout *USTA II*. As a result of the Court's

⁴ See Summary of the Record Evidence, Docket No. I-00030099, June 22, 2004, at 10-12.

⁵ VZ Petition at 5.

⁶ *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*")

⁷ *USTA I*, 290 F.3d at 426.

findings in *USTA I*, the FCC adopted an impairment standard that relied on a “granular analysis informed by consideration of the relevant barriers to entry, as well as a careful examination of the evidence, especially marketplace evidence. . . .”⁸ Nothing in *USTA II* found that such a granular analysis of impairment is improper.⁹

At a minimum, therefore, in developing any new unbundling rule the FCC must look at Pennsylvania-specific data before making any “nuanced” impairment decisions regarding the availability of unbundled elements in the Commonwealth. And regardless of the test it applies, the FCC certainly will need granular evidence of the type gathered in the state record to make its decision consistent with the requirements of *USTA I* and *USTA II*.

According to the D.C. Circuit’s decision in *USTA II*, in fact, the FCC is lawfully authorized to make future unbundling decisions based upon the factual information produced in state *TRO* proceedings. As the D.C. Circuit stated, “a federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information.”¹⁰ Furthermore, the FCC may lawfully make future unbundling decisions based upon state commission policy recommendations arising from state proceedings. The D.C. Circuit said that “a federal agency may turn to an outside entity for advice and policy

⁸ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking*, No. FCC 03-36, released August 21, 2003 (“*TRO*”), ¶84.

⁹ The principal finding in *USTA II* is that, in the Court’s view, the FCC may not permit the states to have the final say on whether the granular impairment test has been met. *See USTA II*, 359 F.2d at 568.

¹⁰ *USTA II*, 359 F.3d at 567.

recommendations, provided the agency makes the final decision itself.”¹¹ The best source for that advice and policy recommendation remains this Commission and the evidence it has developed -- and will continue to develop -- concerning impairment in Pennsylvania.¹²

Finally, and apart from its role relative to any future proceedings at the federal level, the Commission has an interest in maintaining the record in this case for purposes of monitoring Verizon’s UNE-P obligations under the *Global Order*.¹³ That order requires Verizon to offer UNE-P “except where [it] can demonstrate to the Commission, by a preponderance of the evidence, that collocation space is available, that it can be provisioned in a timely manner, and that considerations of the number of customers and revenues from the customers served by the CLEC from a collocation in that central office represents a valid reasonable economic alternative to the provision of UNE-P. . . to that CLEC.”¹⁴ In short,

¹¹ *Id.* at 568.

¹² One FCC commissioner reinforced this point in a recent speech before state regulators, in which he made a direct plea for state commissions to provide the facts gathered and analyses performed by the state directly to the FCC for its use in developing rules to replace those vacated by *USTA II*:

But as we face the new world of transitional rules, the work you’ve done before becomes even more relevant. Many of you responded to our call for state analysis of the availability of switching, high capacity loops and transport. Now you need to help us again. **If you’ve collected information – bring it on. If you’ve gathered facts – show us. If you’ve amassed data and analyzed it based on operational and economic facts – let us see what you’ve learned. State commission knowledge about the state of truly local competition can be so much better than anything we cook up far away in Washington.**

Remarks of Commissioner Michael J. Copps, Southeastern Association Of Regulatory Utility Commissioners, Charleston, South Carolina June 15, 2004 (emphasis added).

¹³ *Joint Petition of Nextlink Pennsylvania, Inc., et al., Docket Nos. P-00991648 and P-00991649, Sept. 30, 1999 (“Global Order”).*

¹⁴ *Id.* at 90.

Verizon must offer detailed, granular economic proof that competitors are not impaired in the absence of UNE-P.

Verizon did not even attempt to make that showing in the instant proceeding. And the record demonstrates that it cannot make that showing. Preservation of that evidence thus will provide the Commission with a useful baseline for assessing any attempt Verizon may make in the future to satisfy the *Global Order's* evidentiary standard, and, more generally, to evaluate the development of local exchange competition in the Commonwealth.

WHEREFORE, for the reasons set forth above, Verizon's Petition to Withdraw Petition and Close Proceeding should be denied.

Respectfully submitted,

**AT&T Communications
of Pennsylvania, LLC**

By its Attorneys,



Robert C. Barber
3033 Chain Bridge Road
Oakton, VA 22185
(703) 691-6061

Of Counsel:
Mark A. Keffer

Dated: June 28, 2004

RECEIVED

JUN 28 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Certificate of Service
Docket No. I-00030099

The undersigned hereby certifies that true and correct copies of AT&T Communications of Pennsylvania, LLC.'s Opposition to Verizon Pennsylvania Inc.'s and Verizon North Inc.'s Petition to Withdraw Petition and Close Proceeding were caused to be served on the persons named below by electronic and overnight or first class mail in accordance with the requirements of 52 Pa. Code §§1.52 and 1.54:

Patricia Armstrong, Esq.
Thomas, Thomas, Armstrong & Niesen
PO Box 9500
Harrisburg, PA 17108

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036

Philip F. McClelland, Esq.
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923

Zsuzsanna E. Benedek, Esq.
Sprint
240 North Third St., Suite 201
Harrisburg, PA 17101

Alan Kohler, Esq.
Daniel Clearfield, Esq.
Wolf Block Schorr & Solis-Cohen
Locust Court, Suite 300
212 Locust Street
Harrisburg, PA 17101

Angela Jones, Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

RECEIVED
JUN 28 2004
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Julia A. Conover, Esq.*
Suzan Paiva, Esq.
Verizon Pennsylvania, Inc.
1717 Arch Street 32 NW
Philadelphia, PA 19103

Kandace Melillo, Esq.
Office of Trial Staff
Pennsylvania PUC
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Steven A. Augustino, Esq.
Kelley Drye & Warren LLP
1200 19th Street N.W.
Suite 500
Washington, DC 20036

Richard U. Stubbs, Esq.
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Renardo L. Hicks, Esq.
Anderson Gulotta & Hicks, PC
1110 N. Mountain Road
Harrisburg, PA 17112

Philip Macres, Esq.
Swidler Berlin Shereff & Friedmann
3000 K Street, NW
Washington, DC 20007

Ross A. Buntrock, Esq.
Kelley Drye & Warren LLP
1200 19th Street N.W.
Suite 500
Washington, DC 20036

Debra M. Kriete, Esq.
Rhoads & Sinon LLP
1 South Market Square, 12th Fl.
Harrisburg, PA 17101

ORIGINAL

• Thomas Koutsky, Esq.
Z-Tel
1200 19th Street, NW
Suite 500
Washington, DC 20036

Robin Cohn, Esq.
Russell Blau, Esq.
Swidler Berlin Shereff Friedman
3000 K St., NW
Washington, DC 20007



Robert C. Barber

Dated: June 28, 2004

* overnight mail

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560 (in PA only)

IRWINA. POPOWSKY
Consumer Advocate

FAX (717) 783-7152
consumer@paoca.org

July 7, 2004

James J. McNulty, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

DOCUMENT ORIGINAL
FOLDER

Re: Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Network Elements
Docket No. I-00030099

Dear Secretary McNulty:

Enclosed please find for filing an original and three (3) copies of the Office of Consumer Advocate's Answer to the Petition to Withdraw Petition and Close Proceedings of Verizon Pennsylvania, Inc. and Verizon North, Inc., in the above-captioned matter.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

Joel H. Cheskis
Assistant Consumer Advocate

SECRETARY'S OFFICE

2004 JUL -7 PM 3:56

RECEIVED

Enclosures

cc: All parties of record
Hon. Susan Colwell, ALJ
*76655

32

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SECRETARY'S OFFICE

JUL 14 11 38 AM '04

RECEIVED

Investigation into the :
Obligation of Incumbent :
Local Exchange Carriers : Docket No. I-00030099
to Unbundle Network Elements :

DOCKETED
JUL 12 2004

ANSWER
OF THE OFFICE OF CONSUMER ADVOCATE
TO THE PETITION TO WITHDRAW PETITION AND CLOSE PROCEEDINGS
OF VERIZON PENNSYLVANIA, INC. AND VERIZON NORTH, INC.

Pursuant to Section 5.61(a) of the Pennsylvania Public Utility Commission ("Commission" or "PUC") regulations, 52 Pa. Code §5.61(a), the Office of Consumer Advocate ("OCA") hereby files this Answer to the Petition to Withdraw Petition and Close Proceeding filed by Verizon Pennsylvania, Inc. and Verizon North, Inc. (collectively referred to as "Verizon") on June 16, 2004. In support of its Answer, the OCA submits as follows:

DOCUMENT
FOLDER

I. INTRODUCTION

On August 21, 2003, the Federal Communications Commission ("FCC") released its Triennial Review Order¹ ("TRO") adopting new rules concerning the obligation of incumbent local exchange carriers ("ILECs") to make their unbundled network elements ("UNEs") available to competitive local exchange carriers ("CLECs"). In doing so, the FCC, among other things, delegated to state commissions the responsibility of conducting analyses on a more granular level using mechanisms established in the TRO. On October 2, 2003, the effective date

¹ Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003)(FCC 03-36), as corrected by errata, FCC 03-227 issued on September 17, 2003.

of the TRO, the PUC issued a Procedural Order establishing three dockets to adjudicate those mechanisms discussed in the TRO.² On October 31, 2003, Verizon filed a Petition asking the PUC to initiate a proceeding under one of those dockets and make a finding that competitors are not impaired without access to unbundled switching to serve certain mass market customers. Verizon's Petition was assigned to the Office of Administrative Law Judge and the above-captioned formal proceeding was litigated.

The OCA filed an Answer to Verizon's October 31, 2003 Petition asserting that the Petition is not supported by sufficient evidence and should be rejected. The OCA fully participated in the litigation of Verizon's Petition including presenting testimony of two witnesses and participating in hearings held in this matter on January 26 through January 29, 2004. The OCA also filed two briefs further articulating its positions.

Concurrent with the litigation of Verizon's Petition, the FCC's TRO was appealed to the Circuit Court of Appeals for the District of Columbia by various parties who were active in the proceeding before the FCC. Those appeals resulted in an Order by the DC Circuit on March 2, 2004 vacating the unbundling provisions of the TRO and remanding the proceeding back to the FCC.³ USTA II found, among other things, that the FCC had no power to generally delegate to state commissions the task of performing the granular analyses the TRO required. On March 25, 2004, and in response to USTA II, the PUC notified all parties to the above-docketed proceeding of its decision to "generally suspend activity" and revisit the matter at a later time. This notification came prior to the issuance of a Recommended Decision from the presiding officers. However, by Secretarial Letter dated June 3, 2004, the PUC later requested

² Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100, Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements, Docket No. I-00030099, and Development of an Efficient Loop Migration Process, Docket No. M-00031754, Procedural Order (entered October 3, 2003).

³ United States Telecom Assoc. v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

that the presiding officers prepare a summary of the record evidence as the next step in the proceeding. The PUC noted that “such summary will be useful to the Commissioners and staff, despite the legal uncertainty surrounding the TRO.”⁴ The PUC further noted that “at a minimum, the summary will enhance the Commission’s understanding of the presence of facilities-based competition in Pennsylvania today.”⁵

On June 16, 2004, Verizon filed the instant Petition arguing that it should be able to withdraw its Petition and, going even further, to close the entire proceeding. Verizon argues that termination of this docket is necessary because the TRO has been vacated. On June 24, 2004, presiding officer Administrative Law Judge Michael C. Schnierle issued his Summary of the Record Evidence wherein he summarized the presence and use of competitive facilities as determined throughout the proceeding.⁶ ALJ Schnierle recommended that Comments to the Summary should be submitted to the PUC within thirty days.

The OCA files this Answer to Verizon’s Petition to assert that the Petition is without merit and should be rejected. As discussed further below, the PUC should proceed with its intent to accept comments on the Summary and enhance its understanding of the presence of facilities-based competition in Pennsylvania. The PUC should bear in mind the valuable information contained in the record of this proceeding. Furthermore, this proceeding should remain open as it is unclear how Verizon’s unbundling obligations should be determined in the future. This important evidence in the record should not be lost by prematurely terminating this proceeding before the underlying issues are resolved.

As such, Verizon’s instant Petition should be denied.

⁴ Secretarial Letter, Docket No. I-00030099, dated June 3, 2004, at 1.

⁵ Id.

⁶ Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Network Elements, Summary of the Record Evidence, Docket No. I-00030099 (June 24, 2004)(“Summary”).

II. ANSWER

A. Verizon's Petition Should Be Denied Because The Record Evidence In This Proceeding Contains Valuable Information About The State Of Competition In Pennsylvania And Should Be Presented To The Commission.

Granting Verizon's Petition would negate the collective efforts of numerous parties to gauge the true state of facilities-based competition in Pennsylvania. This proceeding has involved the collection of thousands of pages of data, responses to discovery, admitted exhibits and hearing transcripts, among other things, that directly address this issue. All interested parties, including all local exchange carriers in Pennsylvania, had an opportunity to participate in this proceeding by presenting evidence and cross-examining witnesses. All active parties have specifically articulated their positions on the relevant issues in briefs and have responded to points raised by other parties by filing a reply brief. This critical proceeding was awaiting a Recommended Decision from the presiding officers prior to the suspension of activity. At that point, a tremendous amount of relevant information pertaining to critical issues at the forefront of this Commission's agenda was ripe for review by this Commission. Through its Petition, however, Verizon would have all those efforts be for naught and the true state of facilities-based competition not be further examined.

In support of its Petition, Verizon primarily argues that there is no longer justification or legal basis for taking further action in this matter. Verizon offers little exploration as to why this proceeding must be closed. Verizon provides no legal basis for its argument that USTA II effectively "pulls the plug" on any state commission actions on this issue. As discussed further below, the PUC has its own authority to conduct a proceeding to acquire this important information and, as such, has the authority to continue this proceeding,

even though the federal rules that will be developed are currently unknown. Verizon's only legal discussion in its Petition pertains to the impact of a petition for certiorari to the Supreme Court on the effectiveness of the underlying proceeding. That legal issue is not presented herein and, as such, is not relevant to this Petition.

On the other hand, the benefits of continuing the proceeding as the PUC has proposed, significantly outweigh any unsubstantiated reasons to close this docket. For example, the evidence of record in this case details CLEC line counts and the number of switches they have deployed to serve their customers.⁷ While these numbers were hotly contested throughout this proceeding, and ALJ Schnierle's Summary makes no definitive determination as to what the actual line and switch count is, nonetheless, the PUC should be aware of this relevant factual data and the various parties' positions on this issue. This is particularly true given the level of detail presented in this proceeding. That is, the record evidence in this proceeding details not only CLEC line counts, but also specifically in which exchanges the CLECs provide those lines. Regardless of whether or not this information should be used to determine if Verizon should be required to provide certain UNEs under any federal analysis, this information is at the root of local telephone competition in Pennsylvania and should remain available to the PUC.

For example, the record evidence in this proceeding shows that there are over 315,600 residential lines and over 128,700 business lines served by CLECs in Verizon's territory using UNE-P.⁸ Over half of the local customers served by CLECs in Verizon's territory are served through the UNE-P, making it the mainstay of residential local telephone competition in Pennsylvania.⁹ The Commission must be aware that the basis for serving half of the CLEC local lines in Verizon's territory would be eliminated if Verizon was no longer required to provide

⁷ See, Exhibits ALJ 1 through 17.

⁸ See, Verizon response to MCI I-41 and Verizon Hearing Exhibit 2.

⁹ OCA M.B. at 7.

UNE-P to CLECs. In this proceeding, the OCA cautioned that “the Commission should not act blindly in this proceeding but must make its decision being fully aware of the competitive facts so that it can follow the goals of [the federal Telecommunications Act of 1996].”¹⁰ The OCA submits that these reasons also support denying Verizon’s instant Petition as the PUC must be aware of the actual facts and circumstances surrounding the state of local telephone competition in Pennsylvania and the impact its decisions have in this area.

The PUC recognized the benefit of this proceeding in requesting the Summary be made. As noted above, the PUC indicated in its June 3, 2004 Secretarial Letter that such a summary

... will be useful to the Commissioners and staff, despite the legal uncertainty surrounding the TRO. At a minimum, the summary will enhance the Commission’s understanding of the presence of facilities-based competition in Pennsylvania today.

The summary will recite the party positions on each issue and provide any other useful information, such as explain points of debate among the parties as to alternative sources of facilities or explain why there are uncertainties as to what facilities exist to serve customers. It will summarize what the record shows as to the existence of alternative (non-Verizon) switches, transport and high capacity loops on a geographic basis to service wireline customers.¹¹

As such, the PUC recognized the value of this proceeding and the information that has been acquired at this docket.

Therefore, the OCA submits that the record evidence in this proceeding contains valuable information about the state of competition in Pennsylvania and should be presented to the Commission. The PUC should deny Verizon’s Petition to Withdraw Petition and Close Proceeding because it would have the untenable affect of prohibiting PUC review of valuable

¹⁰ Id. at 9.

¹¹ Secretarial Letter.

information relevant to an item at the forefront of the PUC's agenda, the state of local telephone competition.

B. Verizon's Petition Should Be Denied Because The Commission Has State Authority Under Which It Can Review And Consider The Evidence Of Record.

Verizon's Petition should be denied because of the relevance this proceeding has to various state proceedings. In particular, this Commission has recognized that Verizon must continue to unbundle certain elements pursuant to other existing obligations. This fact was reaffirmed in the PUC's December 18, 2003 Order in a TRO companion case.¹² In that Order, the PUC held that the determination to deny CLEC Petitioners' request for a waiver petition to the FCC regarding Verizon's obligation to provide enterprise switching did not relieve Verizon of its obligations under separate authority to provide requesting carriers with access to its local circuit switching. This issue was further reaffirmed by the PUC on May 28, 2004 when it denied Verizon's Petition for Reconsideration of its December 18, 2003 Order.¹³

Verizon's unbundling obligations pursuant to other state authority is clear.¹⁴ There is significant authority dictating Verizon's other obligations to lease portions of its network to competitors at just and reasonable rates. These obligations come from other portions of the federal Telecommunications Act of 1996 ("TA-96") as well as through other state law and this Commission's directives. For example, in its December 18, 2003 Order, the PUC specifically cited to the Global Order,¹⁵ section 271 of TA-96¹⁶ and section 3005(e) of Chapter

¹² Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100, Order (entered Dec. 18, 2003) at 14.

¹³ Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market, Docket No. I-00030100, Order on Reconsideration (entered May 28, 2004).

¹⁴ See, OCA M.B. at 67-72.

¹⁵ In re: Nextlink Pennsylvania, Inc., 196 PUR 4th 172 (Pa. PUC September 30, 1999)

¹⁶ 47 U.S.C. §271.

30¹⁷ for the independent obligation of Verizon to provide access to circuit switching. The PUC determined that Verizon was not relieved of its ongoing obligation to provide access to local circuit switching under separate authority. The PUC has also noted that the terms of an interconnection agreement may prohibit Verizon from unilaterally discontinuing the provision of service on the ground that there is a change of law.¹⁸ And, the PUC has recently determined that “for any telecommunications service for which a Pennsylvania ILEC obtains competitive designation under Chapter 30, the ILEC is required, independent of federal requirements, to unbundle basic service functions to provide that local service.”¹⁹ The record evidence in this proceeding will likely assist the PUC in ensuring that Verizon is meeting its obligations under these other circumstances.

Therefore, there is substantial legal support for the proposition that, in addition to Verizon’s unbundling obligations pursuant to section 251 that are at issue in this proceeding, Verizon also has other obligations to lease portions of its network to competitors at just and reasonable rates. As such, to the extent the future unbundling rules remain uncertain, Verizon’s Petition should be rejected because the PUC has state authority under which it can review and consider the evidence of record.

¹⁷ 66 Pa.C.S. §3005(e). This statute has since expired effective December 31, 2003. However, the underlying Orders entered pursuant to this statute remain in effect. *See, Sunset of Chapter 30, Title 66 of the Public Utility Code, Statement of Policy, Docket No. M-00041786 (entered Jan. 22, 2004).*

¹⁸ October 2, 2003 Order, at 5.

¹⁹ Petition of Verizon Pennsylvania, Inc. for a Determination that its Provision of Business Telecommunications Services to Customers Generating Less than \$10,000 in Annual Total Billed Revenue is a Competitive Service Under Chapter 30 of the Public Utility Code, Docket No. P-00021973, Order (entered Aug. 13, 2003).

C. Verizon's Petition Should Be Denied Because It Is Unclear What The Future Unbundling Rules Will Be Due To Impending Federal Regulatory And Appellate Activity.

Verizon's future federal unbundling obligations are unclear. As discussed above, USTA II vacated and remanded the FCC's unbundling obligations established in the TRO. However, the FCC has committed to develop new rules as a result of USTA II. Furthermore, it is unclear whether USTA II will be appealed to the United States Supreme Court as the deadline for *certiorari* has not passed. Therefore, the OCA submits that Verizon's Petition should be denied because it is premature. The above-captioned docket should not be closed until the federal rules under which this issue will be judged are firmly set because the information acquired in this record may be relevant to a future unbundling obligations.

In USTA II, the DC Circuit specifically recognized the FCC's ability to use information acquired by state commissions in the remanded proceeding. The DC Circuit noted one of the three specific types of legitimate outside party input into agency decision-making processes include fact gathering²⁰ that could be provided by a state commission. The Court further added:

[T]here is some authority for the view that a federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information. While Assiniboine & Sioux Tribes found that a delegation of decision-making power to a state board would be unlawful, it left open whether reliance by the federal agency on the state board for "nondiscretionary activities such as compiling, hearing, and transmitting technical information might not be permissible and desirable."²¹

It is exactly that type of nondiscretionary activity of "compiling, hearing and transmitting technical information" that the PUC has done at this docket and which should be made available to the FCC should the new UNE unbundling rules require. It is clear that the FCC will continue

²⁰ USTA II, at 566.

²¹ Id., at 567, quoting, Assiniboine & Sioux Tribes v. Bd. of Oil and Gas, 792 F.2d 782, 795 (9th Cir. 1986).

to examine the issues that are addressed by the record evidence in this proceeding. The record evidence could likely be directly relevant to any unbundling analysis that the FCC dictates in response to the remand by USTA II.

The future unbundling rules that will necessarily revolve around the issues that have been addressed on the record of this proceeding. As such, Verizon's Petition should be denied because it is unclear what its unbundling obligations may be in the future and the information contained in this record could be relevant to a future unbundling proceeding. The PUC should not forgo the tremendous amount of information acquired in this proceeding merely because the legal framework of these issues is currently unclear. Verizon's instant Petition should be denied.

D. A Summary Of The Record Evidence Is An Appropriate Step To Take At This Time Until Verizon's Unbundling Obligations Become More Clear.

In its Petition, Verizon also opposes the PUC's request that the presiding officers prepare and release a summary of the record in the proceeding.²² Verizon's concern that "it would be improper for the Commission to summarize a 'record' that was developed under illegal rules using the wrong substantive test"²³ is without merit and should be rejected. As indicated above, ALJ Schnierle issued his Summary on June 24, 2004. Comments to the Summary are due thirty days thereafter. Verizon's argument that even the Summary is improper is without merit and should be dismissed. It is certainly reasonable to be able to use the data acquired with the understanding of how that data was collected, even if the underlying reasons for collecting the data, or methods used to acquire the data may no longer remain relevant. As a doctor would

²² Verizon Petition at 5.

²³ Id.

maintain all of a patient's records, so too should the Commission maintain the results that have been acquired through this proceeding.

Verizon further argues that it would be “a waste of Commission resources” to even issue a summary.²⁴ Yet, in making this argument, Verizon fails to acknowledge the tremendous amount of resources already expended by the Commission, as well as numerous parties, to develop the record that currently exists. To close this docket and ignore that substantial collection of data would, *per se*, be a waste of Commission resources, and several parties' resources, that have already been expended in developing this record.

As such, a Summary of the record evidence in this proceeding is an appropriate step to take at this time until Verizon's unbundling obligations become more clear. Verizon's instant Petition should be denied.

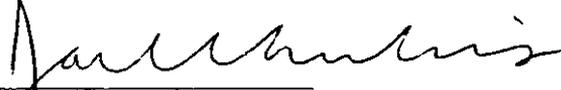
III. CONCLUSION

The Pennsylvania Office of Consumer Advocate respectfully submits that Verizon's instant Petition to Withdraw Petition and Close Record is without merit and should be rejected. Instead, the Commission should accept ALJ Schnierle's Summary of the Record Evidence, and any Comments thereto timely submitted by the parties, and keep this docket open until the future of this issue becomes clearer. The PUC would then have a valuable source of information that sheds a significant amount of light on a critical issue facing the Commission today – the state of local telephone competition in Pennsylvania – while procedural matters at the

²⁴ Id.

federal level are established. This Commission should not waste its opportunity to consider this wealth of information, but should use it to the extent possible, to further its goals.

Respectfully submitted,



Philip F. McClelland
Senior Assistant Consumer Advocate
Joel H. Cheskis
Assistant Consumer Advocate

For: Irwin A. Popowsky
Consumer Advocate

Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048

Date: July 7, 2004

79881

CERTIFICATE OF SERVICE

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements
Docket No. I-00030099

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Anser to the Petition to Withdraw Petition and Close Proceedings of Verizon Pennsylvania, Inc. and Verizon North, Inc., upon counsel for parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 7th day of July, 2004.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Kandace Melillo, Esq.
Office of Trial Staff
Pa. Public Utility Commission
400 North Street, Fl. 2 West
Harrisburg, PA 17120

RECEIVED
2004 JUL -7 PM 3:56
SECRETARY'S BUREAU

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Julia A. Conover, Esq.
William Petersen, Esq.
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103

Angela Jones, Esq.
Office of Small Business Advocate
300 North Second Street
1102 Commerce Bldg.
Harrisburg, PA 17101

Alan Kohler, Esq.
Wolf, Block, Schorr & Solis-Cohen
212 Locust Street
Suite 300
Harrisburg, PA 17101

Zsuzsuanna Benedek
Sprint
240 N. Third Street
Suite 201
Harrisburg, PA 17101

Robert C. Barber, Esq.
AT&T Communications
3033 Chain Bridge Rd., Rm. 3-D
Oakton, VA 22185

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036

Charles V. Gerkin, Jr.
Regulatory Counsel
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231

Russell M. Blau
Robin F. Cohn
Philip Macres
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Renardo L. Hicks, Esq.
Anderson, Gulotta & Hicks, PC
1110 North Mountain Road
Harrisburg, PA 17112

Richard U. Stubbs, Esq.
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Tom Koutsky
VP Law & Public Policy
1200 19th Street, NW
Suite 500
Washington, DC 20036

Ross Buntrock
Steve Augustino
Enrico Soriano
Kelley, Drye & Warren, LLP
1200 Nineteenth Street, NW
Washington, DC 20036-2423


Philip F. McClelland
Senior Assistant Consumer Advocate
Barrett C. Sheridan
Joel H. Cheskis
Assistant Consumer Advocates
Counsel for
Office of Consumer Advocate
555 Walnut Street 5th Floor, Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048 *77517

Julia A. Conover
Vice President and General Counsel
Pennsylvania

ORIGINAL



1717 Arch Street, 32N
Philadelphia, PA 19103

Tel: (215) 963-6001
Fax: (215) 563-2658
Julia.A.Conover@Verizon.com

DOCUMENT
FOLDER

July 12, 2004

RECEIVED

JUL 12 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA UPS OVERNIGHT DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers to
Unbundle Network Elements, Docket No. I-00030099*

Dear Secretary McNulty:

Enclosed please find the original and three copies of Verizon Pennsylvania Inc.'s and
Verizon North Inc.'s Reply to Oppositions to Petition to Withdraw Petition and Close
Proceeding, in reference to the above captioned matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,


Julia A. Conover

JAC/meb

Enclosure

cc: Via E-Mail and UPS Overnight Delivery
Honorable Susan Colwell
Attached Certificate of Service

110

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

JUL 12 2004

Investigation into the :
Obligation of Incumbent : Docket No.
Local Exchange Carriers : I-00030099
to Unbundle Network Elements :

PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

**VERIZON'S REPLY TO OPPOSITIONS TO PETITION
TO WITHDRAW PETITION AND CLOSE PROCEEDING**

DOCKETED
JUL 22 2004

Verizon Pennsylvania Inc. and Verizon North Inc. (collectively "Verizon") reply to the opposition by AT&T, Sprint and OCA to Verizon's request that the Commission permit Verizon to withdraw its Petition and close the docket in the above-captioned proceeding. With the issuance of the mandate in the *USTA II* case,¹ the Commission's authority to proceed with this matter has ended. Not only is there no longer any lawful delegation of authority under which the Commission could consider this case, but also the substantive rules under which the record was developed have been invalidated. In the face of these undisputed facts, the opposing parties provide no valid reason why this docket should continue to remain open. Indeed, many of their objections compel just the contrary conclusion.

For example, both AT&T and Sprint cite the issuance of the Summary of Evidence as mooted at least part of the rationale for Verizon's Petition to Withdraw.² To the contrary, the Summary of Evidence itself provides additional support for Verizon's petition to terminate this proceeding. In particular, the ALJ plainly recognized the

¹ *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) ("*USTA II*").

² AT&T Opposition at 2; Sprint Opposition at 3.

DOCUMENT
FOLDER

significant limitations in this evidentiary record – limitations that make the record unsuitable for any further use by the Commission. As the ALJ himself noted, after the D.C. Circuit decision, “this proceeding lost any *raison d’etre*.”³

For example, with respect to evidence related to transport, the ALJ observed that “due to the FCC’s rules, the Commission’s attribution of the burden of proof to Verizon, and the limited time available for the proceedings, *the information obtained was less than comprehensive.*”⁴ Because the *USTA II* Court invalidated the FCC’s “route-specific” analysis for transport “impairment,” the ALJ observed that “it is doubtful that this method of determining impairment for dedicated transport will be of any usefulness in the future.”⁵ The ALJ concluded that the information on “the state of facilities based telephone competition” in the record “is interesting but limited,” and noted further that “the information that was sought here is more complex than was understood when the Commission’s order was prepared.”⁶ The Summary of Evidence makes it clear that the record developed in this proceeding would be of limited, if any, value in the future.⁷

Significantly, all of these flaws and limitations tend to *understate* by a substantial margin the amount of true facilities based competition in Pennsylvania, thereby further undercutting the usefulness of this record for any purpose. As the ALJ recognized,

In terms of competition generally, it is important to note that these data do not reflect the extent to which CLECs serve enterprise (as opposed to mass market)

³ Summary of Evidence at 5.

⁴ Summary of Evidence at 13 (emphasis supplied).

⁵ *Id.* at 15.

⁶ *Id.* at 19.

⁷ For example, the ALJ observed that “If, for any reason, the Commission decides it needs such information in the future, it should allow more time for its collection.” (*id.* at 19)

customers with their own facilities. *Nor do they reflect residential customers' use of cell phones in substitution for wireline service, or the use of Voice Over Internet Protocol (VOIP), either over public broadband connections or over enterprise data networks, as a substitute for wireline voice service.*" (p. 13)

Any assessment of the competitive market in Pennsylvania must recognize these new technologies; yet – due to time constraints and the infirmities of the FCC's invalidated legal test -- they were not reflected in the analysis presented in this docket. Thus, as the ALJ plainly recognized, this record cannot possibly be the basis for any "accurate, granular picture of the extent of competition in Pennsylvania," as AT&T claims.⁸

Next, Sprint speculates that the record in this docket might be relevant to "interim rules" that the FCC has indicated that it will issue.⁹ Of course, the content of any "interim rules," and whether they will contain any fact-finding role for the states, is pure speculation. If for some reason the FCC believes that information in the possession of individual states may be of value in the development of new rules on remand, it can request what it needs from the states when it promulgates those rules.¹⁰ In any event, the Court of Appeals found that both the subdelegation to the states *and* the FCC's impairment standard were unlawful.¹¹ Thus, even if the FCC ultimately defines some

⁸ AT&T Opposition at 2.

⁹ Sprint Opposition at 2. Similarly, AT&T speculates that the FCC may make "future unbundling decisions based on state commission policy recommendations arising from state proceedings." AT&T Opposition at 4-5. If this were true – and it is rank speculation – the standards and scope of such a proceeding would necessarily be different from this proceeding.

¹⁰ AT&T's Opposition relies on remarks by FCC Commissioner Copps asking state commissions to present facts to the FCC. AT&T Opposition at 5 n.12. However, Commissioner Copps' evident distaste for the D.C. Circuit opinion does not change the fact that the court's determinations are at present binding on the FCC.

¹¹ *USTA II* expressly vacated and remanded the national impairment finding for mass market switching as "inconsistent with our conclusion in *USTA I* that the Commission may not 'loftily abstract[] away from all specific markets,' . . . but

fact gathering role for the states that survives appellate scrutiny, the scope of that role would be far different from the standards and parameters of *this proceeding*, which were dictated by the now discredited legal standard in the *TRO*. And nothing in the “interim rules” could conceivably cure the flaws identified by the ALJ that make this record “less than comprehensive” and therefore unsuitable for any “fact-finding.”

Similarly, both AT&T and OCA argue that this record could be used by the Commission as part of its “general oversight” of competition in the Commonwealth.¹² But even aside from the serious infirmities identified by the ALJ, such as the compressed time period for developing the record and the failure to consider all kinds of competitive activity, there are serious procedural and substantive problems with hijacking the record developed here – which was gathered under a specific set of standards for a specific purpose – for different and largely undefined purposes. This Petition was brought

must instead implement a ‘more nuanced concept of impairment.’ . . .” *USTA II*, 359 F.3d at 569-70. The court went on to criticize the FCC’s impairment finding for switching at considerable length, calling it internally inconsistent, unsupported by the record, and lacking in the essential consideration of more narrowly-tailored alternatives to blanket unbundling. *Id.* Finally, the court characterized the FCC’s definition of impairment as “vague almost to the point of being empty.” *Id.* at 572.

¹² AT&T Opposition at 2; OCA Opposition at 4-5. Nor is there any basis under state law to use *this record*, which was developed solely under the now-discredited standards in the *TRO*. The D.C. Circuit’s vacatur of specific FCC unbundling rules did not leave a vacuum that this Commission is free to fill through the application of state law. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC’s first two attempts to issue UNE rules, Congress did not permit “blanket access to incumbents’ networks” or determine that “more unbundling is better” when it passed the 1996 Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *USTA I*, 290 F.3d at 429. Instead, it made “‘impairment’ the touchstone” for any unbundling requirement. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of impairment under section 251(d)(2) of the 1996 Act *before* an incumbent may be ordered to provide access to a particular network element as a UNE at TELRIC rates. And in *USTA II*, the D.C. Circuit unequivocally held that *only the FCC* has the authority to make that impairment finding – it cannot delegate that authority to state commissions. *See USTA II*, 359 F.3d at 565-68.

pursuant to the FCC's direction in the *TRO*, and Verizon's supporting testimony and evidence was designed solely to rebut the FCC's national finding of impairment for mass market switching, dedicated transport and high-capacity loops under the specific standards embodied in the FCC's objective "triggers" tests. This legal standard set by the FCC, which has now been invalidated, dictated the scope and substance of the evidence presented. Using the record for completely different purposes could present significant due process problems, since it is likely that additional or different evidence would have been presented if the issues in this proceeding had been defined differently. Indeed, this was implicitly recognized by the ALJ when he specifically noted that important categories of competitive activity – such as VoIP and wireless – were *not* reflected in the analyses presented in this case. (Summary of Evidence at 13).

Finally, AT&T's suggestion that the record "conclusively demonstrates that CLECs are impaired in Pennsylvania" could not be farther from the truth. Despite the limitations on record development noted above, the Summary of Evidence nonetheless makes abundantly clear that facilities based competition in Pennsylvania is extremely robust.¹³ With respect to mass market switching, the ALJ concluded that Verizon's summary exhibit "appears to be a reasonably accurate 'snapshot in time' of the non-enterprise lines served by other than Verizon switching." (p. 12). Based on this exhibit, the ALJ found that there are at least four companies providing significant facilities-based

¹³ The FCC's most recent Local Telephone Competition Report for the period ending December 31, 2003, also corroborates this finding. Of the approximately 1.5 million CLEC lines in Pennsylvania, fewer than *half* (49%) are provided using UNEs, including both UNE-P and UNE loop. Approximately 35% of CLEC lines are provided solely over CLEC-owned facilities, with the remainder provided via resale (Table 10). See http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf.

service to residential customers. With respect to mass market switching for the business customers, the ALJ concluded that “there are significant number of DSO lines being serviced by non ILEC switches in the Allentown-Bethlehem-Easton, Harrisburg-Carlisle, Philadelphia-Camden-Wilmington, Pittsburgh, and Scranton-Wilkes Barre areas. Smaller but not ‘de minimus’ numbers are being provided in Lancaster, Lebanon, and Reading areas.” (Summary at 12-13).

Similarly, with respect to transport, while noting the serious handicaps to developing a complete record, he concluded that “in the Philadelphia, Pittsburgh, Allentown and Harrisburg areas, there is considerable non-Verizon fiber that might be used to interconnect Verizon central offices.” (p. 17). Even with high capacity loops, which the ALJ acknowledged involves “primarily an argument over the meaning of the FCC's now defunct standards,” the ALJ concluded that “subject to these caveats, Exhibit 3 to Verizon’s Main Brief lists several locations, all in the Philadelphia Metropolitan area or the City of Pittsburgh, to which a few CLECs have deployed there own high capacity loops.” (p. 19).

These findings – albeit limited by the nature of the proceeding – speak for themselves. To the extent any of these parties assert the need to state their own arguments for the record, the parties’ positions regarding the evidence were already set forth at length in their Briefs and Reply Briefs. There is no need for additional comments by the parties and certainly no reason why this proceeding should continue.

In summary, the Commission no longer has authority “to undertake the state commission analyses required and described in the FCC’s *Triennial Review Order*” – the sole basis upon which the Commission instituted this 9-month proceeding and the sole

reason that Verizon filed its Petition. The Commission now has a Summary of Evidence that describes the record and notes its many infirmities. There is no legal basis, and no need, for any further action. Therefore, Verizon respectfully requests that the Commission (1) grant Verizon leave to withdraw its Petition to Initiate Proceedings and (2) terminate all further proceedings in this matter and close the docket. Because the ALJ directed the parties to file Comments on the Summary of the Evidence within 30 days, or by July 26, 2004, Verizon respectfully requests that the Commission take action before that date in order to avoid unnecessary expenditure of resources by the parties

Respectfully submitted,



Julia A. Conover
Suzan DeBusk Paiva
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6001
fax (215) 563-2658
e-mail: Julia.a.conover@verizon.com
Suzan.d.paiva@verizon.com

Counsel for Verizon Pennsylvania, Inc. and
Verizon North, Inc.

DATED: July 12, 2004

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a copy of Verizon Pennsylvania Inc.'s and Verizon North Inc.'s Reply to Oppositions to Petition to Withdraw Petition and Close Proceeding upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 12th day of July, 2004.

VIA E-MAIL AND UPS OVERNIGHT DELIVERY

Patricia Armstrong, Esquire
Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
& Niesen
212 Locust Street, Suite 500
Harrisburg, PA 17108
Counsel for RTCC

Norman Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
Harrisburg, PA 17101
Counsel for PTA

RECEIVED

JUL 12 2004

Genevieve Morelli, Esquire
Ross Buntrock, Esquire
Heather Hendrickson, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
Counsel for Broadview, BullsEye,
ARC/InfoHighway, McGraw, Met Tel
and Talk America

Alan Kohler, Esquire
Daniel Clearfield, Esquire
Wolf, Block, Schorr & Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101-1236
Counsel for ATX, Full Service Network,
Line Systems Inc., Remi Retail and
Comcast

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Enrico Soriano, Esquire
Steven A. Augustino, Esquire
Darius Withers, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
Counsel for Choice One, Broadview,
Focal, SNiP LiNK and XO

Russell Blau, Esquire
Robin F. Cohn, Esquire
Tamar Finn, Esquire
Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116
Counsel for RCN, Lightship and CTSI

Angela Jones, Esquire
Office of Small Business Advocate
Commerce Building – Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Philip McClelland, Esquire
Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street
Frum Place – 5th Floor
Harrisburg, PA 17101-1923
Via e-mail only to OCA Consultants:
Rowland Curry
Melanie Lloyd
Bob Loube

Michelle Painter, Esquire
MCI WorldCom Communications, Inc.
22001 Loudoun County Parkway
E2-3-507
Ashburn, VA 20147-6105
Counsel for MCI

Kandace Melillo, Esquire
Office of Trial Staff
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Sue Benedek, Esquire
Sprint Communications Co. LP
240 North Third Street
Suite 201
Harrisburg, PA 17101
Counsel for Sprint

Richard U. Stubbs, Esquire
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974
Counsel for Cavalier

Charles V. Gerkin, Jr., Esquire
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231
Counsel for Allegiance

Robert C. Barber, Esquire
AT&T Communications of PA
3033 Chain Bridge Road
Oakton, VA 22185
Counsel for AT&T

Renardo L. Hicks, Esquire
Anderson, Gulotta & Hicks, P.C.
4229 Elmerton Ave.
Harrisburg, PA 17109
Counsel for Penn Telecom

Thomas Koutsky, Esquire
Z-Tel Communications, Inc.
1200 19th Street, N.W., Suite 500
Washington, DC 20036



Suzan DeBusk Paiva
Verizon Pennsylvania Inc.
Verizon North Inc.
1717 Arch Street, 32NW
Philadelphia, PA 19103
(215) 963-6068

DATE: July 14, 2004

SUBJECT: I-00030099

TO: Law Bureau

FROM: James J. McNulty, Secretary *ddt*

DOCKETED
JUL 22 2004

**DOCUMENT
FOLDER**

Petition of Verizon Pa and Verizon North

We attach hereto a copy of a Petition of Verizon Pennsylvania, Inc., and Verizon North, Inc., to withdraw its Petition to Initiate Proceedings filed October 31, 2003, and close the proceeding, which has been captioned and docketed at the above-referenced number.

This matter is being assigned to your Bureau for appropriate action.

Enclosed are copies of Objections to the Petition to Withdraw filed by various individuals that may not have been sent to you previously.

Attachments

cc: Office of Administrative Law Judge

ddt

COMMONWEALTH OF PENNSYLVANIA

ORIGINAL



ORIGINAL

OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

William R. Lloyd, Jr.
Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

July 15, 2004

HAND DELIVERED

DOCUMENT
FOLDER

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P. O. Box 3265
Harrisburg, PA 17105-3265

**Re: Investigation into the Obligation of Incumbent Local Exchange
Carriers to Unbundle Network Elements
Docket No. I-00030099**

Dear Secretary McNulty:

I am delivering for filing today the original plus three copies of a:

1. Notice of Withdrawal of Appearance on behalf of the Office of Small Business Advocate in the above captioned matter; and
2. Notice of Appearance on behalf of the Office of Small Business Advocate in the above captioned matter.

Copies of each of the documents listed above are being served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

Sincerely,

William R. Lloyd, Jr.
Small Business Advocate

Enclosures

cc: Hon. Susan D. Colwell
Administrative Law Judge

Parties of Record

RECEIVED
2004 JUL 15 PM 3:38
SECRETARY'S BUREAU

88

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Investigation into the Obligations of :
Incumbent Local Exchange Carriers to : Docket No. I-00030099
Unbundle Network Elements :

NOTICE OF WITHDRAWAL OF APPEARANCE

The Office of Small Business Advocate, pursuant to 52 Pa. Code § 1.24, hereby withdraws the appearance of Angela T. Jones, as counsel of record in the above captioned proceeding.


Angela T. Jones
Assistant Small Business Advocate

For:
William R. Lloyd, Jr.
Small Business Advocate

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525
(717) 783-2831 (fax)

DOCUMENT
FOLDER

Dated: July 15, 2004

DOCKETED
JUL 16 2004

RECEIVED
2004 JUL 15 PM 3:38
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of :
Incumbent Local Exchange Carriers to : Docket No. I-00030099
Unbundle Network Elements :

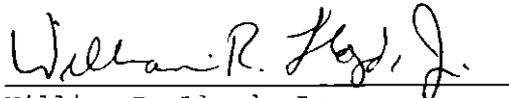
NOTICE OF APPEARANCE

The Office of Small Business Advocate, pursuant to 52 Pa. Code § 1.24, hereby enters the appearance of **William R. Lloyd, Jr.**, replacing Angela Jones as counsel of record, in the above captioned proceeding.

Documents in this proceeding should now be served on the following:

William R. Lloyd, Jr.
Small Business Advocate
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101
(717) 783-2525
(717) 783-2831 (fax)
willloyd@state.pa.us

DOCUMENT
FOLDER



William R. Lloyd, Jr.
Small Business Advocate

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525
(717) 783-2831 (fax)

Dated: July 15, 2004

DOCKETED
JUL 16 2004

RECEIVED
2004 JUL 15 PM 3:38
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of :
Incumbent Local Exchange Carriers to : **Docket No. I-00030099**
Unbundle Network Elements :

CERTIFICATE OF SERVICE

I certify that I am serving a copy of the Notice of Withdrawal of Appearance and the Notice of Appearance on behalf of the Office of Small Business Advocate by first class mail upon the persons addressed below:

Hon. Susan D. Colwell
Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Julia A. Conover, Esquire
Vice President/General Counsel
William B. Petersen, Esquire
Susan DeBusk Paiva, Esquire
Verizon Pennsylvania, Inc.
1717 Arch Street, 32 North
Philadelphia, PA 19103
(215) 963-6023
(215) 563-2658 (fax)

Alan Kohler, Esquire
Daniel Clearfield, Esquire
Wolf, Block, Schorr and Solis-Cohen, LLP
212 Locust Street, Suite 300
Harrisburg, PA 17101
(717) 237-7160
(717) 237-7161 (fax)

Mr. Nego Pile
Lightship Telecom, LLC
1301 Virginia Drive, Suite 440
Fort Washington, PA 19034
(215) 641-0894
(215) 641-0531 (fax)

Barrett C. Sheridan, Esquire
Philip F. McClelland, Esquire
Office of Consumer Advocate
555 Walnut Street
5th FL Forum Place
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)

Johnnie E. Simms, Acting Director
Office of Trial Staff
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976
(717) 772-2677 (fax)

Michelle Painter, Esquire
MCI WorldCom
1133 19th Street, NW
Washington, DC 20036
(202) 736-6204
(202) 736-6242 (fax)

Zsuzsanna E. Benedek, Esquire
Sprint
240 N. Third Street, Suite 201
Harrisburg, PA 17101
(717) 245-6346
(717) 245-6213 (fax)

RECEIVED
2004 JUL 15 PM 3:38
SECRETARY'S BUREAU

D. Mark Thomas, Esquire
Patricia Armstrong, Esquire
Thomas, Thomas, Armstrong & Niesen
212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17109-9500
(717) 255-7600
(717) 236-8278 (fax)

Enrico C. Soriano, Esquire,
Steven A. Augustino, Esquire
Darius B. Withers, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
(202) 955-9600
(202) 955 9792 (fax)

Robert C. Barber, Esquire
Mark A. Keffer, Esquire
AT&T Communications of PA, LLC
3033 Chain Bridge Road, Room 3-D
Oakton, VA 22185
(703) 691-6061
(703) 691-6093 (fax)

Joseph J. Laffey, Vice President
D&E Communications (CEI Networks)
130 East Main Street
P.O. Box 458
Ephrata, PA 17522
(717) 738-8606
(717) 733-2364 (fax)

Peggy Rubino, Esquire
Z-Tel Communications Inc.
601 S. Harbour Island Boulevard
Suite 220
Tempa, FL 33602

Rogelio E. Pena, Esquire
Pena & Associates, LLC
1375 Walnut Street, Suite 220
Boulder, CO 80302
(303) 415-0409
(303) 415-0433 (fax)
(e-mail only: repena@boulderattys.com)

Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman
3000 K Street, NW
Washington, DC 20007
(202) 424-7500
(202) 424-7645 (fax)

Norman James Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17105
(717) 236-1300
(717) 236-4841 (fax)

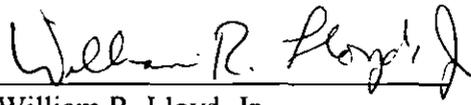
Richard U. Stubbs, Esquire
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974
(267) 803-4002

Renardo L. Hicks, Esquire
Anderson, Gulota & Hicks, PC
1110 N. Mountain Road
Harrisburg, PA 17112
(Penn Telecom)
(717) 541-1194
(717) 541-5434 (fax)

Jeffrey J. Heins
Adelphia Business Solutions of PA
d/b/a Telecove
712 North Main Street
Coudersport, PA 16915

Jeanne Price
Marvin Hendrix
CEI Networks
P.O. Box 458, 130 East Main Street
Ephrata, PA 17522

William E. Ward
CTC Communications Corporation
115 Second Avenue
Waltham, MA 02451



William R. Lloyd, Jr.
Small Business Advocate

Date: July 15, 2004

Julia A. Conover
Vice President and General Counsel
Pennsylvania



ORIGINAL

1717 Arch Street, 32W
Philadelphia, PA 19103
Tel: (215) 963-6001
Fax: (215) 563-2658
Julia.A.Conover@Verizon.com

DOCUMENT
FOLDER

July 23, 2004

RECEIVED

JUL 23 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA UPS OVERNIGHT DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers
to Unbundle Network Elements, Docket No. I-00030099*

Dear Secretary McNulty:

Enclosed please find the original and nine copies of the Comments of Verizon Pennsylvania Inc. and Verizon North Inc. on Summary of the Record, in reference to the above captioned matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Julia A. Conover

JAC/meb

Enclosure

cc: Via UPS Overnight Delivery
Honorable Susan Colwell
Attached Certificate of Service

84

ORIGINAL RECEIVED
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION JUL 23 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Investigation into the :
Obligation of Incumbent : Docket No.
Local Exchange Carriers : I-00030099
to Unbundle Network Elements :

**DOCUMENT
FOLDER**

**COMMENTS OF VERIZON PENNSYLVANIA INC. AND
VERIZON NORTH INC. ON SUMMARY OF THE RECORD**

Verizon Pennsylvania Inc. and Verizon North Inc. (collectively "Verizon") provide the following comments on the Summary of the Record Evidence ("Summary") issued in this proceeding on June 23, 2004.¹

By Secretarial Letter issued June 3, 2004, the Commission directed the Office of Administrative Law Judge to prepare "a summary of the record evidence" designed to "summarize what the record shows as to the existence of alternative (non-Verizon) switches, transport and high capacity loops on a geographic basis to serve wireline customers." Thereafter, on June 16, the D.C. Circuit Court of Appeals issued its mandate in *United States Telecom Assoc. v. FCC (USTA II)*² vacating the Commission's

¹ The Commission stated that the Summary would be subject to comment by the parties. June 3, 2004 Secretarial Letter. Following issuance of the Secretarial Letter, Verizon petitioned to terminate this proceeding without further action, including the issuance of the Summary and filing of Comments. Thereafter, the Summary was issued and the parties were given 30 days to file Comments. Since Verizon's petition to terminate is still pending, Verizon submits these comments in compliance with the June 3 Letter and the Summary.

² 359 F.3d 554, 568 (D.C. Cir. 2004) ("*USTA II*").

DOCKETED
AUG 2 2004

authority to proceed with this matter. Specifically, *USTA II* vacated those portions of the FCC's TRO rules "that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements," and also rejected the substantive rules under which the record in this case was developed.³ These developments seriously undercut the Summary's value to the Commission; indeed, as the ALJ noted, after the D.C. Circuit decision, "this proceeding lost any *raison d'etre*."⁴

Despite the serious limitations in the record, many of which are documented in the Summary itself, the Summary nonetheless confirms that facilities based competition is thriving in Pennsylvania, and that it is not limited solely to urban areas of Philadelphia and Pittsburgh but extends to smaller cities like Allentown/Bethlehem/Easton, Scranton/Wilke-Barre, Harrisburg and Reading. For example, Verizon's exhibit that the ALJ characterizes as a "reasonably accurate 'snapshot in time'" (Summary at 12) shows that competitors are serving nearly **350,000 mass market lines** using their own switching in the eight Pennsylvania markets areas that were at issue in this case. The record, as reflected in the Summary, makes it clear that competitors are not impaired without access to high-capacity transport, mass market switching, and high capacity loops in significant areas of the Commonwealth. Indeed, as discussed below, any flaws in the record (resulting from the use of the FCC's now-vacated impairment standards and other factors) serve to *understate* the extent of facilities based local competition in Pennsylvania.

³ *Id.* at 568-573.

⁴ Summary at 5.

I. THE SUMMARY IS LIMITED BY THE SIGNIFICANT CONSTRAINTS OF THE RECORD, AS THE ALJ RECOGNIZED.

Verizon filed its Petition in this docket to rebut the FCC's national finding of impairment for mass market switching, dedicated transport and high-capacity loops under the specific standards embodied in the FCC's objective "triggers" tests, as outlined in the *Triennial Review Order (TRO)*. The testimony and exhibits in this proceeding were developed solely and specifically to rebut the FCC's national finding of "impairment" for mass market switching, high capacity loops and dedicated interoffice transport under the now-defunct "triggers" tests, and necessarily were constrained by the substantive limitations imposed by the FCC on that analysis. The FCC's legal test has now been invalidated and the FCC's rules vacated by *USTA II*.

The ALJ plainly recognized that the rejection of the FCC's legal test limits the usefulness of this evidentiary record. As the ALJ himself noted that "the FCC's standards . . . dictated, in part, the evidence that was produced." (Summary at 6). For example, with respect to evidence related to transport, Verizon submitted "route specific" reports showing where CLEC facilities linked pairs of wire centers. Because the *USTA II* Court invalidated the FCC's "route-specific" analysis for transport "impairment," the ALJ observed that "it is doubtful that this method of determining impairment for dedicated transport will be of any usefulness in the future."⁵

Similarly, Verizon did not present evidence of significant sources of intermodal competition or of the widespread availability of Verizon's tariffed wholesale services such as special access (which the *USTA II* court found critical to any impairment analysis for

⁵ *Id.* at 15.

dedicated transport) because of the limitations of the FCC's "triggers" analysis. The ALJ specifically noted this omission with respect to intermodal services:

In terms of competition generally, it is important to note that these data do not reflect the extent to which CLECs serve enterprise (as opposed to mass market) customers with their own facilities. *Nor do they reflect residential customers' use of cell phones in substitution for wireline service, or the use of Voice Over Internet Protocol (VOIP), either over public broadband connections or over enterprise data networks, as a substitute for wireline voice service.* (p. 13)

Any assessment of the competitive market in Pennsylvania must recognize these new technologies; yet – due to time constraints and the infirmities of the FCC's invalidated legal test -- they were not reflected in the analysis presented in this docket.

In addition to constraints imposed by the FCC's now-vacated legal test, the ALJ also recognized the limitations caused by the time pressures imposed in litigating this case. The Pennsylvania 9-month docket was one of the first – if not the first – to hold hearings; indeed, many jurisdictions had not even concluded the submission of testimony let alone hearings by the time the *USTA II* decision was issued in March. As a result, the ALJ specifically noted that the record was "limited by the time within which this proceeding was required to be completed, which, in turn, limited the parties' opportunities to use discovery to further explore ambiguous information provided by each other."⁶ For example, the ALJ cited a problem with the exclusion of non-CLEC competitive fiber providers from the Commission's initial interrogatories, which meant that "the record is silent" on those providers' description of their facilities. (Summary at 17). As a result of all of these flaws, he concluded that the information on "the state of facilities based telephone competition" in the record "is interesting but limited."

⁶ The ALJ observed that "If, for any reason, the Commission decides it needs such information in the future, it should allow more time for its collection." Summary at 19.

Significantly, all of these flaws and limitations tend to *understate* by a substantial margin the amount of true facilities-based competition in Pennsylvania, thereby further undercutting the usefulness of this record for any purpose. For example, VoIP providers are not included in the mass market switching analysis, but they are a growing competitive presence in Pennsylvania and elsewhere. Any customer with access to cable modem service has access to VoIP, whether provided by their cable operator, by national providers like Vonage, or by others. Similarly, wireless providers are continuing to make competitive gains at the expense of mass-market wireline customers. According to the most recent FCC Report on local competition, there were 6,073,473 wireless subscribers in Pennsylvania at year end 2003⁷ – more than the total number of Verizon access lines (approximately 5.7 million retail lines for both Verizon companies as of December 2003).

Thus, this record cannot possibly be the basis for any accurate, granular picture of the extent of competition in Pennsylvania.

II. THE RECORD, THOUGH FLAWED, SHOWS THAT FACILITIES-BASED COMPETITION IN PENNSYLVANIA IS ROBUST.

Despite the limitations on record development noted above, the Summary of Evidence nonetheless makes abundantly clear that facilities-based competition in Pennsylvania is extremely robust.

Mass market switching: The ALJ concluded that Verizon's summary exhibit "appears to be a reasonably accurate 'snapshot in time' of the non-enterprise lines served

⁷ See *Local Telephone Competition Status as of December 31, 2003*, Table 13 http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf.

by other than Verizon switching.” (p. 12). This exhibit shows that almost 350,000 lines in eight market areas (SMSAs) are served by CLECs using their own switches. Based on this exhibit, the ALJ found that there are at least four companies providing significant facilities-based service to residential customers: Comcast in the Pittsburgh area, RCN in the Philadelphia area, CTSI and CEI. (Summary at 12) With respect to mass market switching for business customers, the ALJ concluded that “there are significant number of DS0 lines being serviced by non ILEC switches in the Allentown-Bethlehem-Easton, Harrisburg-Carlisle, Philadelphia-Camden-Wilmington, Pittsburgh, and Scranton-Wilkes Barre areas. Smaller but not ‘de minimis’ numbers are being provided in Lancaster, Lebanon, and Reading areas.” (Summary at 12-13).

The FCC’s most recent Local Telephone Competition Report for the period ending December 31, 2003, also corroborates these findings. According to that report, **554,055 access lines** – 35% of the approximately 1.5 million CLEC lines in Pennsylvania --are provided solely over CLEC-owned facilities.⁸ Fewer than **half** (49%) of all lines are provided using UNEs, including both UNE-P and UNE loop (where the CLEC provides its own switching facilities).⁹

The ALJ appropriately made no findings on the other parties’ arguments that certain kinds of CLEC lines do not “count” for purposes of the “triggers” analysis,

⁸ This figure includes both enterprise and market customers, but does not include carriers serving fewer than 10,000 lines. See http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf. (table 10)

⁹ The FCC report contains no breakdown of UNE-P versus UNE-Loops; however, the record in this case establishes that a significant percentage of mass market loops— around 43% -- are UNE-Loops where the CLEC supplies its own switching. See *AT&T St. 1.0, Exh. 10* (providing a breakdown of UNE-P and UNE-Loop in the relevant SMSAs as of June 30, 2003)

because “the FCC’s standards are not ‘operative.’” (Summary at 11) As the *USTA II* decision makes clear, the FCC “cannot ignore intermodal alternatives” in making an impairment analysis.¹⁰

Transport: While the ALJ noted at length problems in developing a complete record, he ultimately concluded that “in the Philadelphia, Pittsburgh, Allentown and Harrisburg areas, there is considerable non-Verizon fiber that might be used to interconnect Verizon central offices.” (p. 17)

High Capacity Loops: Based on the very limited CLEC responses to the Commission’s discovery, Verizon presented evidence of locations where the CLECs deployed high capacity loops. The ALJ acknowledged that the debate here involves “primarily an argument over the meaning of the FCC's now defunct standards,” but nevertheless concluded that “subject to these caveats, Exhibit 3 to Verizon’s Main Brief lists several locations, all in the Philadelphia Metropolitan area or the City of Pittsburgh, to which a few CLECs have deployed their own high capacity loops.” (p. 19).

¹⁰ *USTA II* at 572-73..

III. CONCLUSION

The Commission now has a Summary of Evidence that describes the record and notes its many infirmities. There is no longer any legal basis, and no need, for any further action in this docket. Therefore, now that the parties have had an opportunity to provide comments, Verizon respectfully requests that the Commission (1) grant Verizon leave to withdraw its Petition to Initiate Proceedings and (2) terminate all further proceedings in this matter and close the docket.

Respectfully submitted,



Julia A. Conover
Suzan DeBusk Paiva
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6001
fax (215) 563-2658
e-mail: Julia.a.conover@verizon.com
Suzan.d.paiva@verizon.com

Counsel for Verizon Pennsylvania, Inc. and
Verizon North, Inc.

DATED: July 23, 2004

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a copy of Verizon Pennsylvania Inc.'s and Verizon North Inc.'s Comments on Summary of the Record, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 23rd day of July, 2004.

RECEIVED

JUL 23 2004

VIA UPS OVERNIGHT DELIVERY

Patricia Armstrong, Esquire
Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
& Niesen
212 Locust Street, Suite 500
Harrisburg, PA 17108
Counsel for RTCC

Norman Kennard, Esquire
Hawke McKeon Sniscak & Kennard
100 North Tenth Street
Harrisburg, PA 17101
Counsel for PTA

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Genevieve Morelli, Esquire
Ross Buntrock, Esquire
Heather Hendrickson, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
Counsel for Broadview, BullsEye,
ARC/InfoHighway, McGraw, Met Tel
and Talk America

Alan Kohler, Esquire
Daniel Clearfield, Esquire
Wolf, Block, Schorr & Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101-1236
Counsel for ATX, Full Service Network,
Line Systems Inc., Remi Retail and
Comcast

Enrico Soriano, Esquire
Steven A. Augustino, Esquire
Darius Withers, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036
Counsel for Choice One, Broadview,
Focal, SNiP LiNK and XO

Russell Blau, Esquire
Robin F. Cohn, Esquire
Tamar Finn, Esquire
Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007-5116
Counsel for RCN, Lightship and CTSI

William Lloyd, Esquire
Office of Small Business Advocate
Commerce Building – Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Philip McClelland, Esquire
Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street
Frum Place – 5th Floor
Harrisburg, PA 17101-1923
Via e-mail only to OCA Consultants:
Rowland Curry
Melanie Lloyd
Bob Loube

Michelle Painter, Esquire
MCI WorldCom Communications, Inc.
22001 Loudoun County Parkway
E2-3-507
Ashburn, VA 20147-6105
Counsel for MCI

Johnnie Simms, Esquire
Office of Trial Staff
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Sue Benedek, Esquire
Sprint Communications Co. LP
240 North Third Street
Suite 201
Harrisburg, PA 17101
Counsel for Sprint

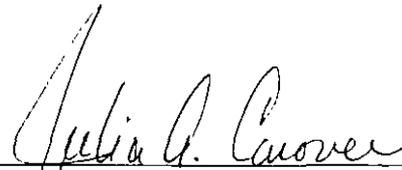
Richard U. Stubbs, Esquire
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974
Counsel for Cavalier

Charles V. Gerkin, Jr., Esquire
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231
Counsel for Allegiance

Robert C. Barber, Esquire
AT&T Communications of PA
3033 Chain Bridge Road
Oakton, VA 22185
Counsel for AT&T

Renardo L. Hicks, Esquire
Anderson, Gulotta & Hicks, P.C.
4229 Elmerton Ave.
Harrisburg, PA 17109
Counsel for Penn Telecom

Thomas Koutsky, Esquire
Z-Tel Communications, Inc.
1200 19th Street, N.W., Suite 500
Washington, DC 20036



Julia A. Conover
Julia A. Conover
Verizon Pennsylvania Inc.
Verizon North Inc.
1717 Arch Street, 32NW
Philadelphia, PA 19103
(215) 963-6001



Zsuzsanna E. Benedek
Senior Attorney

240 North Third Street, Suite 201
Harrisburg, PA 17101
Telephone (717) 236-1385
Fax (717) 236-1389

July 26, 2004

VIA HAND DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

ORIGINAL
DOCUMENT
FOLDER

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements - Docket No.- I-00030099

Dear Secretary McNulty:

Attached please find an original and ten (10) copies of the Comments of Sprint Communications Company, L.P. (hereinafter "Sprint") to the Summary of Record Evidence prepared by Administrative Law Judge Michael C. Schnierle in the above-captioned matter.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Sue Benedek

ZEB/jh
enclosures

cc: Chief Administrative Law Judge Veronica A. Smith (*via hand delivery*)
Certificate of Service (*via electronic mail and first-class mail*)

REC'D
2004 JUL 26 PM 3:14
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to) Docket No. I-00030099
Unbundle Network Elements)

ORIGINAL
RECEIVED
AUG 26 11:34 AM
SECRETARIAT'S BUREAU

COMMENTS OF
SPRINT COMMUNICATIONS COMPANY, L.P.
TO SUMMARY OF RECORD EVIDENCE

On June 3, 2004, the Pennsylvania Public Utility Commission ("PUC" or "Commission") issued a Secretarial Letter in the above-captioned matter. The Commission directed the Office of Administrative Law Judge to prepare a summary of the record evidence as "the next step in this proceeding."¹ The Commission cautioned that the summary will not be a Recommended Decision relative to the legal standards promulgated in the Triennial Review Order ("TRO"). However, the Commission requested that the record summary contain the following information:

The summary will recite the party positions on each issue and provide any other useful information, such as explain points of debate among the parties as to alternative sources of facilities or explain why there are uncertainties as to what facilities exist to serve customers. It will summarize what the record shows as to the existence of alternative (non-Verizon) switches, transport and high capacity loops on a geographic basis to serve wireline customers.²

On June 24, 2004, just eight calendar days after Verizon Pennsylvania Inc. and Verizon North Inc. (collectively, "Verizon") filed a Motion to Close the proceeding and to halt production of the contemplated record summary, the Office of Administrative Law

¹ PA PUC Secretarial Letter, dated June 3, 2004 at 1.

² *Id.*

DOCKETED
AUG 2 2004

DOCUMENT
FOLDER

Judge released Judge Michael C. Schnierle's 20-page summary of the record. Comments are due by July 26, 2004. Sprint Communications Company, L.P. (hereinafter "Sprint") submits the following comments to the prepared summary of the record.

A. *USTA II* did not create "defunct" national impairment standards, nor did *USTA II* strike down high capacity loops as a "subset" of dedicated transport, as the summary of record incorrectly finds.

The record summary states that, in light of the *USTA II* decision,³ "the FCC's [impairment] standards are defunct."⁴ Having made this incorrect assumption, the record summary also goes on to conclude that the D.C. Circuit Court in *USTA II* treated high capacity loops "as a subset of 'dedicated transport.'"⁵ These unsupported conclusions are problematic from Sprint's standpoint for at least two reasons. First, this is not what *USTA II* did or what *USTA II* decided. Second, if left uncorrected, Verizon may construe and use these statements as justification that it is no longer required to unbundle and provide high capacity loops.

The record summary is incorrect in assuming that the FCC's national impairment standards are "defunct".⁶ *USTA II* did not strike down the entire TRO. In addition to removing the state commissions' ability to make certain impairment findings, *USTA II* struck down only the express UNEs identified and addressed by the D.C. Circuit Court. The UNEs expressly identified and struck by the Court include mass market switching and the UNE platform; DS1, DS3, and dark fiber transport; and interoffice transport for CMRS carriers.⁷ Other TRO findings were specifically upheld. Still others were not addressed at all, and

³ *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 2004 U.S. App. LEXIS 3960 (D.C. Cir.2004), *stay denied*, 2004 U.S. App. LEXIS 11063 ("*USTA II*").

⁴ Summary of Record at 16-17. *See also*, "[T]he FCC's not defunct standards." *Id.* at 18.

⁵ Summary of Record at 5.

⁶ *Id.* at 16-17, 18.

⁷ *USTA II*, 359 F.3d at 568-71, 573-74.

among these were high-capacity UNE loops.⁸ To the extent not specifically addressed and vacated in *USTA II*, the FCC's national impairment findings still stand. Indeed, as the D.C. Circuit Court's order makes clear, whatever was not specifically addressed by the court was "otherwise denied."⁹

In light of the Court's determinations with respect to market switching and dedicated interoffice transport, the record summary apparently concludes that the national impairment finding for high capacity loops has been vacated as well. This is not true. The Court did not rule on the lawfulness of the impairment finding for high cap loops and thus the national finding of impairment has been unaffected. While the FCC was divided on other issues, it reached this determination by a unanimous vote. In his separate statement, Chairman Powell made it a point to emphasize that, although fiber loops are no longer required to be unbundled (an aspect of the Triennial Review Order specifically upheld by *USTA II*), "competitors will continue to receive access to high-capacity loops provided over incumbent LEC Time Division Multiplexing ('TDM') networks."¹⁰ The TRO thereby directs that "[a]n incumbent LEC *shall provide* a requesting telecommunications carrier with nondiscriminatory access to" these high-capacity loops at TELRIC, except where there have been state findings of fact on non-impairment, self-provisioning, and wholesale alternatives.¹¹ Indeed, in expressly upholding the TRO's requirement that ILECs provide routine network modifications, it pointed specifically to high-capacity loops as an example of

⁸ High-capacity UNE loops include DS1, DS3, and dark fiber loops. TRO at ¶¶ 311, 320, 325. They exclude OCn-level capability, because the Commission found no impairment at that capacity level. *Id.* at ¶ 315.

⁹ *USTA II*, 359 F.3d at 594.

¹⁰ TRO, Statement of Chairman Powell at 1.

¹¹ 47 C.F.R. §§ 51.319(a)(4)-(6) and TRO at App. B pp. 13-15 (emphasis added).

where such network modifications are required.¹² Similarly, in upholding the order’s exclusion of fiber-to-the-home loops from unbundling, it acknowledged CLEC arguments that the Commission had found impairment for high-capacity DS3 loops, because “‘a single DS3 loop, generally, can not provide a sufficient revenue opportunity’ to overcome the entry barriers to deployment.”¹³ The D.C. Circuit Court understood the significance of high-capacity loops, yet did not act to vacate them.

The D.C. Circuit Court in *USTA II* addressed many individual network elements raised by the appealing ILEC and CLEC petitioners. It specifically vacated mass market switching and dedicated transport, but it was silent on high-capacity loops. Clearly, Verizon’s continuing obligation to provide high capacity loops remains unaffected by *USTA II*.

Accordingly, this Commission must correct the record summary and make it very clear that *USTA II* did not render “defunct” the FCC’s national impairment findings. Likewise, the Commission should correct the improper statement in the record summary that high capacity loops are “a subset of ‘dedicated transport’” when the D.C. Circuit Court in *USTA II* made no such finding. The Commission should conclude that the FCC’s national impairment findings clearly apply to high capacity loops (DS1, DS3, and dark fiber loops) and that Verizon’s continuing obligation to provide such high capacity loops remains unaffected by *USTA II*.

¹² *USTA II*, 359 F.3d at 578, discussing TRO at ¶¶ 633-34.

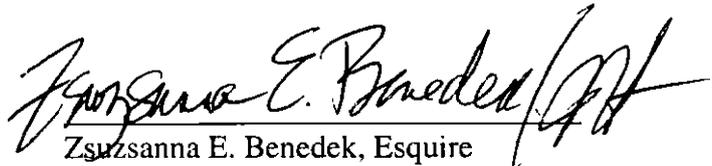
¹³ *Id.* at 583, quoting TRO at ¶ 320.

B. This Commission should transmit select portions of the record to FCC.

The FCC is developing new rules, and reportedly interim rules, as a result of *USTA II*. While it is too soon to definitively say what information relative to the Pennsylvania TRO record (as it exists or as it may be supplemented) may be relevant and useful in this regard, it is known that the Court in *USTA II* did not completely close the door as to state involvement.¹⁴ Accordingly, so as not to overburden the FCC, Sprint submits that the Commission should transmit appropriate portions of the Pennsylvania TRO record to the FCC, subject to any further request for information from the FCC.

WHEREFORE, for the reasons set forth above, Sprint submits these Comments to ALJ Schnierle's Summary of the Record Evidence.

Respectfully submitted,



Zsuzsanna E. Benedek, Esquire
Sprint Communications Company, L.P.
240 North Third Street, Suite 201
Harrisburg, PA 17101
Phone: (717) 245-6346
Fax: (717) 236-1389
e-mail: sue.e.benedek@mail.sprint.com

**On behalf of Sprint Communications
Company, L.P.**

DATED: July 26, 2004

¹⁴ *USTA II*, 359 F.3d at 587 (Delegation to the state commissions of a fact finding role as to enterprise switching where the state commission gathers evidence and can petition the FCC if it feels that a finding of non-impairment is unjust is not affected by the Court's decision regarding unlawful subdelegation of decision making authority to state commissions.).

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Investigation into the Obligations of)
Incumbent Local Exchange Carriers to) Docket No. I-00030099
Unbundle Network Elements)

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of July, 2004, served a true copy, via electronic and first-class mail, of the foregoing Comments, in accordance with the requirements of 52 Pa. Code §1.54:

Julia A. Conover, Esquire
Suzan D. Pavia, Esquire
William B. Peterson, Esquire
Verizon Pennsylvania, Inc.
1717 Arch Street, 32NW
Philadelphia, PA 19103

Steven Gray, Esquire
Office of Small Business Advocate
300 North Second Street
Commerce Building, Suite 1102
Harrisburg, PA 17101

Office of Trial Staff
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Norman Kennard, Esquire
Hawke, McKeon, Sniscak and Kennard, LLP
100 North Tenth Street
Harrisburg, PA 17101

Ross A. Buntrock, Esquire
Genevive Morelli, Esquire
Heather T. Hendrickson, Esquire
Kelley, Drye and Warren, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Alan Kohler, Esquire
Wolf, Block, Schorr and Solis-Cohen
212 Locust Street, Suite 300
Harrisburg, PA 17101

Michelle Painter, Esquire
MCI WorldCom, Inc.
22001 Loudoun County Parkway, E2-3-507
Ashburn, VA 20147

Phillip McClelland, Esquire
Barrett Sheridan, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1923

Robert C. Barber, Esquire
AT&T Communications of PA
3033 Chain Bridge Road
Oakton, VA 22185

Phillip J. Macres, Esquire
Swidler, Berlin, Shereff and Friedman, LLP
3000 K Street, NW
Washington, DC 20007-5116

SECRETARIAT BUREAU

2004 JUL 26 PM 3:14

RECEIVED

Enrico C. Soriano, Esquire
Steven A. Augustino, Esquire
Darius B. Withers, Esquire
Kelley, Drye and Warren, LLP
1200 19th Street, NW
Washington, DC 20036

Debra M. Kriete, Esquire
Rhoads and Sinon, LLP
One South Market Street
12th Floor
Harrisburg, PA 17101

Renardo L. Hicks, Esquire
Anderson, Gulotta and Hicks, PC
1110 North Mountain Road
Harrisburg, PA 17112

Jeanne Price
Marvin Hendrix
CEI Networks
PO Box 458
130 East Main Street
Ephrata, PA 17522

Jeffrey J. Heins
Telecove Communications, Inc.
712 North Main Street
Coudersport, PA 16915

Rebecca Sommi
Vice President, Regulatory
Broadview Networks, Inc.
400 Horsham Road
Horsham, PA 19044

Thomas Koutsky, Vice President
Law and Public Safety
Z-Tel Communications, Inc.
1200 19th Street, NW, Suite 500
Washington, DC 20036

Peggy Rubino
Z-Tel Communications, Inc.
601 South Harbour Island Boulevard
Suite 220
Tampa, FL 33602

Richard U. Stubbs, Esquire
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Rogelio E. Pena, Esquire
1375 Walnut Street
Suite 220
Boulder, CO 80302
(via electronic mail only)

William E. Ward
CTC Communications Corporation
115 Second Avenue
Waltham, MA 02451

Respectfully Submitted,



Zsuzsanna E. Benedek, Esquire
Sprint Communications Company, L.P.
240 North Third Street, Suite 201
Harrisburg, PA 17101
Phone: (717) 245-6346
Fax: (717) 236-1389
E-Mail: sue.e.benedek@mail.sprint.com



Robert C. Barber
Senior Attorney

Room 3D
3033 Chain Bridge Road
Oakton, VA 22185
703 691-6061
FAX 703 691-6093
EMAIL rbarber@att.com

July 26, 2004

BY OVERNIGHT MAIL

Mr. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

DOCUMENT
FOLDER
ORIGINAL

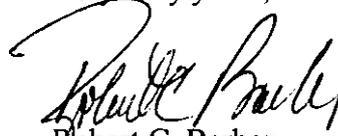
Re: Investigation Into Obligations Of Incumbent
Local Exchange Carriers To Unbundle Network Elements
Docket No. I-00030099

Dear Mr. McNulty:

Please find enclosed for filing in the above-captioned proceeding the original and three (3) copies of AT&T Communications of Pennsylvania, LLC's Comments Concerning the Summary of the Record Evidence.

Please do not hesitate to contact me with any questions regarding the enclosures.

Very truly yours,


Robert C. Barber

Enclosures

cc: (w/ encl)
The Honorable Susan Colwell
Service List (w/ encl)

RECEIVED

JUL 26 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Certificate of Service
Docket No. I-00030099

RECEIVED

JUL 26 2004

The undersigned hereby certifies that true and correct copies of AT&T Communications Pennsylvania, LLC's Comments Concerning the Summary of the Record Evidence were caused to be served on persons named below by electronic and overnight or first class mail in accordance with the requirements of 52 Pa. Code §§ 1.52 and 1.54:

Patricia Armstrong, Esq.
Thomas, Thomas, Armstrong & Niesen
PO Box 9500
Harrisburg, PA 17108

Michelle Painter, Esq.
MCI
1133 19th Street, NW
Washington, DC 20036

Philip F. McClelland, Esq.
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923

Zsuzsanna E. Benedek, Esq.
Sprint
240 North Third St., Suite 201
Harrisburg, PA 17101

Alan Kohler, Esq.
Daniel Clearfield, Esq.
Wolf Block Schorr & Solis-Cohen
Locust Court, Suite 300
212 Locust Street
Harrisburg, PA 17101

Angela Jones, Esq.
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Julia A. Conover, Esq.*
Suzan Paiva, Esq.
Verizon Pennsylvania, Inc.
1717 Arch Street 32 NW
Philadelphia, PA 19103

Kandace Melillo, Esq.
Office of Trial Staff
Pennsylvania PUC
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Steven A. Augustino, Esq.
Kelley Drye & Warren LLP
1200 19th Street N.W.
Suite 500
Washington, DC 20036

Richard U. Stubbs, Esq.
Cavalier Telephone Mid-Atlantic, LLC
965 Thomas Drive
Warminster, PA 18974

Renardo L. Hicks, Esq.
Anderson Gulotta & Hicks, PC
1110 N. Mountain Road
Harrisburg, PA 17112

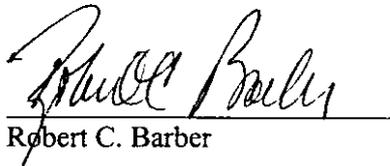
Philip Macres, Esq.
Swidler Berlin Shereff & Friedmann
3000 K Street, NW
Washington, DC 20007

Ross A. Buntrock, Esq.
Kelley Drye & Warren LLP
1200 19th Street N.W.
Suite 500
Washington, DC 20036

Debra M. Kriete, Esq.
Rhoads & Sinon LLP
1 South Market Square, 12th Fl.
Harrisburg, PA 17101

Thomas Koutsky, Esq.
Z-Tel
1200 19th Street, NW
Suite 500
Washington, DC 20036

Robin Cohn, Esq.
Russell Blau, Esq.
Swidler Berlin Shereff Friedman
3000 K St., NW
Washington, DC 20007



Robert C. Barber

Dated: July 26, 2004

* overnight mail

ORIGINAL

RECEIVED

JUL 26 2004

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU**

**Investigation into the Obligations of)
Incumbent Local Exchange Carriers to)
Unbundle Network Elements)**

Docket No. I-00030099

DOCKETED
AUG 2 2004

**AT&T COMMUNICATIONS OF PENNSYLVANIA, LLC'S
COMMENTS CONCERNING
THE SUMMARY OF THE RECORD EVIDENCE**

ALJ Schnierle's high-level summary of the massive record that was developed in this case fairly depicts the serious and ultimately fatal deficiencies in Verizon's effort to eliminate the unbundled network elements platform ("UNE-P") in Pennsylvania. As he described it, Verizon's "evidence" concerning impairment for mass market switching was afflicted by, among other problems, its failure to distinguish between residential and business UNE-L competition, its effort to portray DS0s provided to enterprise business customers as evidence of mass market competition, and its attempt to pass off tens of thousands of lines attributable to the state government's telecommunications contract as mass market service.¹

**DOCUMENT
FOLDER**

Of course, none of that comes as any surprise to any party that was involved in this proceeding. Indeed, the defects identified in the Summary are symptomatic of Verizon's approach throughout this proceeding, and especially its attempt to avoid anything resembling a thorough, fully informed examination of the status of competition in Pennsylvania. This was evident in Verizon's simplistic interpretation of the *TRO*, an approach which would have had the Commission ignore such critical factors as the minimal extent of unbundled loop

¹ Summary of the Record Evidence, Docket No. I-00030099, June 22, 2004, at 10-12.

(“UNE-L”) competition for residential customers and the competitive consequences for consumers of the loss of UNE-P based alternatives.

Given that history, it thus also comes as no surprise that Verizon attempts to portray the Summary as actually endorsing its data, citing the Summary as purportedly concluding that Verizon’s evidence “appears to be a reasonably accurate ‘snapshot in time’ of the non-enterprise lines served by other than Verizon switching.”² What the Summary really states, of course, is that *except for* Verizon’s willful depiction of the state government contract as “mass market” lines, *except for* its inclusion of DSOs provided to enterprise customers, and *except for* its failure to separately identify residential UNE-L lines, Verizon’s “snapshot” was “reasonably accurate.”³ This is akin to stating that, except for the exaggeration, embellishment, and utter fantasy, *Alice In Wonderland* accurately portrays life on the other side of the looking glass.

The truth is that Verizon’s “evidence” in this case was so riddled with errors and willful misstatements that it cannot seriously be relied upon as an “accurate” portrayal of the state of competition in Pennsylvania, much less as the basis for such a critical step as eliminating UNE-P. In contrast, the complete evidentiary record – and, in particular, the analysis put forward by AT&T – conclusively demonstrates that competitors continue to be impaired in the absence of unbundled switching, dedicated transport and high capacity loops.

Given its the limited nature, the Summary was not able to give full attention to all aspects of that record. As a result, certain important points merit mention here.

² Verizon Pennsylvania Inc.’s and Verizon North Inc.’s Reply to Oppositions to Petition to Withdraw Petition and Close Proceeding, Docket No. I-00030099, July 12, 2004, at 5.

³ Summary of the Record Evidence at 12.

For example, the Summary does not note that while Verizon attempted to prove non-impairment for mass market switching in eight Metropolitan Statistical Areas (“MSAs”) -- Allentown/Bethlehem/Easton; Harrisburg/Carlisle; Lancaster; Lebanon; Philadelphia; Pittsburgh; Reading; and Scranton/Wilkes-Barre – it limited that challenge to Density Cells 1, 2 and 3 in those MSAs. That is, Verizon’s evidentiary presentation purposely excluded Density Cell 4 wire centers altogether. By electing not to include that data, Verizon essentially conceded impairment for over 1 million lines in over different 100 wire centers in VZ-PA’s territory.

The same generally holds true for Verizon North’s territory. While a few Verizon North wire centers were implicated within the MSAs targeted by Verizon –resulting in Verizon North’s belated addition to the case as a petitioner -- the bulk of the VZ North territory (and wire centers and lines) were not included in the case. The exclusion of this VZ North data essentially conceded impairment for another 600,000 lines.

Even in those limited areas in which Verizon sought to eliminate UNE-P, a complete analysis of the data conclusively demonstrated impairment in the absence of unbundled switching for mass market customers –that is for *both* residential and small business customers. In the ALJ’s view, “[t]he biggest single problem with Verizon’s compilation is that it does not separate residential from small business lines.”⁴ Verizon’s data thus masked the fact that CLECs were not using their own switches to serve *both* the residential and small business segments of the mass market. Indeed, as the ALJ further observed that, based on his review of the evidence it appeared that only four “CLECs” were serving residential

⁴ *Id.* at 9.

customers – two cable telephony providers and two ILECs using their ILEC switching facilities to serve out-of-territory customers.⁵

That evidence, of course, proves nothing about whether a stand-alone CLEC *could* service residential customers by connecting Verizon unbundled loops to its own switch. More to the point, the complete record clearly demonstrates that CLECs are not doing so *now* in any significant numbers. To the contrary, once “Verizon’s “evidence” was put to the test in an evidentiary proceeding, it became clear that there are no wire centers, much less MSAs, where at least three CLECs are using their own switches to serve both the residence and business subscribers that comprise the “mass market.”⁶

In contrast, the record showed that UNE-P penetration in the areas targeted by Verizon was substantial. This is important context that is missing from the Summary. Indeed, Verizon’s own data showed that UNE-P entry involved hundreds of thousands of lines – the bulk of which were being used to serve residential customers -- and was widespread across all of the MSAs, with UNE-P competition present in virtually every wire center in every MSA. Thus, unlike with UNE-L, CLECs were able to use UNE-P to meet the telecommunications needs of large numbers of residential consumers, scattered widely across virtually all wire centers in the MSAs at issue.

Even this UNE-P data, however, understates the current extent of competition for residential customers through use of the platform because it predated AT&T’s entry into Pennsylvania’s residential local exchange market last fall. That entry, which was based on

⁵ *Id.* at 12.

⁶ *See* Direct Testimony of Robert Kirchberger and E. Christopher Nurse, AT&T Stmt. 1.0, Exhibits 1-8.

UNE-P, undoubtedly has increased the number of consumers who are currently enjoying competitive choice because of the availability of the platform.

It is precisely that choice, of course, that the Commission sought to foster when it required Verizon to make UNE-P available under the terms of the *Global Order*.⁷ And it is precisely that choice that Verizon has squarely in its sights in its unrelenting efforts to eliminate UNE-P. The Summary of the Record Evidence, and the underlying record itself, clearly demonstrate that those efforts should be rejected.

Respectfully submitted,

**AT&T Communications
of Pennsylvania, LLC**

By its Attorneys,



Robert C. Barber
3033 Chain Bridge Road
Oakton, VA 22185
(703) 691-6061

Of Counsel:
Mark A. Keffer

Dated: July 26, 2004

⁷ Although largely confining itself to a brief description of the evidence and litigation positions of the parties, the Summary mentions in passing that, presumably as a result of the Supreme Court's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), "the FCC's standards" for impairment "are defunct." Summary at 16-17. Any such suggestion, however, grossly overstates the reach of the *USTA II* decision. That decision did not invalidate the Telecommunication Act's basic "impairment" standard for unbundling. Nor did it invalidate the granular approach the FCC must use to assess impairment. To the contrary, any impairment analysis the FCC undertakes pursuant to the *USTA II* remand must continue to be "granular" under the requirements of *USTA I*. At a minimum, therefore, in developing any new unbundling rule the FCC must look at Pennsylvania-specific data before making any "nuanced" impairment decisions regarding the availability of unbundled elements in the Commonwealth. And regardless of the test it applies, the FCC certainly will need granular evidence of the type gathered in the state record to make its decision consistent with the requirements of *USTA I* and *USTA II*.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

RE: INVESTIGATION INTO THE OBLIGATION OF
INCUMBENT LOCAL EXCHANGE CARRIERS TO
UNBUNDLE NETWORK ELEMENTS

Docket No.
I-00030099

RE: INVESTIGATION INTO THE OBLIGATIONS OF
INCUMBENT LOCAL EXCHANGE CARRIERS TO
UNBUNDLE LOCAL CIRCUIT SWITCHING FOR
THE ENTERPRISE MARKET

Docket No.
I-0030100

DOCKETED
SEP 22 2004

PA. PUBLIC
UTILITY
SECRETARY'S BUREAU

2004 AUG 18 PM 4: 16

RECEIVED

NOTICE OF
WITHDRAWAL OF APPEARANCE

TO THE SECRETARY:

The Office of Trial Staff (OTS) of the Pennsylvania Public Utility Commission (Commission), pursuant to 52 Pa. Code § 1.24, hereby withdraws the appearance of Kandace F. Melillo, as a counsel of record in the above-captioned proceeding. Please direct questions regarding this to the undersigned.

Johnnie E. Simms
Chief Prosecutor
Office of Trial Staff
Pa. Public Utility Commission

P. O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-6170

Dated: August 18, 2004

DOCUMENT
FOLDER

48

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Investigation Into The Obligation :
Of Incumbent Local Exchange Carriers : Docket No.
To Unbundle Network Elements : I-00030099
:
Re: Investigation Into The Obligation :
Of Incumbent Local Exchange Carriers : Docket No.
To Unbundle Local Circuit Switching : I-00030100
For The Enterprise Market :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Notice of Appearance**, dated August 18, 2004, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below:

Barrett C. Sheridan, Esquire
Philip F. McClelland, Esquire
Office of Consumer Advocate
555 Walnut Street
Forum Place - 5th Floor
Harrisburg, PA 17101-1923

Carol F. Pennington, Esquire
Angela T. Jones, Esquire
Office of Small Business Advocate
Commerce Building - Suite 1102
300 North 2nd Street
Harrisburg, PA 17101

Ross A. Buntrock, Esquire
Genevieve Morelli, Esquire
Heather T. Hendrickson, Esquire
Kelley Drye & Warren LLP
1200 19th Street, NW Suite 500
Washington, D.C. 20036

RECEIVED
2004 AUG 18 PM 4: 16
SECRETARY'S BUREAU

Zsuzsanna E. Benedek, Esquire
Sprint Communications Co. LP
240 North Third Street - Suite 201
Harrisburg, PA 17101

Alan C. Kohler, Esquire
Wolf Block Schorr & Solis-Cohen
Suite 300
Locust Court Building
212 Locust Street
Harrisburg, PA 17101

Philip J. Macres, Esquire
Swidler Berlin Shereff Friedman LLP
3000 K Street NW
Suite 300
Washington, DC 20007-5116

Julia A. Conover, Esquire
William B. Peterson, Esquire
Suzan DeBusk Paiva, Esquire
Verizon Communications
1717 Arch Street, 32 NW
Philadelphia, PA 19103

Robert C. Barber, Esquire
Mark A. Keffer, Esquire
AT&T Communications of PA
3033 Chain Bridge Road
Room 3-D
Oakton, VA 22185

Michelle Painter, Esquire
MCI WorldCom Network Services Inc.
1133 19th Street, NW
Washington, DC 20036

Enrico C. Soriano, Esquire
Steven A. Augustino, Esquire
Darius B. Withers, Esquire
Kelley Drye & Warren LLP
1200 19th Street NW
Washington, DC 22182

Charles V. Gerkin, Jr., Esquire
Regulatory Counsel
Allegiance Telecom Inc.
9201 North Central Expressway
Dallas, TX 75231

Robin F. Cohn, Esquire
Swidler Berlin Shereff Friedman LLP
3000 K Street NW
Suite 300
Washington, DC 20007-5116

Thomas Koutsky, Esquire
Z-Tel Communications Inc.
1200 19th Street NW
Suite 500
Washington, DC 20036

Renardo L. Hicks, Esquire
Anderson, Gulotta & Hicks, P.C.
1110 North Mountain Road
Harrisburg, PA 17112

Richard U. Stubbs, Esquire
Conrad Counsel
Cavalier Telephone Mid Atlantic LLC
965 Thomas Drive
Warminster, PA 18974

Rogelio E. Pena, Esquire
1375 Walnut Street
Suite 220
Boulder, CO 80302

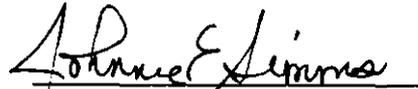
William E. Ward
CTC Communications Corporation
115 Second Avenue
Waltham, MA 02451

Jeffrey J. Heins
Adelphia Business Solutions of PA Inc.
d/b/a TelCove
712 North Main Street
Coudersport, PA 16915

Jeanne Price
Marvin Hendrix
CEI Networks
P.O. Box 458
130 East Main Street
Ephrata, PA 17522

Metro Teleconnect Companies, Inc.
2150 Herr Street
Harrisburg, PA 17103-1625

Honorable Susan D. Colwell
Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265



Johnnie E. Simms
Chief Prosecutor
Office of Trial Staff
Pa. Public Utility Commission

Dated: August 18, 2004
Docket Nos. I-00030099
I-00030100

ORIGINAL



Robert C. Barber
Senior Attorney

Suite 1000
1120 20th Street, NW
Washington, DC 20036
202 457-2160
FAX 281 664-9658
rcbarber@att.com

DOCUMENT
FOLDER

April 1, 2005

Mr. James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Docket No. I-00030099

Dear Mr. McNulty:

Please update the service list for the above referenced case with the following information for:

Robert C. Barber
Senior Attorney
AT&T
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-2160
rcbarber@att.com

RECEIVED
05 APR -4 AM 11:27
P.A.U.C.
SECRETARY'S BUREAU

DOCKETED

MAY 2 2005

Sincerely,
Robert C. Barber
Robert C. Barber

KJR