

Julia A. Conover  
Vice President and General Counsel  
Pennsylvania



1717 Arch Street, 32W  
Philadelphia, PA 19103

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

June 16, 2004

**VIA UPS OVERNIGHT DELIVERY**

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

DOCUMENT  
FOLDER

Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers to  
Unbundle Network Elements, Docket No. 1-00030099*

Dear Secretary McNulty:

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

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

Very truly yours.

  
Julia A. Conover

JAC/meb

Enclosure

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

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JUN 16 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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JUN 16 2004

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Investigation into the :  
Obligation of Incumbent :  
Local Exchange Carriers :  
to Unbundle Network Elements :

Docket No.  
I-00030099

DOCKETED  
JUL 22 2004

**PETITION TO WITHDRAW PETITION AND CLOSE PROCEEDING**

Verizon Pennsylvania Inc. and Verizon North Inc. (collectively "Verizon") respectfully request that the Commission permit Verizon to withdraw its Petition to Initiate Proceedings, filed October 31, 2003, and that the Commission close the docket in the above-captioned proceeding. Although Verizon appreciates the considerable time and resources that were devoted to this proceeding, termination of this docket is necessary because the sole authority under which the Commission instituted this proceeding – "to undertake the state commission analyses required and described in the FCC's *Triennial Review Order*" – has been vacated. There is no longer justification or legal basis for taking further action in this matter (including the preparation and release of a "summary of evidence"), and the docket should be closed. In support of this Petition, Verizon states as follows:

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FOLDER

1. On August 21, 2003, the FCC issued its *Triennial Review Order* (“TRO”), effective October 2, 2003. The TRO, among other things, established a rebuttable, nationwide presumption of impairment for certain network elements – specifically, mass market switching, dedicated interoffice transport facilities, and high capacity loop transport facilities. The TRO also purported to delegate to this and other state commissions authority to conduct more granular reviews to determine whether there is “no impairment” under section 251(d)(2) for these elements in particular markets. The FCC established a two-step process that state commissions were to follow in conducting these reviews. First, states were required to find no impairment if particular substantive standards embodied in certain objective “triggers” were satisfied based on evidence of actual deployment of competitive alternatives to the ILECs’ network elements. Second, if (and only if) the triggers were not met, state commissions could consider evidence of “potential deployment” of competitive alternatives to rebut the national finding of impairment. The FCC ordered state commissions to complete their delegated impairment analyses within nine months of the effective date of the TRO.

2. Acting on this delegation, the Commission established this “9-month proceeding” on October 3, 2003, “to undertake the state commission analyses required and described in the FCC’s *Triennial Review Order*.”<sup>1</sup> The Commission further ordered that “[a]ny ILEC seeking review of its unbundling obligations must file a Petition to Initiate Proceeding . . . at the 9-month proceeding Docket by October 31, 2003.”<sup>2</sup> Consistent with the Commission’s Procedural Order, Verizon filed its Petition in this

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<sup>1</sup> Procedural Order at 11-21 & Ordering ¶ 1.

<sup>2</sup> *Id.* at 18 & Ordering ¶ 3.

docket on October 31, 2003. The purpose of the Petition, and the supporting testimony and evidence presented by Verizon, was solely to rebut the FCC's national finding of impairment for mass market switching, dedicated transport and high-capacity loops under the specific standards embodied in the FCC's objective "triggers" tests.

3. On March 2, 2004, the United States Court of Appeals for the D.C. Circuit, in *USTA II*, vacated those portions of the FCC's TRO rules "that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements."<sup>3</sup> The court held that the FCC had no power to delegate to state commissions the task of making the impairment findings assigned to the FCC by Congress in section 251(d)(2). The D.C. Circuit further found that the FCC's national findings of impairment for unbundled local switching and dedicated interoffice and loop transport, including dark fiber, were inconsistent with the 1996 Act and could not stand on their own. In vacating the FCC's rules, however, the court stayed the mandate for 60 days, until May 3, 2003, and thereafter agreed to the FCC's unopposed request to stay the mandate for an additional 45 days, through June 15, 2004.

4. On March 25, 2004, the Commission suspended further activity in this docket "[i]n light of the D.C. Circuit's decision."<sup>4</sup> At the time, this suspension was appropriate to "ensure efficient use of Commission resources" for the duration of the stay,<sup>5</sup> given the uncertainty concerning whether and when the mandate ultimately would issue. The Commission indicated that it would revisit this suspension in May. .

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<sup>3</sup> *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) ("*USTA I*").

<sup>4</sup> See March 25, 2004 Notice to All Parties regarding suspension of activities in Docket No. 1-00030099.

<sup>5</sup> *Id.* at 2.

5. On June 3, 2004, the Commission issued a Secretarial letter stating that it was directing the Office of Administrative Law Judge (OALJ) to prepare a “summary of the record evidence” in this proceeding. The June 3 letter further stated that this summary would be a public document subject to comment by the parties.<sup>6</sup>

6. There is no longer any uncertainty over the issuance of the mandate. Today, June 16, 2004, the D.C. Circuit’s mandate issued, and thus the FCC’s rules that delegated authority to this Commission to make impairment findings for mass market switching, dedicated transport and high-capacity loops no longer exist.<sup>7</sup> As a result, there is no longer any lawful delegation of authority under which the Commission may continue this 9-month proceeding in Pennsylvania.<sup>8</sup>

7. Accordingly, Verizon seeks leave to withdraw the Petition, and requests that the Commission close the docket. Verizon filed the Petition for the sole purpose of rebutting the FCC’s national findings of impairment for mass market switching, high

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<sup>6</sup> Letter from James J. McNulty to All Parties, Dkt. No. I-00030099 (June 3, 2003).

<sup>7</sup> A copy of the D.C. Circuit’s *USTA II* mandate is attached as Exhibit A. The pendency of petitions for certiorari to the U.S. Supreme Court does not impact the effectiveness of the *USTA II* mandate, which is now binding federal law. “Neither the filing nor the granting of a petition for certiorari operates as a stay . . . with respect to . . . the issuance of the mandate.” Stern & Gressman, *Supreme Court Practice* § 17.10 (8th ed. 2002); *see also* 16A Wright & Miller, *Federal Practice and Procedure* § 3986 n.18 (“[T]he filing of a petition for certiorari in the Supreme Court does not by itself, without some judicial order, operate to stay the issuance of the mandate of the court of appeals, or to continue in effect a prior stay order.”). Instead, a party must move for a stay under Fed. R. App. P. 41(d)(2), and show that its petition will show “a substantial question” and that there is “good cause for a stay.” Although various parties moved the D.C. Circuit for a stay of the *USTA II* mandate, the D.C. Circuit denied their requests. *United States Telecom Assoc. v. Federal Communications Commission*, No. 00-1012 *et al.*, Order denying stay (D.C. Cir. June 4, 2004) Thereafter, the only recourse is to seek a stay directly from the Supreme Court, and show a “likelihood” both “that four Members of [the Supreme] Court will grant certiorari to review the decision of the Court of Appeals on the merits” and “that [the Supreme] Court, having granted certiorari and heard the case, would reverse the judgment of the Court of Appeals.” *E.g., Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J.). On June 14, 2004, the Chief Justice, acting as Circuit Justice for the District of Columbia Circuit, denied requests to stay issuance of the mandate filed with the Court, thus finding that there was no such “likelihood” of reversal.

<sup>8</sup> *USTA II*, 359 F.3d at 568 (finding that only the FCC, not the states, is authorized to conduct the required impairment analysis under section 251(d)(2) of the Act; “the fact that other provisions of the statute carefully delineate a particular role for the state commissions, but § 251(d)(2) does not, reassures use that our result is consistent with congressional intent”).

capacity loops and dedicated interoffice transport in specific Pennsylvania markets. With the issuance of the mandate, the Commission no longer has authority to conduct this proceeding.

8. Verizon further requests that the Commission refrain from the preparation or release of a “summary of the record” in this proceeding. The record in this proceeding was developed solely and specifically to rebut the FCC’s national finding of “impairment” for mass market switching, high capacity loops and dedicated interoffice transport under the now-defunct “triggers” tests in the TRO, and necessarily was constrained by the substantive limitations imposed by the FCC on that analysis. The FCC’s legal test has now been invalidated and the FCC’s rules vacated. It would be improper for the Commission to summarize a “record” that was developed under illegal rules using the wrong substantive test. Moreover, it would be a waste of the Commission’s resources to issue such a summary and for the parties to prepare “comments” on it, since that “summary” would have no lawful purpose.

## CONCLUSION

For the reasons set forth above, the Commission no longer has authority “to undertake the state commission analyses required and described in the FCC’s *Triennial Review Order*” – the sole basis upon which the Commission instituted this 9-month proceeding. Therefore, Verizon respectfully requests that the Commission (1) grant Verizon leave to withdraw its Petition to Initiate Proceedings and (2) terminate all further proceedings in this matter (including the issuance of a “summary of the record”) and close the docket.

Respectfully submitted,



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

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

DATED: June 16, 2004

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1012

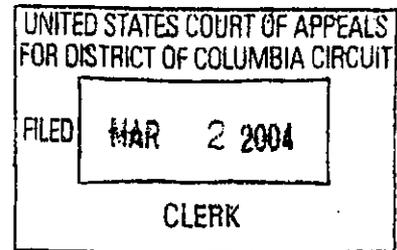
September Term, 2003

United States Telecom Association,  
Petitioner

v.

Federal Communications Commission and  
United States of America,  
Respondents

Bell Atlantic Telephone Companies, et al.,  
Intervenors



Consolidated with 00-1015, 00-1025, 01-1075, 01-1102, 01-1103, 03-1310, 03-1311,  
03-1312, 03-1313, 03-1314, 03-1315, 03-1316, 03-1317, 03-1318,  
03-1319, 03-1320, 03-1324, 03-1325, 03-1326, 03-1327, 03-1328,  
03-1329, 03-1330, 03-1331, 03-1338, 03-1339, 03-1342, 03-1347,  
03-1348, 03-1360, 03-1372, 03-1373, 03-1385, 03-1391, 03-1393,  
03-1394, 03-1395, 03-1400, 03-1401, 03-1424, 03-1442

On Petitions for Review of an Order of the  
Federal Communications Commission

Before: EDWARDS and RANDOLPH, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

**JUDGMENT**

These causes came on to be heard on the petitions for review of an order of the Federal Communications Commission and were argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the petitions for review be denied in part and dismissed in part for lack of standing and as unripe; the FCC's order be vacated in part, and the cases remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

MANDATE  
Pursuant to the provisions of Fed. R. App. Pro. 45(a)  
ISSUED: [Signature]  
BY: [Signature]  
ATTACHED:  Amending Order  
 Opinion  
 Order on Costs

FOR THE COURT:  
Mark J. Tanager, Clerk  
BY: [Signature]  
Michael C. McGrail  
Deputy Clerk

Date: March 2, 2004

Opinion for the court filed by Senior Circuit Judge Williams.

**CERTIFICATE OF SERVICE**

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

Dated at Philadelphia, Pennsylvania, this 16<sup>th</sup> day of June, 2004.

**VIA E-MAIL AND UPS OVERNIGHT DELIVERY**

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

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

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

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

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

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

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

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

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

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

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SECRETARY'S BUREAU

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

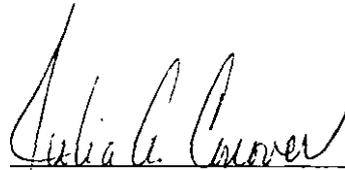
Richard U. Stubbs, Esquire  
Cavalier Telephone Mid-Atlantic, LLC  
965 Thomas Drive  
Warminster, PA 18974  
Counsel for Cavalier

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

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

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

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



---

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