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February 2, 2004

BY OVERNIGHT MAIL AND ELECTRONIC MAIL

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

Dear Ms. Paiva:

Enclosed please find the PROPRIETARY supplemental responses of CTSI, LLC to Verizon-Pennsylvania, Inc.'s Third Set of Interrogatories in the above-captioned proceeding.

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

Sincerely,



Robin F. Cohn

cc: James J. McNulty, Secretary (cover letter and service list)
Service List

I hereby certify that on this 2nd day of February 2004, I served a copy of the foregoing PROPRIETARY Supplemental Response of CTSI, LLC to Verizon-Pennsylvania, Inc.'s Third Set of Interrogatories in Docket Number I-00030099, by electronic mail and U.S. first class mail, postage prepaid, except where otherwise indicated, on the following individuals:

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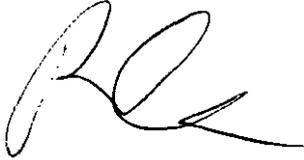
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A handwritten signature in black ink, appearing to read 'R. Cohn', written over a horizontal line.

Robin F. Cohn



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February 4, 2004

Pennsylvania Public Utility Commission
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RE:

Dear Madam or Sir:

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Choice One Communications, Inc. ("Choice One") is a certified competitive local exchange carrier operating in the state of Pennsylvania. Please add Stephanie Ayers-Hamilton to the service list for the following dockets at the address listed below. (1) Docket R-00016683 Generic Investigation Regarding Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates. (2) Docket I-00030099 Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements. (3) Docket M-00031754 Development of Efficient Loop Migration Process. (4) Docket P-00930715 Verizon Pennsylvania Inc. Petition and Plan for Alternative Form of Regulation Under Chapter 30. (5) Docket I-00030100 Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market.

Choice One Communications, Inc.
Attn: Stephanie Ayers-Hamilton
Network Planning Analyst
100 Chestnut Street
Rochester, New York 14604
(585) 697-2163
sayers@choiceonecom.com

Should you have any questions, please feel free to contact me at the number listed above.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Ayers-Hamilton".

Stephanie Ayers-Hamilton
Network Planning Analyst
Choice One Communications, Inc.



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

February 12, 2004

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

ORIGINAL

Re: Investigation Into The Obligations Of Incumbent Local
Exchange Carriers To Unbundle Network Elements

Docket No. I-00030099

Dear Secretary McNulty:

Enclosed for filing please find an original and nine (9) copies of the **Main Brief** of the Office of Trial Staff (OTS) in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Kandace F. Melillo

Kandace F. Melillo
Prosecutor
Office of Trial Staff

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Enclosure

c: Parties of Record

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RE: INVESTIGATION INTO THE :
OBLIGATIONS OF INCUMBENT : Docket No.
LOCAL EXCHANGE CARRIERS TO : I-00030099
UNBUNDLE NETWORK ELEMENTS :

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SECRETARY'S BUREAU

MAIN BRIEF
OF THE
OFFICE OF TRIAL STAFF

DOCUMENT
FOLDER

DOCKETED
FEB 27 2004

Kandace F. Melillo
Prosecutor

Office of Trial Staff
Pennsylvania Public
Utility Commission

P.O. Box 3265
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(717) 783-6155

Dated: February 12, 2004

ORIGINAL

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I. INTRODUCTION

In 1996, Congress enacted the Telecommunications Act of 1996 (“TA-96”), which established a national policy of promoting telecommunications competition to “secure lower prices and higher quality services for American telecommunications consumers.” TA-96 Preamble, PL 104-104, 110 Stat. 56 (1996). To accomplish this goal, Section 251 of TA-96, 47 U.S.C. §251, requires that Incumbent Local Exchange Carriers (ILECs) provide nondiscriminatory access to their network elements, on an unbundled basis, to Competitive Local Exchange Carriers (CLECs). These unbundled network elements (UNEs) must also be priced on the basis of cost, which has been defined as “forward-looking long-run economic cost” or TELRIC.¹

In determining what UNEs are to be made available to CLECs at TELRIC rates, the Federal Communications Commission (FCC), at a minimum, considers whether access is necessary and whether the failure to provide the UNE would impair the ability of the CLEC to provide the retail services it seeks to offer. 47 U.S.C. §251(d)(2)(A) and (B). Under the *UNE Remand Order*,² the FCC established that unbundling rules would be revisited every three years.

¹ See, 47 U.S.C. §§252(d)(1); see also, In The Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 et al., released August 8, 1996, ¶672.

² See, Implementation of the Local Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, 3725 (1999)(*UNE Remand Order*).

On August 21, 2003, as part of its revisiting of unbundling obligations, the FCC released its *Triennial Review Order (TRO)*,³ which set forth new rules for determining whether CLEC impairment exists without access to certain UNEs. Therein, the FCC, *inter alia*, established a national finding that CLECs are impaired without access to unbundled local circuit switching for mass market customers. *TRO*, ¶459. The FCC also called upon the states to conduct a granular analysis, within nine-months of the effective date of the *TRO* (i.e., by June 2, 2004), to ascertain whether there are any markets within the state wherein CLECs would not be impaired in the absence of unbundled mass market switching.⁴ *TRO*, ¶493.

In conducting this granular investigation, the FCC first specifically reserved to the states the discretion to define the geographic market in which CLEC impairment would be evaluated. The FCC provided certain guidelines to the states, but placed only one “bright line” limitation; which is, that the market could not be defined as encompassing the entire state. *TRO*, ¶495. The FCC defined “mass market customers”—the customers at issue in the granular investigation—as residential **and** very small business customers. *TRO*, ¶127; see also footnote (fnt.) 1402.

The FCC established certain criteria or “triggers” to be used by the states for determining whether CLECs are impaired in a particular geographic market without access to unbundled mass market switching, and indicated that, if either of

³ See, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order (released August 21, 2003)(FCC 03-36), as corrected by errata, FCC 03-227 issued on September 17, 2003 (hereinafter “*TRO*”).

⁴ The *TRO* also provided for a granular analysis by the states concerning CLEC impairment with respect to unbundled transport and high capacity loops. See, e.g., *TRO*, ¶¶328, 405. However, as set forth more fully herein, OTS has elected to concentrate in this Main Brief on impairment with respect to unbundled mass market local circuit switching.

these “triggers” is met, then the CLEC is not impaired. These triggers are: (1) the self-provisioning trigger, which requires that three or more unaffiliated competing carriers be actively providing service to mass market customers in that market, with the use of their own switches;⁵ and, (2) the competitive wholesale facilities trigger, which requires that two or more competing carriers, not affiliated with each other or the incumbent LEC, offer wholesale switching service for that market using their own switch. *TRO*, ¶¶499, 501, 504; see also, 47 C.F.R. §51.319(d)(2)(iii)(A)(1) and (2).

The FCC also recognized that there may be markets where, for example, self-provisioning of switching is economic, notwithstanding that there are not three carriers which have, in fact, provisioned their own switches in that market. Therefore, if neither of the two above-described triggers is satisfied, the FCC directed states to conduct a further “potential deployment” analysis, to determine whether the market in question is actually suitable for “multiple, competitive supply.” Evidence of actual competitive deployment and various operational and economic factors are to be considered in determining whether a finding of “no impairment” is appropriate, despite the lack of triggers. *TRO*, ¶¶506, 507; see also, 47 C.F.R. §51.319(d)(2)(iii)(B).

On October 3, 2003, in response to the FCC’s request to conduct a nine-month granular analysis, the Commission entered a Procedural Order, at Docket No. I-00030099 (Procedural Order), establishing the process under which this analysis

⁵ The FCC recognized that, even where the self-provisioning trigger has been satisfied, significant entry barriers may remain. In these instances, the state commission may petition the FCC for a waiver of application of the trigger. *TRO*, ¶462.

would be conducted. In so doing, the Commission tentatively made a finding, consistent with the FCC national finding, that CLECs are impaired in Pennsylvania without access to unbundled mass market local switching. It provided the opportunity for ILECs to challenge this tentative conclusion through a petition to initiate proceeding, to be made no later than October 31, 2003. However, the Commission ruled that ILECs would bear the burden of proving non-impairment. Procedural Order, p. 12.

On October 31, 2003, Verizon Pa., Inc, later joined by Verizon North Inc.(collectively referred to herein as “Verizon”), filed a Petition to Initiate Proceedings with the Commission, requesting, with respect to unbundled mass market switching, that the Commission find non-impairment, based on satisfaction of the self-provisioning trigger,⁶ in Density Cells 1, 2, and 3,⁷ within the Metropolitan Statistical Areas (“MSAs”) of Philadelphia, Allentown, Reading, Lancaster, Harrisburg, Scranton/Wilkes-Barre and Pittsburgh. Verizon Statement (St.) 1.0, pp. 5-6. In its later-filed supplemental direct testimony, Verizon clarified that under the latest Office of Management and Budget (OMB) definitions, the Harrisburg MSA (Harrisburg-Carlisle-Lebanon MSA) was now a Combined Statistical Area consisting of two separate MSAs: Harrisburg-Carlisle and Lebanon. Verizon is seeking relief in all eight of these MSAs. Verizon St. 1.1, p. 6, fnt. 1.

⁶ As will be noted later, Verizon did not attempt to prove its switching case under the competitive wholesale facilities trigger or under a theory of potential deployment, and is instead relying solely upon the self-provisioning switching trigger. Verizon St. 1.0, p. 8.

⁷ Verizon clarified, on the record, that while it believed it was entitled to a finding of non-impairment throughout each of the MSAs, it was not requesting relief in the Density Cell 4 areas of these MSAs. Accordingly, the unbundled network platform (UNE-P), which includes local switching, would continue to be available to serve mass market customers in Density Cell 4. Tr. 294-295.

A proceeding was initiated, and Administrative Law Judges Michael C. Schnierle (ALJ Schnierle) and Susan D. Colwell (ALJ Colwell) were assigned to hear the evidence and to render a Recommended Decision to the Commission, by April 1, 2004. Procedural Order, p. 21.

A Prehearing Conference was held on November 25, 2003; at which time, interventions of many interested parties were granted, and a procedural schedule was established. Parties to this proceeding, in addition to Verizon, include the Office of Trial Staff (OTS),⁸ the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), AT&T Communications of Pennsylvania, Inc. (AT&T), MCI WorldCom Network Services, Inc. (MCI), Penn Telecom, Inc. (Penn Telecom), Sprint Communications Company, LP (Sprint), Cavalier Telephone Mid Atlantic LLC (Cavalier), the Pennsylvania Carriers' Coalition (comprised of Full Service Network, Remi Retail Communications, LLC, ATX Licensing, Inc., and Line Systems, Inc.), the CLEC Coalition (comprised of ARC Networks, Inc., Broadview Networks, Inc., Bullseye Telecom, Inc., McGraw Communications, Inc., and Metropolitan Telecommunications of PA, Inc.), the Loop Transport Carrier Coalition (SNIPLINK LLC, Choice One Communications, XO Communications, and Focal), and Allegiance Telecom Inc.

Hearings were held in Harrisburg, PA before ALJ Schnierle and ALJ Colwell on January 26-29, 2004. OTS did not present a witness, but did reserve the

⁸ OTS is participating under its statutory authorization, and also at the direction of the Commission, as set forth in the Procedural Order, Ordering Paragraph 6.

right to adopt positions of other parties. Main Briefs are due on or before February 17, 2004, and Reply Briefs are due on or before March 1, 2004.

OTS has reviewed the numerous pieces of testimony and discovery responses, and has observed the cross-examination of witnesses at the evidentiary hearings. It then applied this evidence to the legal requirements for showing non-impairment with respect to mass market switching. OTS's conclusion, as will be presented herein, is that Verizon, the Petitioner and moving party, has not met its burden of proof, as is properly assigned to it by the Commission and by 66 Pa. C.S. §332(a). Accordingly, its request to be relieved of unbundling and TELRIC pricing obligations under TA-96, as to mass market local circuit switching, should be denied.

OTS will not be addressing the dedicated transport and high capacity loop unbundling issues in this case.

II. SUMMARY OF ARGUMENT

Verizon has the burden of proof in this proceeding, as previously established by the Commission and as provided for by statute. Procedural Order, p. 12; 66 Pa. C.S. §332)(a).

Verizon clearly has not met that burden with respect to its request to be relieved from unbundling obligations for mass market switching, under the FCC criteria. It has not demonstrated that the three or more CLECs, which it has identified as trigger candidates, are serving both mass market business and residential customers through their own switches. It has included intermodal carriers as trigger candidates, without showing comparability in quality with its own service, in violation of the FCC rules. It also has included ILECs operating as CLECs, with no showing that other CLEC entrants would be on an even playing field with these advantaged “CLECs.”

But perhaps Verizon’s most egregious position is its insistence that this Commission can exercise no independent judgment in assessing trigger candidates, to the point of absurdity. Tr. 93-99. Verizon’s stated position, however, did not stop it from exercising its own judgment to include trigger candidates, when it suited Verizon’s purposes. Tr. 108-110. Verizon’s self-serving position would be nothing short of ruinous for competition in Pennsylvania, and should be summarily rejected.

In summary, Verizon should not be granted its requested finding of CLEC non-impairment with respect to unbundled mass market switching in Pennsylvania. UNE-P availability should be preserved in all markets, for the benefit of Pennsylvania telecommunications competition.

III. ARGUMENT

A. Verizon Has The Burden Of Proof With Respect To CLEC Mass Market Switching Non-Impairment In This Proceeding.

In the *TRO*, the FCC tentatively found that **CLECs are not impaired** without access to unbundled local circuit switching for the **enterprise** market, and gave states 90 days to rebut the presumption through a granular analysis. *TRO*, ¶¶451, 455. In response to the FCC's finding, this Commission established a process whereby CLECs could challenge the presumption of non-impairment, at Docket No. I-00030100, and ruled that the burden of establishing impairment was on the CLECs. Procedural Order, pp. 7-8. Verizon was a party to that proceeding, and did not challenge the assignment of the burden of proof.

In the instant proceeding, the “tables are turned”, so to speak, in that the FCC has made a national finding of **CLEC impairment** with respect to, inter alia, **mass market switching**. *TRO*, ¶459. The states were asked to conduct a more granular analysis to ascertain whether there were any markets within the states wherein CLECs were not impaired. *TRO*, ¶493.

Any contention that Verizon does not have the burden of proof in this proceeding is without merit. Consistent with the *TRO*'s national finding of impairment, the Commission ruled that ILECs would have the burden of proof as to mass market switching non-impairment. Procedural Order, p. 12. Furthermore, as the Petitioner and moving party herein, Verizon is assigned the burden of proof by statute at 66 Pa. C.S. §332(a).

As stated by the Pennsylvania Supreme Court, when a party bears the burden of proof, that party must, in addition to establishing a prima facie case, also establish that:

. . . the elements of that cause of action are proven with substantial evidence that enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.

Burleson v. Pa. P.U.C., 501 Pa. 433, 437, 461 A.2d 1234, 1236 (1983).

The Commission and the Courts have held that the burden of proof does not shift to the party challenging a petitioner's proposal. While the burden of going forward may shift, the burden of finally and convincingly establishing its position remains with Verizon in this case. The opposing parties have no such burden.⁹

In summary, it is Verizon's burden to establish, with substantial evidence, that each and every requirement for a finding of CLEC non-impairment is met, within the relevant geographic area. As will be discussed herein, Verizon has not met that burden, and its request for a non-impairment finding should therefore be denied.

B. Verizon Has Not Met Its Burden Of Proof With Respect To CLEC Mass Market Switching Non-Impairment.

1. Relevant geographic area for conducting the analysis

OTS accepts the position of the OCA, as expressed through its witness Dr. Robert Loube, that the relevant geographic area, for purposes of conducting a

⁹ See, Berner v. Pa. P.U.C., 382 Pa. 622, 631, 116 A.2d 738, 744 (1955); see also, Pa. P.U.C. v. Equitable Gas Company, 57 Pa.P.U.C. 423, 444 (fnt. 37) (1983).

mass market switching analysis of CLEC impairment, should be the density cells within the MSA. OCA St. 1, pp. 15-21. MSAs are not granular enough, and usage of MSAs as market areas could produce unjust and unreasonable results. For example, as explained by Dr. Loube:

Within each MSA there are at least two density cells and in the case of Philadelphia and Pittsburgh MSAs, there are four density cells. It is possible that an entrant could be impaired in one of the cells but not the others. If the decision to determine whether to eliminate the access to the local circuit switching UNE was made on the MSA level, then there could be areas where impairment exists but the switching UNE is not available. On the other hand, if the PUC determined that entrants were entitled to access to the local circuit switch UNE, then there could be areas where no impairment exists, but carriers still had the right to use the UNE.

OCA St. 1, pp. 16-17.

Verizon also supports use of density cells for defining the geographic market, although its preference apparently is to use MSAs. Verizon St. 1.0, pp. 11-14; Tr. 212-213. However, even though it prefers MSAs, Verizon has used density cells as the relevant geographic market in its own analyses concerning whether the trigger mechanism has been met. Verizon St. 1.0, p. 33; Verizon St. 1.1, p. 6; Verizon St. 1.2, Attachment 5. Furthermore, Verizon is, in effect, asking the Commission to find non-impairment by density cell, because it is not seeking a non-impairment finding as to the Density Cell 4 areas in any of the MSAs in question. Tr. 294-295.

In conclusion, OTS supports use of density cells as a reasonable and relevant geographic area for use of the FCC's trigger mechanism criteria for mass market switching.

2. Definition of mass market customer

As stated previously, Verizon has decided to base its entire mass market switching non-impairment case on the self-provisioning trigger set forth by the FCC at 47 C.F.R. §51.319(d)(2)(iii)(A)(1). Verizon St. 1.0, p. 8. Under this trigger, Verizon must present substantial evidence that three or more competing providers, unaffiliated with Verizon or each other, including intermodal providers of service comparable in quality to that of Verizon, each are serving mass market customers in the particular market with the use of their own local circuit switches.

The *TRO*, at paragraph 127, defines "mass market customer" as consisting of both residential and very small business customers.¹⁰ However, Verizon's position in this proceeding, as reflected in its analysis, is that a CLEC should be counted as a "trigger candidate" towards the required "three or more competing providers", even if it provides service only to mass market business customers, and eschews service to residential customers. Verizon St. 1.2, pp. 15-16; Tr. 127, 131; Verizon St. 1.2, Attachment 5.

This is a completely inaccurate interpretation of the *TRO* and implementing rules. The "mass market" has been defined by the FCC as including

¹⁰ In addition, paragraph 459 of the *TRO* describes the "mass market" as consisting primarily of consumers of analog "plain old telephone service" or "POTS" that purchase only a limited number of POTS lines and can only be economically served via analog DS0 loops.

both residential **and** small business customers. Analogizing to principles of statutory construction, it must be presumed that the FCC meant every word it wrote to be operative. 1 Pa. C.S. §1922(2).¹¹ Accordingly, Verizon cannot meet its burden of proof through counting a “business service only” CLEC as a trigger candidate in a density cell. OTS agrees with AT&T witnesses Robert Kirchberger and E. Christopher Nurse¹² that **each** of the three or more CLECs used by Verizon as trigger candidates must be shown today to serve both residential and small business customers. AT&T St. 1.0, p. 25.

For the foregoing reasons, each Verizon trigger candidate which has not been demonstrated to be serving both mass market business and residential customers, should not be counted. Since Verizon failed to present evidence which specifically provided a breakdown, between residence and business mass market customers, for each of its CLEC trigger candidates, in each of the density cells for which relief was sought, Verizon has failed to meet its burden of proof. Its request for a finding of CLEC non-impairment for mass market switching should therefore be denied.

3. Definition of service to mass market customers

Verizon’s interpretation of the *TRO* and implementing rules is that state commissions are not permitted to exercise any rational and reasonable judgment in applying the trigger mechanism. OCA St. 1, p. 31; Tr. 93-99. This is particularly

¹¹ Whenever possible, each word in a statute is to be given meaning, and not treated as mere surplusage. *Habecker v. Nationwide Ins. Co.*, 445 A.2d 1222, 1226, 299 Pa. Super. 463, 471 (1982).

¹² Many other witnesses also agreed that service to “mass market customers”, for purposes of qualifying as a trigger candidate under the *TRO*, must include service to residential customers. See, OCA witness Dr. Loube (OCA St. 1, p.28), Sprint witness Peter Sywenki (Sprint St. 1.0, p. 21), the PCC panel (PCC St. 1.0, p. 38), and CLEC Coalition witness Joseph Gillan (CLEC Coalition St. 1.0, p. 47).

evident in Verizon's interpretation of "servicing the mass market." For example, as confirmed by Verizon witness Harold West, Verizon counted a CLEC as a trigger candidate, and believes that the Commission should do the same, even if the CLEC serves only one DS0 line from that switch. Tr. 139, 200.

In fact, Verizon would treat service from an enterprise switch, serving one large business customer, as mass market service, if even one fax machine from that business is served via a DS0 line. Tr. 94, 134-136. If three unaffiliated CLECs in that market each serve only one large business fax machine with a DS0 line, through their own enterprise switches, then, according to Verizon, the trigger mechanism would be met, and UNE-P would be unavailable to serve all residential customers in that market! Tr. 94-95. Verizon's extremely rigid interpretation is completely unreasonable, and would result in the unavailability of UNE-P to markets wherein CLECs are not actually serving mass market business and residential customers.

Verizon's insistence upon applying the triggers "with blinders on" has likely led to its inclusion of Adelphia as a trigger candidate, due to Adelphia's (now Telcove) apparent use of DS0 lines to serve its state contract. Under cross-examination, however, Mr. West acknowledged that the Pennsylvania state government would be an enterprise customer and not a mass market customer. Tr. 118-121.

While Verizon would hamstring the Commission in applying the triggers, it appears that Verizon did not always apply the same constraints to itself.

Instead, Verizon did exercise some judgment in performing its impairment analysis, and included CLECs, in a doubtful case, when it advanced Verizon's trigger count. Tr. 108-110.

Verizon's approach should be soundly rejected, and its trigger analysis, which incorporates this flawed and self-serving methodology, should likewise be rejected. Instead, reasoned judgment must be permitted, and "serving the mass market" must therefore be interpreted as including some threshold level of actual mass market customer service. See, e.g., testimony of Dr. Loube, OCA St. 1, pp. 27-29.

4. Intermodal providers as trigger candidates

As indicated in Verizon Attachment 5 to the Rebuttal Testimony of Verizon witnesses West and Peduto, Verizon has included cable telephony providers, which are intermodal providers, as trigger candidates. See also, OCA St. 1, pp. 38-40; Tr. 267. However, as noted in the *TRO*, cable telephony provides evidence of entry using both a self-provisioned switch and a self-provisioned loop and therefore is not "evidence of an entrant's ability to access the incumbent LEC's wireline voice-grade local loop and thereby self-deploy local circuit switches." *TRO*, ¶¶98, 446.

The *TRO*, at ¶98, clearly allows for less weight to be given to intermodal provider entry, and the associated rules, at 47 C.F.R. §51.319(d)(2)(iii)(A)(1), indicate that such providers are only to be counted as trigger candidates if the service is comparable in quality to that of the ILEC. See also, AT&T St. 1.0. pp. 31-32. In the instant case, Verizon has presented no evidence which

compares each of its intermodal trigger candidate's service to its own service, in terms of quality. Tr. 103, 268. Accordingly, under the FCC rules, Verizon should not have counted any of these intermodal providers as trigger candidates. This means that all intermodal providers should be removed from Verizon Attachment 5, and all density cells wherein intermodal providers were relied upon to reach the trigger threshold of three CLECs should be removed from consideration in this case.

5. ILECs with CLEC-affiliates as trigger candidates

Verizon has also counted, as trigger candidates, certain ILECs which are operating as CLECs in Pennsylvania. Verizon St. 1.2, Attachment 5; AT&T St. 1.0, p. 40. As testified to by OCA witness Dr. Loube, these companies should not be included as mass market switching trigger candidates. These ILECs have many of the same advantages of cable companies, as they have switches which serve the incumbent franchise territory, and therefore enjoy the benefits of economies of scope not available to new entrants. Also, if the ILEC has a rural exemption to the provision of UNEs, it has a protected monopoly franchise to provide a secure base of operations for expansion, which is not available to CLECs. OCA St. 1, pp. 33-34.

AT&T witness Kirchberger and Nurse provide another reason why these ILECs may be disqualified as trigger candidates. If the ILEC serving as a CLEC does not serve its own mass market customers through its own switch, then that ILEC does not meet the FCC requirement that mass market service be provided through use of the CLEC's own local circuit switches. 47 C.F.R. §51.319(d)(2)(iii)(A)(1); AT&T St. 1.0, pp. 40-41.

Accordingly, these ILECs operating as CLECs shown on Verizon's Attachment 5 to Verizon St. 1.2, should be removed as potential trigger candidates for mass market switching.

6. Conclusion concerning Verizon's evidentiary burden

In summary, as demonstrated by the foregoing discussion, Verizon has not met its burden of proving, under the FCC's self-provisioning trigger, that CLECs are not impaired without access to unbundled mass market switching, in the particular markets examined herein.

First of all, Verizon failed to prove that each of its three or more purported trigger candidates in the particular market served both mass market business and residential customers. Verizon also used a completely unreasonable and self-serving definition of "service to mass market customers" in its analysis of non-impairment, and would count a CLEC as a trigger candidate even if the CLEC only served one fax machine in that market with a DS0 line. This calls into question Verizon's entire analysis. A reasonable threshold level of mass market service must be required to count a CLEC as a trigger candidate for that geographic area.

In addition, Verizon improperly included intermodal providers as trigger candidates, without any demonstration, as required by the FCC, that the service being provided by each of these intermodal providers was comparable in quality to that being provided by Verizon.

Finally, Verizon included ILECs as trigger candidates which operate as CLECs, despite all the economies of scope and switching advantages enjoyed by these players, which make the playing field uneven.

Some of the parties, including OCA and AT&T, have re-examined Verizon's non-impairment analysis data, and have removed all the improperly included CLECs. Based upon these revisions, there are no remaining MSAs wherein the FCC's self-provisioning triggers are met. OCA St. 1, pp. 35-40; AT&T St. 1.0, pp. 37-38.

IV. CONCLUSION

In conclusion, for all the foregoing reasons, Verizon's request for a finding of no CLEC impairment, with respect to mass market switching in Density Cells 1, 2, and 3 of the eight identified MSAs, should be denied in its entirety.

Respectfully submitted,

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Dated: February 12, 2004

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief**, dated February 12, 2004, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below:

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Dated: February 12, 2004
Docket No. I-00030099



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Re: Request To Remove CTC Communications Corp. As A Party To Docket No. I-00030099

Dear Ms. Smith:

CTC Communications Corp. ("CTC") requests that it be removed as a party to the above referenced docket concerning the implementation of the Federal Communications Commission's Triennial Review Order.¹ CTC is authorized to provide local exchange and long distance services in Pennsylvania. CTC, however, provides long distance and local exchange service only on a resale basis and does not maintain its own communications facilities or equipment in Pennsylvania. Thus CTC possesses no information that would be responsive in this proceeding. Accordingly, CTC requests that it no longer be considered a party in this proceeding and be relieved of any obligation to respond to any current or future data or discovery requests, either from the Commission or from other parties. In the alternative, if the Commission determines that CTC must remain a party, please consider this letter as its response to any and all data or discovery requests issued in this proceeding.

If you have any questions concerning CTC's request to be removed as a party to the above referenced proceeding, please contact the undersigned.

Sincerely,

William E. Ward
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James J. McNulty, Secretary – PA PUC

DOCUMENT
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¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) ("Triennial Review Order").



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S OFFICE

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

Docket No. I - 00030099

Initial Brief of Allegiance Telecom of Pennsylvania

The Pennsylvania Public Utility Commission ("Commission") launched this proceeding by its order of October 2, 2003 in satisfaction of its obligations under the Triennial Review Order to reach its own impairment conclusion concerning mass market switching, DS1, DS3 and dark fiber transport and high capacity loops. Allegiance Telecom of Pennsylvania, Inc. ("Allegiance") participated in the proceeding for the purpose of responding to Verizon of Pennsylvania's ("Verizon") mischaracterization of Allegiance as a wholesale provider of dedicated transport and for the purpose of demonstrating the mistakes made by Verizon in its zeal to use submitted data in order to characterize Allegiance as satisfying the self provisioning trigger along certain dedicated transport routes. Allegiance's Initial Brief is limited to these two points.

Introduction

The FCC has already reached national findings of impairment with respect to dark fiber, DS1 and DS3 Transport subject to a more granular route by route analysis by the various state commissions.¹ In order to overcome the national finding with respect to any of the categories of transport, it is incumbent upon Verizon to present evidence sufficient

¹ Triennial Review Order, par.359

to rebut the finding by satisfying one or more of the triggers identified by the FCC.² It is Verizon's burden of persuasion to meet in this proceeding and not the responsibility of Allegiance or of any other party opposing a non-impairment finding. As Allegiance will demonstrate, Verizon has been fast and loose with its use of Allegiance data to both mischaracterize Allegiance as a wholesale provider of dedicated transport and as a self-provider of dedicated transport. Based upon the errors committed by Verizon in the use of the Allegiance data, Allegiance does not know how the Commission can have any faith in any of the assertions of Verizon concerning on which routes, if any, the Commission should reach a non-impairment finding. The Commission needs to either: (1) interject itself into the verification process or; (2) simply send Verizon back to the drawing board and dismiss the transport portion of this proceeding for lack of evidence to support removal of the national impairment finding for any transport level. Verizon can file a new case at any time if it feels it can satisfy the burden of proof to overcome the national findings of impairment. As will be demonstrated, at least in the case of Allegiance, Verizon's case falls woefully short of the mark.

I. Use of Allegiance to satisfy the wholesale trigger for any level of dedicated transport is wrong and may not be used to satisfy the wholesale trigger.

Verizon has identified Allegiance as a wholesale provider of dedicated transport on 569 routes³. On all 569 routes Verizon is wrong. Allegiance is not a wholesale provider of dedicated transport on these or any other routes. Allegiance witness, Richard Anderson testified under oath that Allegiance has not provided any wholesale transport in

² Either the self-provisioning trigger for DS3 or dark fiber or the wholesale trigger for DS1, DS3 or dark fiber transport

³Anderson Testimony,p.6

Pennsylvania. While it is true that Allegiance filed an access tariff listing dedicated transport Mr. Anderson explained that the tariff was filed at the time Allegiance entered the market but, before Allegiance had completed its product offering. Mr. Anderson made it clear that Allegiance has not sold any dedicated transport service to other carriers, does not market wholesale transport and is not capable of providing dedicated transportation on a widely available basis⁴. Verizon waived cross examination of Mr. Anderson.

Notwithstanding Mr. Anderson's sworn testimony, Verizon insists that Allegiance is a wholesale provider of transport. Verizon contends that it is only necessary for a carrier to be ready and willing to provide wholesale transport for it to "count" as a wholesale provider and not for such carrier to actually have wholesale arrangements⁵. Verizon misapprehends the nature of Mr. Anderson's testimony. Allegiance has no wholesale arrangements because it is most definitely not "ready and willing" to provide wholesale dedicated transport. Nor is the obtuse reference to "Dedicated DS1 Aggregation products" on the Allegiance website a smoking gun sufficient to categorize Allegiance as a wholesaler of dedicated transport and overcome Mr. Anderson's sworn testimony. Verizon could have asked Mr. Anderson about the Allegiance products that are provided at wholesale on cross-examination but Verizon chose not to. In fact, Allegiance is filing a modified access tariff this week to remove dedicated transport from the tariff. Allegiance asks the Commission take administrative notice of this filing.

The purpose of the wholesale trigger is to identify alternatives to the use of dedicated transport provided as unbundled network elements. A carrier who does not

⁴ Anderson testimony,p.8

⁵ Rebuttal Testimony, West/Peduto,p.61

wish to provide wholesale dedicated transport and who in fact does not provide dedicated wholesale transport is no alternative at all. Verizon's use of Allegiance as a wholesale provider is misplaced and any routes for which Verizon has sought a non-impairment finding based on the allegation that Allegiance satisfies the wholesale trigger must be denied.

II. Verizon has mistakenly identified Allegiance as having self-provisioned transport between numerous wire centers where Allegiance does not have fiber-fed collocations or is not interconnected.

In order to satisfy the self-provisioning trigger for transport Verizon must demonstrate to the Commission that three or more unaffiliated competing providers have deployed their own transport facilities and are "operationally ready to use those transport facilities to provide dedicated transport" between those ILEC wire centers.⁶ Allegiance has been named by Verizon as satisfying the self provisioning trigger on 418 routes. In a majority of cases, Verizons assertions are plainly wrong either because they are based on the conclusion that Allegiance has fiber collocations where it does not or because Verizon has assumed that every wire center along an Allegiance fiber ring is connected to every other wire center along this and any other fiber ring.

With respect to the latter assumption, Verizon, however, does not directly dispute Allegiance's evidence that Allegiance's fiber optic facilities are not interconnected.⁷ Its witnesses simply speculated that "even if Allegiance's local fiber rings are not connected, since these rings are an integral part of the Allegiance network, the specific pairs of Verizon wire centers that Verizon identified as being at either end of a direct route could

⁶ 47 CFR 51.319(e)(2)(i)(a)

⁷ See Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 44, lines 5-6

nevertheless be directly or indirectly connected by Allegiance transport facilities.”⁸ But as Allegiance’s witness testified, “Without network modifications, including the installation and provisioning of add-drop multiplexers, Allegiance does not have point-to-point transport capability between any A and Z locations in Pennsylvania.”⁹ Therefore, reliance on the fiber ring along these routes to satisfy the self-provisioning trigger is misplaced.¹⁰

On many of the other routes on which Verizon claims the self-provisioning trigger to be met by Allegiance, Verizon misreads the Allegiance responses to the Commission’s preliminary data requests and of Allegiance witness’s testimony. In his Direct Testimony at 6, lines 5-7, Mr. Anderson notes that “Verizon has incorrectly included in its list of Allegiance self-provisioned routes a number of instances where we are still using Verizon UNE transport and have not self-provisioned the fiber.” He goes on to state that “*For example*, Allegiance purchases UNE transport from Verizon between [two named pairs of wire centers market as proprietary], yet Verizon has included these pairs on its list of Allegiance self-provisioned routes.”¹¹

Verizon’s witnesses concede that if Allegiance uses only Verizon UNE transport between two wire centers, “Verizon agrees that they should be removed from Verizon’s pairing reports.”¹² Suggesting that Allegiance may have misunderstood the Commission’s Transport Question 2,¹³ Messrs. West and Peduto appear to take the four wire centers mentioned in Mr. Anderson’s testimony as an exhaustive list of the collocations where

⁸ Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 60, lines 6-10.

⁹ Direct Testimony of Richard Anderson at 6, lines 21-23.

¹⁰ Even assuming Verizon to be correct in this assumption would only affect 83 of the routes Verizon contends Allegiance to be self provisioning dedicated transport.

¹¹ *Id.* lines 7-11 (emphasis added).

¹² Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 61, lines 8-11, and 69, lines 15-16.

¹³ Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 61, lines 3-11, and 69, lines 12-15.

Verizon incorrectly identified Allegiance as having self-provisioned transport facilities. This leads them to conclude that “Allegiance ... dispute[s] Verizon’s identification of a few collocation arrangements ...”¹⁴ and that “even if Allegiance were to be removed from the analysis for a few wire centers, that might not affect the total number of direct routes meeting the transport triggers.”¹⁵

It is Verizon’s witnesses, however, and not Allegiance, who have misread the Commission’s Transport Question 2, as well as Allegiance’s testimony. Noting that Question 2 “specifically defined transport facilities *to exclude UNEs obtained from Verizon*,”¹⁶ the witnesses conclude that “Allegiance identified the [four wire centers specifically mentioned by Mr. Anderson] as wire centers at which it has operational, non-Verizon fiber-based collocation.”¹⁷ But the witnesses ignore the actual wording of Question 2. In that question, the Commission directed, “For each wire center identified in your response to Question 1, provide the number of arrangements by wire center, [and] identify the transport facilities that currently serve such collocation arrangement.”¹⁸ In Allegiance’s Table 4, Allegiance listed the wire centers identified in its response to Question 1. In column F, Allegiance identified the number of collocation arrangements in each wire center. In column G, Allegiance identified any non-Verizon DS3 transport terminating in Allegiance’s collocation in each wire center, and, in column H, any non-Verizon dark fiber transport IRUs, the equipment used by Allegiance to light the fiber, and the lit capacity that Allegiance has implemented.

¹⁴ Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 51 n.27.

¹⁵ Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 60, lines 10-12.

¹⁶ Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 61, lines 4-5.

¹⁷ Verizon Statement No. 1.2, West/Peduto Rebuttal Testimony at 61, lines 5-7.

¹⁸ Exhibit ALJ-5 (Statement of Transport Question 2).

Mr. Anderson's mention of four specific wire centers at which it does have Verizon transport facilities was not intended as an exhaustive listing of such wire centers, but — as indicated by the words "*for example*" at the beginning of the sentence — only as an *example* of Verizon's erroneous identification of Allegiance's allegedly self-provisioned routes. On Allegiance's Table 4 it identified 37 wire centers for which it did not identify any non-Verizon transport facilities, indicating that Allegiance's collocations in those wire centers are served only by transport facilities obtained from Verizon. Those wire centers were included on Table 4 so that Allegiance could identify in Column F the number of collocation arrangements it has at each, but Verizon's witnesses apparently assumed that Allegiance has non-Verizon transport at all of the wire centers listed in Table 4. 21 of those wire centers show up in Verizon's "pairing" tables in which it claims that Allegiance has self-provisioned DS3 transport over routes connecting 418 wire center pairs.¹⁹ Further, Verizon identifies each of the wire centers that are clearly identified on Table 4 as having only a single DS3 obtained from another carrier as one of the wire centers in 25 wire center pairs over which Verizon claims that Allegiance has self-provisioned DS3 transport. Allegiance is not merely "disput[ing] Verizon's

¹⁹ It is not readily apparent why the other 16 wire centers where Allegiance did not identify any non-Verizon transport facilities do not also appear in Verizon's "pairing" tables. With no explanation from Verizon, this is but one more example of inconsistencies in Verizon's data.

identification of a few collocation arrangements.” Even if Verizon’s erroneous assumption that a CLEC can transport DS3 level traffic between any two fiber-based collocations were accepted, Allegiance has demonstrated that it has self-provisioned DS3 transport over less than half the routes claimed by Verizon in Pittsburg, and less than ten percent of the routes claimed in Philadelphia.

Whatever this Commission concludes that a CLEC needs to do in order to be “operationally ready” to provision DS3 between two wire centers in which it has fiber facilities, Verizon’s misidentification of Allegiance as having non-Verizon fiber-based collocations at both ends of over 80% of the transport routes it claims demonstrates a compelling need for this Commission to verify Verizon’s claims by obtaining the necessary information directly from CLECs. Allegiance does not propose, as contended by SNiP LiNK’s witness, that the Commission authorize “a new round of discovery and verification ... at this juncture of this proceeding.”²⁰ Allegiance agrees that “Verizon has had ample opportunity to ask parties and non-parties to provide information in discovery relevant to Verizon’s claims.”²¹

For this proceeding, the Commission should determine that the loop and transport triggers are satisfied only where evidence and discovery responses from CLECs directly support, on a route-by-route basis, Verizon’s conclusions concerning the existence and locations of competitive transport and loop facilities. Where CLECs have self-provisioned fiber, the Commission should find that the triggers are met only where data from CLECs — not Verizon’s unsupported assumptions — demonstrates that a CLEC in fact has in place whatever equipment, systems and processes the Commission determines

²⁰ Rebuttal Testimony of Anthony Abate at 1, lines 18-19.

²¹ *Id.* at 2, lines 21-23.

are necessary in order to be “operationally ready” to provision transport or “willing immediately to provide, on a widely available basis” transport over that fiber. For the future, the Commission should adopt a process for determining non-impairment that explicitly asks CLECs and other transport providers where they have self-provisioned transport and whether they have in place the equipment, systems and processes that the Commission determines to be necessary for operational readiness or widely available wholesale offerings.

Conclusion

Based on this record, there can be no conclusion but that Allegiance is not a wholesale provider of dedicated transport and that the characterization of Allegiance as a self provider of transport is incorrect in a majority of cases. The Commission should have serious reservations about using the self-serving assertions of Verizon as a basis for rendering a non-impairment finding with respect to any dedicated transport. Rather, the Commission should maintain the national finding of impairment for dedicated transport in this proceeding until such time that a more reasoned and objective analysis of CLEC supplied data can be presented.

Respectfully submitted

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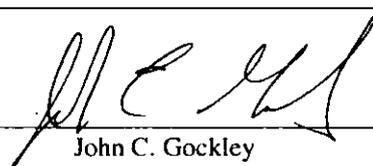
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Initial Brief of Allegiance Telecom of Pennsylvania, Inc. upon the participants, listed below, in accordance with the requirements of § 1.54 (relating to service by a participant). The served Initial Brief is filed on behalf of Allegiance Telecom of Pennsylvania in Docket No. I-00030099.

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

Dear Secretary McNulty:

Enclosed for filing are the original and nine (9) copies of the Main Brief on behalf of the Office of Small Business Advocate in the above-docketed proceeding. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

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

Sincerely,

Angela T. Jones
Assistant Small Business Advocate

Enclosures

cc: Hon. Michael C. Schnierle
Administrative Law Judge

Parties of Record

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**MAIN BRIEF
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

SECRETARY'S BUREAU

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I. INTRODUCTION

By Order of August 31, 2003, the Federal Communications Commission (“FCC”) found that competitive local exchange carriers (“CLECs”) are impaired without access to unbundled local switching for mass markets, unbundled transport and unbundled high capacity loops.¹ If an incumbent local exchange carrier (“ILEC”) seeks to have the national finding of impairment overturned, it must show that CLECs are not impaired. To make that showing, an ILEC must present evidence that meets the standards set by the FCC in the Triennial Review Order (“TRO”) and accompanying rules.

Among the standards of review that the FCC provided for state commissions was “objective triggers,” which is to be a focused analysis to “avoid delays caused by protracted proceedings and ... minimize administrative burdens.”² If the evidence produced demonstrates that the “objective triggers” are met within a particular market, the state commission is to report a determination of no impairment to the FCC.

The Pennsylvania Public Utility Commission (“Commission” or “PUC”) by Procedural Order entered on October 3, 2003, initiated this proceeding to direct Verizon Pennsylvania, Inc. (“VZ-PA”) to file a Petition if VZ-PA intended to put forth evidence to refute that the FCC’s finding of impairment is applicable to the Commonwealth of Pennsylvania.

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order (rel. August 21, 2003) (FCC 03-36), corrected by errata, FCC 03-227 issued September 13, 2003 (“TRO”).

² TRO ¶ 407.

On October 17, 2003, the Office of Small Business Advocate (“OSBA”) intervened in this proceeding in compliance with the Commission’s Procedural Order. Various other parties also intervened.

On October 31, 2003, VZ filed a Petition to Initiate Proceedings for TRO analysis for impairment along with direct testimony relying on the TRO’s:

- (1) “self-provisioning trigger,” for analysis of CLEC impairment without access to unbundled local switching for mass markets;
- (2) “wholesale trigger” and “self-provisioning trigger,” for analysis of CLEC impairment without access to unbundled transport; and
- (3) “self deployment trigger,” for analysis of CLEC impairment without access to unbundled high capacity loops.

Regarding the impairment analysis for unbundled local switching, VZ-PA sought to justify through record evidence a finding of no impairment in density cells 1, 2 and 3 of the following VZ-PA territories defined as Metropolitan Statistical Areas (“MSAs”):

- (1) Philadelphia-Camden-Wilmington,
- (2) Allentown-Bethlehem-Easton,
- (3) Reading,
- (4) Lancaster,
- (5) Harrisburg-Carlisle-Lebanon combined statistical area,³
- (6) Scranton-Wilkes-Barre, and
- (7) Pittsburgh⁴

A prehearing conference involving the parties to this proceeding was held on November 25, 2003, to establish the hearing and briefing schedule of the proceeding. The Second Prehearing Order issued on November 26, 2003, contained the schedule for the proceeding.

³ This is the combination of Harrisburg-Carlisle and Lebanon MSAs.

⁴ See VZ Stmt. No. 1.1 at 6 l. 2 - 8.

By letter to the Commission's Secretary dated November 26, 2003, VZ-PA amended its filing to include Verizon North, Inc. VZ-PA submitted this amendment because one of the MSAs identified in density cell 3 as being at issue for a finding of no impairment is in the service territory of Verizon North, Inc. The amendment did not require any substantive change to the testimony already submitted to the parties but clarified that the service territory in contention for an impairment analysis contained territory of Verizon North, Inc. and VZ-PA (collectively, "VZ").

VZ filed supplemental direct testimony on December 19, 2003. On January 9, 2004, intervening parties filed direct testimony. On January 20, 2004, parties filed rebuttal testimony to the intervenors' direct testimony. The OSBA did not file testimony in this proceeding.

Hearings were held by Administrative Law Judges Michael A. Schnierle and Susan D. Colwell on January 26 - 29, 2004. Main Briefs are due on or before February 17, 2004. The OSBA is filing this Main Brief in compliance with the Second Prehearing Order.

II. SUMMARY OF THE ARGUMENT

The OSBA does not address whether the evidentiary record justifies a finding of no impairment in the seven markets at issue in this proceeding. Rather, the OSBA seeks to clarify ambiguity that may be perceived in reviewing the evidentiary record. By so clarifying, the OSBA desires to preempt a result that is contrary to the public interest if the Commission makes a finding of no impairment.

The OSBA recommends that if a finding of no impairment is the conclusion reached concerning the local switching component, CLECs would be prohibited from accessing unbundled network elements for local switching from VZ only in density cells 1, 2 and 3 in the following

MSAs: (1) Philadelphia-Camden-Wilmington, (2) Allentown-Bethlehem-Easton, (3) Reading, (4) Lancaster, (5) the combined MSAs of Harrisburg-Carlisle and Lebanon, (6) Scranton-Wilkes-Barre, and (7) Pittsburgh. In all the remaining VZ service territory, including all of density cell 4, VZ could not refrain from providing CLEC access to unbundled local switching elements since VZ did not provide notice or proof in this evidentiary record for a contrary finding.

III. ARGUMENT

A. The role of this Commission

The U.S. House of Representatives Committee of Conference provided the legislative amendments for a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition....”⁵ Furthermore, in 2001, based on a report by the PUC, the FCC declared that the local telecommunications marketplace is competitive in Pennsylvania.⁶ Therefore, it is imperative that the decisions made in this TRO proceeding do not impede the progress of a competitive local exchange telecommunications marketplace.

There are several means to compete in the local telecommunications marketplace, i.e. facilities-based, resale and a mix of leasing network elements from the incumbent local exchange

⁵ H.R. Rep. 104-458, S. 652, 104th Congress 2d Session, Ordered to be printed January 31, 1996. (Enacted as the federal Telecommunications Act of 1996 (“TA-96”), 47 U.S.C. 251*et seq.*)

⁶ See, Application of Verizon Pennsylvania, Inc., et al., for Authorization Under 271 of the Communications Act to Provide In-Region, Inter LATA Service in the Commonwealth of Pennsylvania, FCC Docket No. 01-138 (dated June 25, 2001, PUC Consultative Report) and FCC 01-269 (dated September 26, 2001).

carrier enhanced with mechanisms owned by the CLEC.⁷ The last of the three has been used aggressively by CLECs within this Commonwealth and is at issue in this proceeding.

The TRO defines network elements as facilities or equipment capable of being used by a requesting carrier to provide telecommunications service.⁸ The FCC through its TRO has set new standards and principles for determining when a network element should be unbundled.⁹ The FCC has stated that this Commission's role is one of fact-finder to identify where CLECs are not impaired without access to unbundled local switching within this Commonwealth's mass market on a market-by-market basis.¹⁰ The FCC's finding is only a national finding of impairment; there is no presumption of impairment regarding local switching within the mass market at the state level.¹¹

This Commission was directed to follow a specific process in determining whether to find no impairment in a particular market. The first step is to determine whether self-provisioning and wholesale triggers to a particular market are evident in deployment of switches serving the mass market. If the self-provisioning and wholesale triggers are satisfied, the Commission need not proceed any further because no impairment should exist in that market.¹² This is, in fact, the scenario VZ is advocating in its local circuit switching case for the specified density cells in the

⁷ This last option is known as the unbundled network element approach to competition.

⁸ TRO at ¶ 59.

⁹ TRO at ¶ 55.

¹⁰ TRO at ¶ 493 and note 1532.

¹¹ TRO at ¶ 493 and note 1533.

¹² TRO at ¶ 494 and 47 C.F.R. § 51.319(d)(2)(iii)(A).

seven MSAs. However, the FCC notes the existence of exceptional circumstances that may bar a determination of no impairment even when this trigger is satisfied.¹³

Before analyzing whether the self-provisioning trigger is satisfied, the relevant market or specific geographic area must be determined. The FCC has provided rules for defining a market at Section 51.319(d)(2)(i).¹⁴ The FCC provides guidance in the characteristics of a relevant market and affirmatively states that the market cannot be an entire state; but, otherwise, the FCC leaves the discretion to the Commission in declaring the relevant markets. It is the declaration of the relevant market that the OSBA seeks to clarify.

B. VZ affirmed that the remedy for a finding of no impairment is relief from unbundling local switching in only density cells 1, 2 and 3 of the seven specified MSAs.

VZ alleged in written direct testimony that the FCC's switching trigger is satisfied at both the MSA level and in density cells 1, 2 and 3 within the Philadelphia, Allentown, Reading, Lancaster, Harrisburg-Carlisle and Lebanon, Scranton-Wilkes-Barre and Pittsburgh MSAs.¹⁵ In supplemental testimony, VZ alleged that it "meets the FCC's mass market switching trigger in Density Cells 1, 2 and 3 within the Philadelphia-Camden-Wilmington, Allentown-Bethlehem-Easton, Reading, Lancaster, Scranton-Wilkes-Barre and Pittsburgh MSAs and within the ... Harrisburg-Carlisle and Lebanon MSAs."¹⁶

¹³ TRO at ¶ 494 note 1534. (Because the OSBA does not argue whether or not impairment exists, the OSBA does not analyze whether the exceptional circumstances are applicable in this proceeding.)

¹⁴ 47 C.F.R. § 51.319(d)(2)(i).

¹⁵ See VZ Stmt. No. 1.0 at 6 l. 1-4.

¹⁶ See VZ Stmt. No. 1.1 at 6 l. 2-7.

Most parties understood that although VZ's preference was a finding of no impairment in all of the density cells within each specified MSA, VZ's claim for relief involved only density cells 1, 2 and 3 within the specific MSAs.¹⁷ Furthermore, the OSBA did not provide testimony because VZ's claim for relief regarding the relevant geographic market for the switch trigger analysis appeared to be limited to density cells 1, 2 and 3 within the specified MSAs.

In rebuttal testimony, another VZ witness, Dr. Taylor, stated that the appropriate relevant geographic market is MSAs.¹⁸ Dr. Taylor further stated in rebuttal testimony that,

Verizon appropriately recognizes that the MSAs are the relevant geographic market....

While Verizon's position is that the MSA is the correct geographic market, it presented evidence on a Density Cell basis so as to provide the Commission with an alternative to MSAs if the Commission were not inclined to accept the entire MSA as the relevant geographic market. It follows that if Verizon passes the self-provisioning trigger test based on a Density Cell definition of the geographic market within an MSA...then it must also pass the trigger test based on an MSA definition of the geographic market. Therefore, even though Verizon submitted evidence on a Density Cell basis, the Commission can and should still decide that the entire MSA should be entitled to relief.¹⁹

However, later in the same rebuttal testimony, Dr. Taylor stated, "...Verizon has met the triggers required to relieve it of the requirement to unbundle mass market switching, at a minimum, in the Density Cell 1, 2 and 3 areas of the Philadelphia, Pittsburgh, Harrisburg, Allentown, Reading,

¹⁷ See OCA Stmt. No. 1 at 18 l. 15 -19 l. 15. (Noting that VZ uses the density cells within the MSAs when asking the Commission to determine the objective triggers have been met.)

¹⁸ See VZ Stmt. 2.0 at 8 l. 1-2.

¹⁹ VZ Stmt. 2.0 at 23 l. 5-17. (Footnote omitted.)

Scranton/Wilkes-Barre, and Lancaster MSAs.”²⁰ Dr. Taylor’s testimony caused confusion as to what VZ claimed the outcome of the proceeding should be for the local circuit switching analysis.

On cross-examination the VZ witness, Mr. West, confirmed that VZ has two positions for the issue of the appropriate relevant market, one being the entire area within each MSA specified and the other being only density cells 1, 2 and 3 within the MSAs identified.²¹ However, this same VZ witness, Mr. West, under later cross-examination stated the following,

Q. Mr. West, let me ask you, let’s turn to the switching triggers. I was confused yesterday, and again, I’m sure it was me, about exactly what Verizon’s claim is in the case and I thought it might be helpful in this case to clarify. Do you have Verizon Hearing Exhibit 1, the map that’s been depicted in the --

A. I do.

Q. Let’s take the Harrisburg-Carlisle, PA MSA for a moment. You have areas in there that are cross-hatched, which means that you claim that in those areas there are at least three self-provisioning CLECs, and therefore, there is no impairment for switching in those areas; is that correct?

A. Yes.

Q. Now, does that mean that if the Commission agrees with your claim, that switching would become unavailable in the entire MSA, including the Density Cell 4 areas?

A. That’s not our proposal.

Q. Okay. That’s what I wanted to make sure.

* * *

²⁰ See VZ Stmt. No. 2.0 at 27 l. 7-10.

²¹ Tr. at 211 l. 25 - 213 l. 4.

A. - - but that's not our proposal. Our proposal is to show that we meet the triggers in the MSA, but then to apply it to Density Cells 1, 2 and 3.

Q. It would only apply to Density Cells 1, 2 and 3?

A. That's correct.

Q. And Density Cell 4 would continue to have available switching as a UNE and UNE-P?

A. Right, because we're not seeking that relief today.²²

Section 5.243(e) of Pa. Code Title 52 states that "no participant will be permitted to introduce evidence during a rebuttal phase ... which should have been included in the participant's case-in-chief or which substantially varies from the participant's case-in-chief..."²³ The notice provided to the parties by VZ's direct testimony was that VZ's requested relief included only the alternative of density cells 1, 2 and 3 in the specified MSAs. Throughout VZ's direct testimony, VZ's claim for no impairment was within density cells 1, 2 and 3 of the specific MSAs enumerated *supra*. VZ's own supporting witness for the switch trigger analysis affirmatively stated that the evidence presented shows "[VZ] meets the mass market switching trigger in the Density Cell 1, 2 and 3 areas of the Philadelphia-Camden-Delaware, Pittsburgh, Harrisburg-Carlisle and Lebanon, Allentown, Reading, Scranton-Wilkes-Barre, and Lancaster MSAs."²⁴ It is not until the rebuttal testimony of Dr. Taylor that the result of the switch trigger analysis is precisely stated as applicable to the entire area of the specified MSAs. Consistent with the rule

²² Tr. at 294 l. 3 - 295 l. 9.

²³ 52 Pa. Code § 5.243(e).

²⁴ VZ. Stmt. 1.0 at 33 l. 12-14.

at Section 5.243(e) of Pa. Code Title 52, this is a departure from the direct testimony and, at best, should be given little evidentiary weight.

What has transpired in this record is VZ's clarification of its case where the last witness to speak to the issue affirmatively chose a claim for relief consistent with the initial understanding of the other parties. This statement was made by Mr. West after he had heard Dr. Taylor's testimony in cross-examination and was questioned about the confusion created by Dr. Taylor. Mr. West was the witness responsible for the issue of the relevant markets for the local switching analysis. Consistent with Blackmore v. Public Service Commission, the standard for finding the weight and sufficiency of the evidence to be persuasive is the cumulative effect of the evidence produced.²⁵ In this proceeding, the cumulative effect of the record evidence produced is that VZ's claim is limited to density cells 1, 2 and 3 contained within the specified seven MSAs.

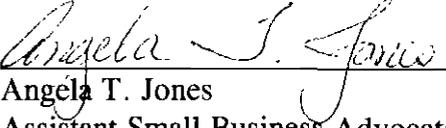
To award relief based on VZ's preference for the entire specified MSAs rather than for only density cells 1, 2 and 3 would go against the weight of the evidence presented and the notice of the stated claim for relief.

²⁵ 120 Pa. Super. 437; 183 A. 115, 120-21 (1936).

IV. CONCLUSION

For the reasons set forth in this Main Brief, the Office of Small Business Advocate cautions the ALJs and the Commission that if a finding of no impairment is reached for local switching, the only justifiable relief consistent with the public interest would be to implement that remedy solely in density cells 1, 2 and 3 in the metropolitan statistical areas of Philadelphia-Camden-Delaware, Allentown-Bethlehem-Easton, Reading, Lancaster, Harrisburg-Carlisle and Lebanon, Scranton-Wilkes-Barre and Pittsburgh.

Respectfully submitted,


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Dated: February 17, 2004

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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 Main Brief on behalf of the Office of Small Business Advocate by e-mail and first class mail upon the persons addressed below:

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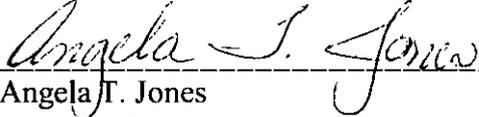
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Assistant Small Business Advocate

Date: February 17, 2004



"Your Local Telephone Company"

February 17, 2004

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Harrisburg, PA 17120

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

Dear Mr. McNulty:

Enclosed for filing are an original and nine (9) copies of the public version of the Post-Hearing Brief of Cavalier Telephone Mid-Atlantic, LLC in the above referenced proceeding.

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

Very truly yours,

Richard U. Stubbs
General Counsel
267-803-4002

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Via Email and FedEx Overnight
cc: The Honorable Michael C. Schnierle
The Honorable Susan Colwell
Certificate of Service

Enclosure

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION
PUBLIC UTILITY COMMISSION SECRETARY'S BUREAU

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

POST-HEARING BRIEF OF CAVALIER TELEPHONE MID-ATLANTIC, LLC

Cavalier Telephone Mid-Atlantic, LLC ("Cavalier") hereby submits its Post-Hearing Brief in the above-captioned proceeding that arises from the Federal Communications Commission's ("FCC") *Triennial Review Order*¹ ("TRO") and the Commission's *Procedural Order*.² Based both on the FCC's TRO standards and on the basic equitable grounds of "unclean hands", the Commission should deny Verizon Pennsylvania, Inc.'s ("Verizon") Petition to eliminate such unbundled network elements ("UNEs") as dedicated transport facilities.

The record reflects that Verizon has failed to marshal its case to demonstrate general satisfaction of the FCC's UNE-elimination trigger standards. To the contrary, the record reflects that Verizon's case rests on numerous theoretical inferences and scant evidence of CLECs succeeding without access to UNEs. Verizon failed to set forth and prove a compelling case, UNE-by-UNE, route-by-route, market-by-market. As such the FCC's presumption should remain intact that Pennsylvania CLECs are impaired³ by their lack of access to unbundled network elements such as dark fiber, DS1 and DS3 transport

¹ *Review of 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, FCC 03-36 (rel. August 21, 2003).
² *Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements*, Dkt. I-00031754 (Procedural Order entered October 3, 2003).
³ See Procedural Order at 12 (Commission "tentatively conclude[s] there is impairment in Pennsylvania").

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facilities.⁴ Further, the Commission should resist Verizon's frequent refrain that the CLECs somehow have a responsibility to disprove Verizon's case.⁵ As the Commission has declared in its Procedural Order, "any ILEC desiring to contest the presumption of impairment must bear the burden of proving non-impairment."⁶ With the future of telecom competition at stake, this Commission should accordingly refuse to order the elimination of any UNE upon evidence that was less than compelling.

Moreover, Verizon has attempted both to invoke the protections of the *TRO* and yet to refuse to comply with *TRO* mandates unless and until CLECs agree to Verizon's onerous interconnection agreement amendment demands. As evidenced in Verizon's October 2, 2003 industry letter, Verizon has stated it would not comply with its *TRO* obligations unless and until CLECs, including Cavalier, agree to pay a great cost for the privilege. It is unseemly for Verizon to refuse *TRO* compliance, and yet to appear before this Commission to seek broad elimination of UNEs pursuant to the same *TRO*.

I. STATEMENT OF LAW

As the Commission noted in its Procedural Order, the FCC has determined that a requesting carrier is impaired when lack of access to an ILEC network element poses barriers to entry, including operation and economic barriers that are likely to make entry into a market uneconomic. Such barriers include scale economics, sunk costs, first-mover advantages, and barriers within the control of an ILEC. The Commission's unbundling analysis must consider market-specific variations, including customer class,

⁴ Verizon is *not* contesting the presumption that CLECs, including Cavalier, are impaired without access to dark fiber, DS1 and DS3 enterprise market loops. See Verizon's Petition at 2.

⁵ Verizon Statement 1.0 at 52 (claiming burden upon CLECs to disprove Verizon's case).

⁶ *Id.*

geography, and service.⁷

Under the *TRO*, the ILEC must continue to provide unbundled dark fiber transport facilities unless the ILEC can prove non-impairment on a route-specific basis.⁸ An ILEC must also continue to unbundle DS3 transport unless the ILEC can prove non-impairment thereof on a route-specific basis.⁹ Likewise, the ILEC must continue to provide unbundled access to DS1 dedicated transport unless and until the ILEC can prove CLECs are not impaired without access thereto.¹⁰ The FCC defines a “route, for purposes of these tests, as a connection between wire center or switch ‘A’ and wire center or switch ‘Z’.”¹¹ The FCC thus rejected the ILECs’ “fiber-based collocation proposals . . . based solely on the presence of alternative transport at one end of a route such that when one end of a route is competitive (a central office with fiber-based collocation), no unbundled transport will be available in our out of that competitive central office.”¹² CLECs are also not required to cobble together multiple vendor circuits through intermediate points in order to connect the A and Z points.¹³

The FCC requires additional granularity to its impairment analysis by adopting, on a route-by-route basis, triggers for the Commission to use in determining when CLECs cease to be impaired without unbundled transport. In applying these triggers, dark fiber is not to be considered a wholesale alternative for lit fiber. For the “self-provisioning” trigger for DS3s and for dark fiber, the ILEC must prove that three

⁷ Procedural Order at 11-12.

⁸ *TRO*, ¶381.

⁹ *TRO*, ¶386.

¹⁰ *TRO*, ¶¶391-392 (noting that DS1 dedicated transport “is not generally made available on a wholesale basis”).

¹¹ *Id.* ¶401.

¹² *Id.*

¹³ *Id.*

unaffiliated carriers, in addition to the ILEC, have deployed transport facilities along one route.¹⁴ Such facilities must terminate in a collocation arrangement.¹⁵ This trigger does not apply to DS-1 transport, as “competing carriers generally cannot self-provide DS1 transport.”¹⁶ Contrary to Verizon’s insistence that this is a “black and white” inquiry, the Commission may employ its own “analytical flexibility” to determine, subject to FCC waiver, that impairment exists even where the three-carrier self-provisioning trigger has been met.¹⁷

Verizon may also show non-impairment by proving that two non-ILEC wholesale carriers sell transport facilities along each route at issue.¹⁸ The non-ILEC carriers “must be operationally ready and willing” to sell capacity to fellow carriers on a reasonable and non-discriminatory basis.¹⁹ The FCC emphasized that CLECs must be able to connect to the alternative facilities within the ILEC’s end office using cross connects between their collocations and the collocation or fiber termination panel of a competitive provider.²⁰ Lit fiber transport that a CLEC leases from an ILEC or another carrier does not count toward satisfaction of this trigger.²¹

II. ARGUMENT²²

A. AS TO DARK FIBER TRANSPORT, VERIZON HAS FAILED TO SATISFY THE “SELF-PROVISIONING” AND “COMPETITIVE

¹⁴ *TRO*, ¶405.

¹⁵ *Id.* ¶406.

¹⁶ *Id.* ¶ 409

¹⁷ *Id.* ¶411.

¹⁸ *TRO* ¶412.

¹⁹ *TRO* ¶414.

²⁰ *Id.*

²¹ *TRO* ¶414

²² Cavalier will address only the issue of dedicated transport in this case and will, thus, not address issues regarding mass market switching or high-capacity loops.

**WHOLESALE” TRIGGERS WITH RESPECT TO NUMEROUS ROUTES
IN LATA 228.**

1. **Verizon Has Failed To Satisfy the “Self-Provisioning” Trigger With Respect to Dark Fiber Transport Routes With an End Point at the [BEGIN PROPRIETARY] [END PROPRIETARY]**

At Hearing, upon Cavalier’s admission of having provided mistaken data in this matter, Verizon all but conceded it has not satisfied the “self-provisioning” trigger for dark fiber dedicated transport routes that reach either the [BEGIN PROPRIETARY] [END PROPRIETARY] In light of Cavalier’s corrected response, and even leaving aside whether other carriers were incorrectly characterized as trigger candidates, Verizon has identified fewer than three such trigger candidates for dark fiber dedicated transport to and from the [BEGIN PROPRIETARY] [END PROPRIETARY] Thus, pursuant to the terms of the TRO, the Commission should conclude that Verizon has failed to satisfy the dark fiber dedicated transport trigger as to all LATA 228 routes with an end point at the [BEGIN PROPRIETARY] [END PROPRIETARY]

Cavalier concedes this was largely a problem of its own making during the early discovery phase of this case. In its November 14, 2003 response to the Commission’s Appendix A questions, Cavalier had stated, in error, that it was relying upon [BEGIN PROPRIETARY] [END PROPRIETARY] dark fiber for its dedicated transport needs in the [BEGIN PROPRIETARY] [END PROPRIETARY] In reality Cavalier was relying upon Verizon-fed fiber in both COs and, indeed, Verizon had come to the same initial conclusion that neither [BEGIN PROPRIETARY] [END PROPRIETARY] [END PROPRIETARY] Based entirely upon Cavalier’s error,²³ Verizon changed its position to assert that

²³ See Tr. 325:17-24 (“[F]or whatever reason, . . . Verizon did not identify in its direct testimony [BEGIN PROPRIETARY] [END PROPRIETARY] as having fiber-based collocation.”)

[BEGIN PROPRIETARY] [END PROPRIETARY] both²⁴ satisfied the dark fiber transport self-deployment trigger at those COs.²⁵ Verizon later stated, however, [BEGIN PROPRIETARY] [END PROPRIETARY].²⁶

Moreover, there is no independent evidentiary basis for Verizon to list [BEGIN PROPRIETARY] [END PROPRIETARY] as a transport trigger candidate for routes involving [BEGIN PROPRIETARY] [END PROPRIETARY] was never listed as a “footnote 14” CLEC, and never provided testimony or discovery responses. Moreover, Verizon apparently never subpoenaed City Signal to testify in this case. Cavalier’s witness, Jim Vermeulen, further testified without objection or rebuttal that [BEGIN PROPRIETARY] [END PROPRIETARY]

In summary, Verizon largely or fully concedes there is no evidence that either [BEGIN PROPRIETARY] [END PROPRIETARY] Removing those two carriers from Verizon’s list of alleged self-deployment dark fiber trigger candidates, Verizon is left with just one other trigger candidate²⁷ collocated at the [BEGIN PROPRIETARY] [END PROPRIETARY] Verizon’s numbers thus fall short as to self-deployment of dark fiber at both of these COs, and the Commission should accordingly require Verizon to continue to provide CLECs with access to UNE dark fiber transport facilities at the [BEGIN PROPRIETARY] [END PROPRIETARY]

2. **For the Same Reasons, Verizon Has Failed To Satisfy the “Competitive Wholesale Facilities” Trigger With Respect to Dark Fiber Transport Routes With an End Point at the [BEGIN PROPRIETARY] Dewey Central Office, [END PROPRIETARY] and**

²⁴Verizon has nonetheless failed to explain why it included *both* [BEGIN PROPRIETARY] [END PROPRIETARY] as self-provisioning transport trigger candidates in those COs.

²⁵ See Verizon Statement 1.1, Ex. 6, Att. A.

²⁶ Tr. 707:19 - 711:9; Cavalier Statement 1.0; see ALJ Ex. 17.A, Transport Exhibit.

²⁷ Moreover, as discussed *infra*, it is not at all clear that this candidate [BEGIN PROPRIETARY] [END PROPRIETARY] satisfies the trigger.

Has a Significantly Weakened Case as to Dark Fiber Routes With an End Point at the [BEGIN PROPRIETARY] [END PROPRIETARY]

For largely the same reasons discussed in Section II.A.1, *supra*, Verizon is likewise unable to satisfy the “competitive wholesale facilities” trigger as to dark fiber dedicated transport routes reaching the [BEGIN PROPRIETARY] [END PROPRIETARY] This evidence also weakens Verizon’s competitive wholesale dark fiber trigger case as to routes reaching [BEGIN PROPRIETARY] [END PROPRIETARY] That is, Verizon’s failure to carry its burden regarding one or more other wholesale dark fiber transport trigger candidates must result in continued UNE protection for routes reaching [BEGIN PROPRIETARY] [END PROPRIETARY]

As Verizon should concede, as to the [BEGIN PROPRIETARY] [END PROPRIETARY] the logic that resulted in Verizon’s removal of [BEGIN PROPRIETARY] [END PROPRIETARY] from their self-deployed dark fiber trigger candidacy applies equally to the “competitive wholesale facilities” trigger. If a CLEC does not have self-deployed dedicated transport facilities, that CLEC cannot sell competitive wholesale dedicated transport facilities.

As such, removing those two carriers from Verizon’s list of alleged competitive wholesale dark fiber trigger candidates, Verizon is left with only one other trigger candidate collocated at the [BEGIN PROPRIETARY] [END PROPRIETARY] thus failing to satisfy the trigger for dark fiber transport routes reaching that CO. Further, as to [BEGIN PROPRIETARY] [END PROPRIETARY] are no longer competitive wholesale trigger candidates; should either [BEGIN PROPRIETARY] [END PROPRIETARY] be found not to belong on Verizon’s list of competitive wholesale

trigger candidates for this CO, *see infra* Sections II.A.3 and II.A.4, the Commission must likewise protect such affected dark fiber transport routes from UNE elimination.

3. **[BEGIN PROPRIETARY] [END PROPRIETARY] Does Not Offer or Provide Pennsylvania Carriers Wholesale Dark Fiber Transport Facilities and Thus Does Not Satisfy That Competitive Wholesale Transport Trigger On Any Route.**

[BEGIN PROPRIETARY] [END PROPRIETARY] is simply not a competitive wholesale provider of dark fiber transport facilities. Accordingly, the Commission should disregard Verizon's inclusion of this carrier as a trigger candidate of such facilities.

At Hearing, **[BEGIN PROPRIETARY] [END PROPRIETARY]** vouched that it "does not provide dark fiber dedicated transport in Pennsylvania to other carriers."²⁸

On cross exam the carrier's witness, Dr. Michael Pelcovits, stated it was "very clear" that **[BEGIN PROPRIETARY] [END PROPRIETARY]** does not provide dark fiber."²⁹

This testimony comported with the understanding of Cavalier witness Jim Vermeulen.

He testified that, from his perspective as a participant in the dark fiber transport market,

[BEGIN PROPRIETARY] [END PROPRIETARY] does not lease dark fiber to other CLECs."³⁰

Indeed, Verizon's witness Carlo Michael Peduto III effectively conceded much of the point on cross-exam:

Q. If **[BEGIN PROPRIETARY] [END PROPRIETARY]** stated in fact it does not provide dark fiber transport to other carriers in Pennsylvania, does Verizon have reason to doubt that statement?

A. This is an area where clear distinction is needed. If **[BEGIN PROPRIETARY] [END PROPRIETARY]** clearly stated that it does

²⁸ Cavalier Cross-Ex. 1; Tr. 391:15 – 392:11.

²⁹ Tr. 404:22-24.

³⁰ Cavalier Statement 1.0, at 7:18-21.

not offer dark fiber at wholesale to other providers in Pennsylvania, then **[BEGIN PROPRIETARY] [END PROPRIETARY]** would be removed from the dark fiber trigger of the pairing report.³¹

Further, while Mr. Peduto suggested some metaphysical divide between not “providing” dark fiber transport and not “offering” dark fiber transport, his testimony revealed no tangible distinction. Mr. Peduto failed to offer any evidence of **[BEGIN PROPRIETARY] [END PROPRIETARY]** “offering” wholesale dark fiber transport to any carrier in Pennsylvania. Rather, the only evidence Verizon produced of **[BEGIN PROPRIETARY] [END PROPRIETARY]** marketing its dedicated transport services to another carrier involved “lit” DS3 facilities only, not dark fiber transport.³² On cross exam, Mr. Peduto’s claim was rather less than damning: “I think it is still unclear to Verizon and to me as to whether **[BEGIN PROPRIETARY] [END PROPRIETARY]** offers on a widely available basis dark fiber at wholesale. I think it’s unclear to me.”³³ Cavalier posits that, if **[BEGIN PROPRIETARY] [END PROPRIETARY]** were actually offering dark fiber at wholesale on a widely available basis, the market and its participants, including Mr. Peduto and Mr. Vermeulen, would have heard about it.

In light of the testimony of **[BEGIN PROPRIETARY] [END PROPRIETARY]** and Mr. Vermeulen, and as against Verizon’s unfounded speculation, the Commission should adjudge Verizon as having failed to demonstrate that **[BEGIN PROPRIETARY] [END PROPRIETARY]** satisfied the competitive wholesale dark fiber transport trigger.

4. **[BEGIN PROPRIETARY] [END PROPRIETARY] Does Not Offer or Provide Pennsylvania Carriers Wholesale Dark Fiber Transport**

³¹ Tr. 328:13-20.

³² See Verizon Statement 1.2, at 48:8-11.

³³ Tr. 327:19-22.

Facilities and Thus Does Not Satisfy That Competitive Wholesale Transport Trigger On Any Route.

Verizon has also mischaracterized **[BEGIN PROPRIETARY] [END PROPRIETARY]** as a dark fiber dedicated transport trigger candidate. Accordingly, the Commission should disregard Verizon's inclusion of this carrier as a trigger candidate of such facilities.

At Hearing, AT&T confirmed that it does not provide on a wholesale basis dedicated transport, dark or lit, as defined by the FCC in the *TRO*.³⁴ As Messrs. Nurse and Kirchberger ably explained, the wholesale trigger test set out by the FCC requires that AT&T must be "operationally ready and willing to provide the particular capacity transport on a wholesale basis along the specific route."³⁵ AT&T testifies that it is not operationally ready and willing to provide wire center to wire center dedicated transport on a wholesale basis between the collocation pairs and the speeds relevant to the triggers analysis. AT&T maintains there is insufficient demand for such wire center to wire center dedicated transport.³⁶

AT&T moreover offered at Hearing a rigorous textual and real-world analysis of the interplay between regulation section 51.319(e) and *TRO* ¶401.³⁷ Cavalier supports all AT&T arguments in this regard.

The Commission should likewise conclude Verizon has failed to demonstrate AT&T as having satisfied any dark fiber or lit fiber dedicated transport trigger.

5. [BEGIN PROPRIETARY] [END PROPRIETARY] Does Not Offer or Provide Pennsylvania Carriers Wholesale Dark Fiber Transport

³⁴ AT&T Statement 1.0 at 118:11-13

³⁵ *TRO*, ¶414. AT&T Statement 1.0, at 119:12-18.

³⁶ AT&T Statement 1.0, at 119:12-18.

³⁷ See Tr. at 451-501.

Facilities and Thus Does Not Satisfy The Competitive Wholesale Transport Trigger On Any Route.

As Cavalier witness Jim Vermeulen testified, Cavalier does not provide dark fiber dedicated transport to any CLECs in Pennsylvania.³⁸

Mr. Vermeulen was emphatic that, regardless of what might be suggested on a Cavalier web page,³⁹ Cavalier has no metro dark fiber rings available to other carriers in Pennsylvania.⁴⁰ This is fully consistent with Cavalier's tariff.⁴¹ Moreover, Cavalier's web pages, while perhaps out of date, nonetheless distinguished between Pennsylvania and Delaware regarding the availability of dark fiber.⁴² Cavalier is only willing to lease dark fiber on routes, such as in Delaware, where Cavalier has excess capacity available.⁴³ Cavalier is "not willing to provide dark fiber in the Philadelphia market",⁴⁴ *i.e.* Cavalier's only Pennsylvania market.

As such Verizon must not be permitted to count Cavalier as a dark fiber transport wholesale trigger candidate for any wire center in Pennsylvania.⁴⁵

6. [BEGIN PROPRIETARY] [END PROPRIETARY] Should Not Satisfy the Competitive Wholesale Transport Trigger, Particularly With Respect to Routes With an End Point at [BEGIN PROPRIETARY] [END PROPRIETARY]

[BEGIN PROPRIETARY] [END PROPRIETARY] had minimal involvement in this matter and provided limited information in response to SniP LiNK's subpoena. What little the parties have learned apparently does not advance Verizon's dark fiber

³⁸ Cavalier Statement 1.0, at 5:9-13; Tr. 716:3-5.

³⁹ As Mr. Vermeulen said, "I do not manage the web site, but I do manage . . . the network." Tr. 728:17-18.

⁴⁰ Tr. 715:18-20.

⁴¹ Cavalier Statement 1.0, at 5:19-22.

⁴² Tr. 732 :25 – 733:5.

⁴³ Tr. 715:23-25.

⁴⁴ Tr. 728:13-14.

⁴⁵ Moreover, the Commission should in no way rule in such a way as to interfere with the sovereignty of the State of Delaware's Public Service Commission. Basic principles of comity and federalism should preclude any such order.

dedicated transport case with respect to routes that reach, for instance, Bryn Mawr (BRYMPABM).

[BEGIN PROPRIETARY] [END PROPRIETARY] is not a significant wholesale provider of dark fiber transport facilities in Pennsylvania. **[BEGIN PROPRIETARY] [END PROPRIETARY]**

[BEGIN PROPRIETARY] [END PROPRIETARY] specifically does not offer or provide wholesale dark fiber transport facilities between the following wire centers: **[BEGIN PROPRIETARY] [END PROPRIETARY]**

Accordingly, the Commission should disregard Verizon's inclusion of **[BEGIN PROPRIETARY] [END PROPRIETARY]** as a trigger candidate of transport facilities reaching **[BEGIN PROPRIETARY] [END PROPRIETARY]** and other end points.⁴⁶

B. VERIZON HAS FAILED TO SATISFY THE “SELF-PROVISIONING” DS-3 TRANSPORT TRIGGER WITH RESPECT TO NUMEROUS DEDICATED TRANSPORT ROUTES IN LATA 228.

1. **For the Same Reasons Explained *Supra*, Neither [BEGIN PROPRIETARY] [END PROPRIETARY]**

For the same reasons stated in Section II.A, *supra*, **[BEGIN PROPRIETARY] [END PROPRIETARY]** must be removed from Verizon's list of self-provisioning DS-3 (or “lit”) transport trigger candidates for routes with an end point at **[BEGIN PROPRIETARY] [END PROPRIETARY]** Again, as **[BEGIN PROPRIETARY] [END PROPRIETARY]** relies upon Verizon-fed UNE transport facilities in the two

⁴⁶ *Id.*

aforementioned COs⁴⁷ -- which UNE fiber Verizon does not make available to Cavalier by right of indefeasible use.⁴⁸

Likewise, as Jim Vermeulen testified without objection or rebuttal, **[BEGIN PROPRIETARY] [END PROPRIETARY]** has no transport facilities, dark or lit, built into either of those COs or into either's CATT box.⁴⁹ As **[BEGIN PROPRIETARY] [END PROPRIETARY]** has had no involvement in this case and as Verizon never subpoenaed **[BEGIN PROPRIETARY] [END PROPRIETARY]**, Verizon has no evidence upon which to claim that carrier as satisfying this trigger.

Accordingly, the Commission should find neither **[BEGIN PROPRIETARY] [END PROPRIETARY]** to have satisfied the self-provisioning trigger for DS-3 dedicated transport routes whose end points are either **BEGIN PROPRIETARY] [END PROPRIETARY]**

2. **[BEGIN PROPRIETARY] [END PROPRIETARY]**
Should Not Be Deemed A Trigger Candidate for Self-Provisioned or Competitive Wholesale DS-3 Transport Facilities. **[END PROPRIETARY]**

From its limited submission in this case, it appears **[BEGIN PROPRIETARY] [END PROPRIETARY]** does not offer CLECs DS3 dedicated transport.⁵⁰ Moreover, **[BEGIN PROPRIETARY] [END PROPRIETARY]** states that it does not self-provision of dedicated transport with regard to the Bryn Mawr wire center of LATA 228. Further, **[BEGIN PROPRIETARY] [END PROPRIETARY]** web site suggests the

⁴⁷ Tr. 707:19 - 711:9; Cavalier Statement 1.0; *see* ALJ Ex. 17.A, Transport Exhibit. Of course, Verizon is not likely to claim that the UNE fiber transport it provides Cavalier is subject to Cavalier's right of indefeasible use.

⁴⁸ *See* §51.319(e)(5)(i)(a).

⁴⁹ Cavalier Statement 1.0, at 6:16 – 7:1.

⁵⁰ AboveNet Response to Appendix 1 questions, attached to SNiP LiNK subpoena, SNiP LiNK Ex. 1.

company markets its fiber as bandwidth to ISPs, and not as dedicated transport between Verizon wire centers.⁵¹

Cavalier submits that, at best, this case's record with respect to **[BEGIN PROPRIETARY] [END PROPRIETARY]** is too vague and speculative to support Verizon's case in any way. Verizon had the opportunity to subpoena **[BEGIN PROPRIETARY] [END PROPRIETARY]** to bolster its case for UNE elimination but did not. Verizon should not be allowed to profit from so incomplete a record as that relating to **[BEGIN PROPRIETARY] [END PROPRIETARY]**.

C. THE COMMISSION SHOULD DENY THE PETITION DUE TO VERIZON'S NON-COMPLIANCE WITH ITS SUBSTANTIVE OBLIGATIONS UNDER THE TRO.

While Verizon seeks to take advantage of the unbundling possibilities allowed by the *TRO*, Verizon comes before the Commission with unclean hands, continuing to engage in anticompetitive activity rejected by the *TRO*. The Commission should thus deny Verizon the opportunity to profit by the same FCC Order it continues to undermine.

As Mr. Vermeulen testified, since October 2, 2003, Verizon has engaged in a concerted effort (a) of strong-arming CLECs into accepting Verizon's unilaterally drafted TRO amendment proposal, (b) refusing to advise CLECs of whether, in the event Verizon is successful, Verizon intends to remove the at-risk facilities altogether and (c) refusing thus far to negotiate over any rates of services already impacted by the TRO. As Cavalier explained in its November 14, 2003 Answer to Verizon's Petition to Initiate Proceedings (Answer), Verizon improperly announced to CLECs by October 2 letter that Verizon would condition its compliance with the TRO upon CLECs' agreeing to Verizon's self-serving interconnection agreement (ICA) amendment. Verizon's October

⁵¹ Tr. 345:2-19.

2 letter further indicated that, as to each CLEC, Verizon would refuse to comply with the TRO during its ICA negotiation period. As Cavalier explained in its Answer that, making Verizon's tactic all the more offensive, Verizon's proposed pricing is absurdly expensive (well over \$1,500) for, e.g. the routine DS-1 facilities modifications ordered by the FCC.

Since that time Cavalier has repeatedly sent Verizon written requests about whether, if successful, Verizon would eliminate altogether any facilities CLECs have come to rely upon. Cavalier has also asked about how the remaining facilities would be priced. For months Verizon has failed to answer these basic questions. The Commission should therefore take this issue very seriously. To date Cavalier has have had no indication from Verizon, if a particular dedicated transport route is removed from the list of UNEs, what the wholesale price for that facility will be.⁵²

The Commission should not tolerate this. While Verizon's non-compliance with its "no facilities" obligations may be better investigated in a separate proceeding, the Commission is nonetheless charged in the instant proceeding with carrying out the mandates of the TRO. It is inequitable for Verizon to seek to eliminate unbundled network elements under the auspices of the TRO while systematically contravening the TRO in order to choke off competition. On the basis of Verizon's "unclean hands", the Commission should therefore deny Verizon's Petition.

III. CONCLUSION

For the foregoing reasons, Cavalier respectfully urges the Commission to deny and dismiss Verizon's Petition, to maintain intact for CLECs all available UNE dedicated

⁵² Cavalier Statement 1.0, at 9:10 – 10:8.

transport routes, to direct Verizon to rescind its October 2, 2003 industry Letter and to order such other just and equitable relief as the Commission shall see fit.

Respectfully submitted,

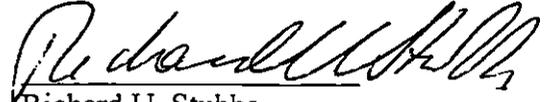
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Dated: February 17, 2004

SERVICE LIST

I hereby certify that I have this day served a true copy of the Post-Hearing Brief of Cavalier Telephone Mid-Atlantic, LLC upon the participants listed below in accordance with 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys) and the Orders issued in the referenced matter.

Dated in Warminster, Pennsylvania on February 17, 2004.


Richard U. Stubbs

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