corresp

Conversent
Communications

Orig-Files
C 04-C-0314
Copies:
per 3/26/04 Distribution list

VIA OVERNIGHT & ELECTRONIC MAIL

September 1, 2004

The Honorable Jaclyn A. Brilling
Acting Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: NY PSC CASE NO. 04-C-0314

Dear Secretary Brilling:

Enclosed for filing, please find an original and five (5) copies of Conversent Communications of New York, LLC's Objection to Verizon's Notice of Withdrawal of Petition for Arbitration.

Thank you for your attention in this matter.

Sincerely,

Alan Shoer
Director of Regulatory Affairs and Counsel
Conversent Communications of New York, LLC

AS/cw

Enclosure

cc: Joseph Post
Sandra Thorn

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Petition of Verizon New York, Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order	)))))	**Case No. 04-C-0314**

Conversent Communications of New York, LLC's
Objection To Verizon's Notice of Withdrawal of Petition For Arbitration

Conversent Communications of New York, LLC ("Conversent") respectfully objects to the attempt by Verizon New York, Inc. ("Verizon") to unilaterally dismiss Conversent from this proceeding by way of a "Notice of Withdrawal," filed on August 20, 2004. Verizon filed this request on August 20, 2004, *after* the Arbitrator's Order of August 12, 2004 holding this proceeding in abeyance pending Verizon's amended filings, as requested in the Arbitrator's Order.[1]

After receiving rulings adverse to Verizon's position (specifically on Verizon's obligations to perform routine network modifications at existing TELRIC rates) Verizon now seeks to avoid the impact of this ruling by seeking to dismiss Conversent (and others) so that certain parties, such as Conversent, cannot obtain the benefit of the Arbitrator's preliminary rulings regarding routine network modifications. The Arbitrator should not allow this, nor should the Arbitrator allow Verizon to arbitrarily determine

[1] *Ruling Holding Proceeding In Abeyance Pending Amended Filings, Denying Motion to Dismiss With Prejudice, Requiring Verizon to Rebut Proposed Resolution of Routine Network Modifications Issue, and Granting Stipulated Dismissals*, Case Nos. 04-C-0314, 0318 (Aug. 12, 2004)

which parties will participate in the remaining factual and legal determinations that will be made here.

Although Verizon has framed its request as a "Notice of Withdrawal," it is clear that Verizon is not seeking to withdraw its "consolidated" petition. What Verizon actually seeks is a dismissal of individual parties. In other words, Verizon filed a consolidated petition against all companies; if Verizon intends to withdraw the petition against all parties it may do so in a proper Notice of Withdrawal. It should not be allowed to obtain a "Notice to Withdraw" individual parties without that party's consent.

Finally, the Arbitrator has ruled that she will hold off on ruling on any pending Motions to Dismiss. Accordingly, in the event that this matter is also to be treated as a Verizon Motion to Dismiss certain parties – as it should – Conversent respectfully submits the following objection for the Arbitrator's consideration when all pending motions to dismiss are taken up.

I. Introduction

On March 10, 2004, Verizon filed a "Consolidated" Petition for Arbitration to Amend Interconnection Agreements between Verizon New York and Competitive Local Exchange Carriers ("CLECs") in New York to "implement" the changes to Verizon's unbundling obligations brought about by the FCC's Triennial Review Order, as affirmed by the USTA II court. Verizon updated its Consolidated Petition on March 19, 2004.

Conversent responded to Verizon's petition on April 12, 2004, pursuant to Section 252(b)(3), raising additional issues that were not resolved in negotiations and proposing its own amendments to our interconnection agreement on such matters as the

definitions, scope of Verizon's unbundling obligations, transition arrangements and Verizon's obligation to perform routine network modifications at existing TELRIC rates.

Conversent requested that the Commission arbitrate these issues and to modify the agreements accordingly. Indeed, Section 252(b) sets forth that a party that does not request an arbitration may, nonetheless, raise additional issues in a response and that the Commission "**shall** resolve each issue set forth in the petition **and the response**. . ." (emphasis added). Further, just recently, the Arbitrator requested Verizon to update its filing, and, while deferring pending motions, entered a preliminary finding of law in agreement with Conversent's response on the subject of network modifications. Arbitrator's August 12, 2004 Ruling at pp. 11-19.

Indeed, the Arbitrator specifically cited Conversent's response in her ruling, stating: "Moreover, as Conversent argues, to the extent the routine network modifications are not fully reflected in such UNE rates, Verizon's proper remedy may be to make that demonstration in a filing to revise those rates . . ." Id at 16. The Arbitrator further requested Verizon to make a new filing to address, among other things, "the factual issues as to whether current UNE rates include routine network modifications . . ."

Instead of making such a filing, Verizon filed this so-called "Notice of Withdrawal" as to certain parties – i.e. a motion to dismiss just some parties, such as Conversent, who have raised the issue of network modifications, and have now obtained a preliminary ruling from the Arbitrator that will lead to further proceedings and rulings in this case. Verizon's August 20, 2004 Notice cleverly makes no mention of the Arbitrator's preliminary rulings of law on the matter of routine network modifications, and the fact that Conversent would be a beneficiary of such a ruling, when finalized. Of

course, Verizon seeks to dismiss Conversent so that any further rulings made by the Arbitrator on an arbitratable issue raised by Conversent in its response will no longer apply to Conversent. No wonder Verizon makes no mention of the Arbitrator's preliminary findings in its "Notice."

To be sure, the changes of law necessitated by the TRO, the USTA II decision, the recent Interim FCC Order, and/or the up-coming final FCC rules (and the corresponding obligations to negotiate (and the right to arbitrate if negotiations are not successful) have been somewhat of a moving target since the TRO Order was reversed and remanded by the D.C. Court of Appeals in the *USTA II* decision. Still, the FCC has set a course to implement new unbundling rules for the *USTA II* UNEs (unbundled switching and unbundled DS-1 and DS-3 and dark fiber transport), as reflected in the recently issued Interim Order and NPRM. These changes will need to be incorporated into existing interconnection agreements.

That is what happened after the USTA I decision was remanded to the FCC and the FCC subsequently enacted UNE Remand rules to implement the *USTA I* decision. Specifically, following the D.C. Court of Appeals decision in *USTA I*, the FCC issued new rules in the UNE Remand proceeding, which triggered the change of law provision in Conversent's interconnection agreement, which in turn led to the negotiation and execution of a UNE remand amendment by Conversent and Verizon.

Now, rather than follow the same process in connection with *USTA II*, Verizon seeks to unilaterally cease providing the *USTA II* UNEs *before* the FCC can implement new unbundling rules. Further, Verizon seeks to avoid the implications of the Arbitrator's preliminary rulings on Verizon's obligations for provisioning high capacity

DS-1 loops requiring routine network modifications, by seeking a dismissal of an aggrieved party. Rather than promoting efficiencies in consolidated resolution of important issues, Verizon's request would lead to a waste of resources and will force repeated petitions about these same matters (such as routine network modifications) in future individual arbitration proceedings.

As reflected in the TRO Order, Section 252's negotiation and arbitration process applies to the UNEs subject to change of law arrangements in the TRO order.[2] Now, after months of efforts, Verizon cannot seem to make up its mind about whether there has been a change of law.[3] As a threshold matter, if there has been no change of law, then why is Verizon seeking an amendment to any existing contracts? And, if there is no change in law, then why is Verizon pushing for arbitration as to any parties? The Commission should not allow Verizon to waffle on such a critical determination. Not surprisingly, given that Verizon cannot make up its mind, the Commission and the parties find themselves being pulled in all different directions by Verizon's inconsistent posturing.

Lastly, as a hidden Motion to Dismiss, it is well-recognized that an action may not be unilaterally dismissed by a plaintiff when a response seeking independent determinations remains for adjudication. See Rule 41(a) of the Federal Rules of Civil Procedure. As shown below, there are good reasons for this restriction; otherwise, a plaintiff – like Verizon – may seek to avoid the matter and unfairly prejudice a defendant when it sees that a defendant (Conversent) also has its own claims raised for arbitration, such as Verizon's unwillingness to abide by the TRO's affirmative obligations on routine

---

[2] *Triennial Review Order*, ¶¶ 703, 704.
[3] See, ft.n 3 to Verizon's Notice.

network modifications. This should not be allowed when a party's rights to pursue its claims in response to a complaint/petition will be prejudiced upon dismissal. For this reason, Conversent supports the point made in the August 31, 2004 letter on behalf of several CLECs, that the Commission should be guided by the ruling of the Vermont Arbitrator in an August 25, 2004 ruling on the exact type of motion raised here.

II. Conversent's Interconnection Agreement Requires An Amendment To Implement Changes to Applicable Law

Verizon's Notice of withdrawal is premised on the materially inaccurate statement that Conversent's existing agreement "already contain[s] specific terms permitting Verizon RI, to cease providing UNEs that are no longer subject to an unbundling obligation under 47 U.S.C. 251(c)(3) and 47 C.F.R. Part 51." Verizon Notice at 1. Putting aside Conversent's view that there is no legal or contractual basis for Verizon to "cease" providing UNEs to Conversent at this time, Verizon failed to include *any* contract language with its pleading in support of this inaccurate claim, so that this Notice should be rejected on this basis alone. A conclusory and self-serving statement should not be allowed to form the basis for this Commission to dismiss a party without its consent.

To the contrary, Conversent's interconnection agreement does not provide Verizon with an unfettered right to discontinue the provisioning of UNEs whenever Verizon decides to do so. Although Section 8.4 of our agreement does recognize Verizon's limitations on providing access to "discontinued" UNEs, this right is restricted to following "applicable law" and transition arrangements upon negotiated amendments to the contract. In other words, Verizon did not reserve itself the unilateral right to be judge, jury and executioner on when, and how, to discontinue UNEs provided to

Conversent. Instead, our agreement sets forth *an agreement to negotiate amendments* upon any change in "Applicable Law" as expressly provided in Section 8.3 of our contract.[4] In particular, the change of law provision in Conversent's existing agreement (Section 8.3) provides the following:

> In the event that a change in Applicable Law materially affects any material terms of this Agreement or the rights or obligations of either [Conversent] or [Verizon] hereunder or the ability of [Conversent] or [Verizon] to perform any material provision hereof, **the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action.**

Thus, in the event of a change in applicable law (as here) the language above provides that the parties must negotiate changes in law to amend the terms and conditions of UNEs to conform to the change in applicable law. Verizon cannot, therefore, dictate what the change in law is. Further, as Conversent has pointed out in earlier filings, there has been no net change in law in the classification of high capacity loops (DS-1), or dedicated transport (including dark fiber) as "Network Elements."

Thus, at bottom, if the parties cannot agree on an amendment that implements a change of law, they have a right to arbitrate or seek other relief, which is exactly the situation here. Further, where Verizon seeks to delay implementation of the affirmative obligations of the TRO (as to routine network modifications) Conversent's response asking that this issue be arbitrated has already started, with the Arbitrator's preliminary ruling. Verizon cannot simply decide to avoid this affirmative obligation because it has a different view of the law.

---

[4] "Applicable Law" is defined broadly in Conversent's agreement to include "***all*** laws, regulations and orders applicable to each Party's performance of its obligations," not just Section 251 and 47 C.F.R. Part 51 as Verizon has asserted. (Section 1.5, emphasis added).

No doubt, the *USTA II* decision, when implemented by the FCC, is likely to result in less unbundling under federal rules than exists today. But it is highly unlikely that the FCC will eliminate outright loops and dedicated transport as "network elements." Once the FCC completes its work, it will undoubtedly necessitate a change in applicable law that will, in accordance with our interconnection agreement, require an amendment to administer the changes in New York. Again, this is how Conversent and Verizon treated the change of law following the USTA I and UNE Remand Proceedings.[5] This is how this matter should proceed post *USTA II*. Therefore, the "agreement to negotiate" a change in applicable law hardly constitutes a unilateral right to discontinue UNE services, as characterized by Verizon (without reference or citation) in its Notice.[6]

III. Dismissal Is Not Appropriate If The Scope Of Verizon's Unbundling Obligations Post-USTA II Is To Be An Issue In This Arbitration.

The Commission should not be misled to believe that Conversent can merely wait for another round of arbitrations once new FCC rules are put in place. As shown in Verizon's most recent amendment filed to reflect the USTA II decision (on March 19, 2004), Verizon continues to seek to be relieved of its unbundling obligations for the *USTA II* UNEs **before** the FCC can implement new rules that are consistent with the *USTA II* decision. Verizon also seeks to eradicate its Section 271 unbundling obligations and the New York Commission's role in unbundling. For example, Verizon's latest amendment is replete with provisions designed to limit its unbundling obligation "*only* to the extent required by *both* 47 U.S.C. 251(c)(3) and 47 C.F.R. Part 51" and that Verizon may "decline to provide access to UNEs . . . to the extent that provision of access to such UNEs . . . is not required by *both* 47 U.S.C. 251(c)(3) *and* 47 C.F.R. Part 51." *See, e.g.,*

[5] The UNE Remand proceeding resulted in some UNEs being de-listed and others added.

Sections 2.1, 2.2, 2.3, 3.1, 3.2, 3.3,3.4, and 4.7.5 (emphasis added). Verizon says it will soon be filing "an updated, simplified TRO amendment to take account of the issuance of the USTA II mandate." Verizon Notice at 4. Conversent expects the same contested provisions will be found there.

In this regard, Verizon seeks an amendment that would override the very definition of "Applicable Law" in Conversent's underlying agreement, since Conversent's agreement defines the applicable laws governing unbundling to include **all** relevant federal and state laws, including state tariffs, Orders of this Commission, and Section 271 of the Act.

Conversent has argued at length in earlier filings that Verizon is using this arbitration as a vehicle to obtain the Commission's imprimatur on this erroneously narrow view of its unbundling obligations. On the contrary, Conversent, and others, have argued in this proceeding that Verizon's unbundling obligations flow from several other sources of federal and state authority, beyond just 47 U.S.C. 251(c)(3) and 47 C.F.R. Part 51 (including state UNE tariffs) and that these other authorities must be included in the characterization of the scope of unbundling so as not to: 1) conflict with the "applicable law" provisions in existing interconnection agreements, and 2) be consistent with the full scope of Verizon's unbundling obligations post-USTA II.

If these important determinations on the scope of Verizon's unbundling obligations post-USTA II is to be decided here as to any party an important precedent will be set that will be applied to Conversent should the exact issue arise in a future arbitration. The Commission should not allow this, particularly where Conversent fully raised this issue as a disputed matter in its original response, requesting that this be an

arbitrated issue in this proceeding, in accordance with Section 252(b) of the Telecommunications Act.

For instance, Verizon's most recent amendment continues to provide that Verizon has no unbundling obligations except as specifically set forth in both 47 U.S.C. 251(c)(3) *and* 47 C.F.R. Part 51. See Sections 2.1, 2.2, 2.3, 3.1, 3.2, 3.3,3.4, and 4.7.5. These provisions would, if adopted, effectively relieve Verizon of its unbundling obligations for *USTA II* UNEs until such time as the FCC completes new unbundling rules in the soon-to-be initiated TRO Remand Proceeding. This would cause enormous disruption in the New York local exchange. The same provisions would also disavow all other laws governing Verizon's unbundling responsibilities, including all other federal laws, state laws, state tariffs and Orders of this Commission. Verizon, in essence, is trying to use this Arbitration process to sharply curtail its unbundling obligations regardless of what is required by other state and federal laws and Orders of this Commission.

If this is a matter to be decided in this arbitration, then Conversent respectfully does not agree that Verizon should be allowed to decide who will – and will not -- participate in that determination, particularly after joining all parties in a "consolidated" arbitration to begin with.

To be sure, the scope of Verizon's unbundling obligations for *USTA II* UNEs, and the transition to alternative arrangements for those locations and routes where the FCC finds no impairment will have to be ruled on eventually. Conversent believes it would be more prudent to wait until the FCC has a chance to make it's ruling and to order Verizon (again) to strike out any references to limitations on the scope of its unbundling obligations for *USTA II* UNEs.

IV. Dismissal Is Not Appropriate If The Routine Network Modification Issue Is To Be Arbitrated.

Further, Verizon's Notice seeks to remove Conversent's ability to advocate and be subject to this Arbitrator's preliminary rulings on routine network modifications, an issue Conversent requested be arbitrated in this proceeding *and which has already been ruled on by this Arbitrator*. Simply put, per the FCC's *TRO,* Verizon must provide CLECs with access to high capacity loops where routine network modifications are required at the Commission-approved rates for DS-1 UNE loops. The Arbitrator has ruled that she agrees, and has allowed Verizon to essentially show cause why this ruling should not stand. If Verizon seeks to over-turn this ruling, Verizon cannot dismiss the party that raised this very subject for arbitration in the first place. The Commission should reject this "Notice" on these grounds as well.

V. Verizon Should Be Foreclosed From Dismissing Conversent On Equity Grounds Since Dismissal Will Waste The Resources Of The Parties And The Commission In Repetitive Arbitrations.

Finally, there is one other reason for rejecting Verizon's Notice, and that is equity and fairness. Conversent, at great expense and time, red-lined Verizon's proposed TRO amendment and has been in active negotiations with Verizon on several iterations of that document. In fact, the last conference call in June 2004 concluded with a request to Conversent to hold off on renewing discussions until Verizon could complete their post-USTA II TRO amendment as applied to Conversent. Conversent believed Verizon – acting in good faith – was working on a Post USTA II amendment for further negotiation with Conversent, as they so indicated.

However, instead of further efforts to negotiate in good faith, as required by our existing agreement, Verizon instead seeks to dismiss Conversent, in the midst of

negotiations, thereby forcing Conversent to begin this work all over again. This is manifestly unjust and unfair and will only lead to wasteful and inefficient individual arbitrations over-lapping on the same underlying issues that could more efficiently be decided within a consolidated proceeding, as Verizon initially sought when they filed for a consolidated arbitration here.

Now, Verizon has done an about-face and seeks to exploit its vast resources to force competitors' and this Commission into numerous and separate arbitrations. This should not be tolerated.

VI. Conclusion

While Verizon has fashioned its pleading as a "Notice of Withdrawal, it is really a petition to dismiss certain parties, including Conversent. If Verizon were truly seeking to withdraw its consolidated petition, it would withdraw its consolidated petition rather than seeking to dismiss certain parties. Verizon's ability to dismiss parties, without consent, has long gone by. Conversent raised specific items for arbitration in its response, and the Commission "shall resolve each issue set forth in . . . the response." 47 U.S.C. 252(b)(4)(c).

The Arbitrator has entered a preliminary ruling on one important issue raised in Conversent's response – concerning network modifications, and further factual and legal proceedings remain for resolution on this issue, as shown by Verizon's indication that they are preparing a filing in response to the Arbitrator's procedural ruling of August 12, 2004. The Arbitrator should not allow Verizon to dismiss Conversent when the issues raised by Conversent will continue to be adjudicated.

Moreover, given Verizon's position that it may unilaterally cease to provide Conversent with the *USTA II* UNEs, Conversent doubts that it will be able to successfully negotiate with Verizon. Accordingly, if and when Verizon seeks to discontinue providing *USTA II* UNEs to Conversent, and if Conversent is bounced from this case, the Commission will have to resolve the additional dispute as to the scope of Verizon's unbundling obligations post USTA II, if it does not permit Conversent to address them here.

Consequently, the Commission should not allow Verizon to treat Conversent as a ping-pong ball in this proceeding, first demanding that Conversent begin negotiations (which we agreed to do in good faith), then bringing Conversent in to this arbitration proceeding, forcing Conversent to file comments, briefs, counter proposals, engage in conference calls, and then, once rulings are made and this proceeding is set to begin to decide the important matters raised by Conversent in its response, to seek to dismiss Conversent.

For all these reasons, Conversent objects to Verizon's Notice of Dismissal.

Respectfully submitted,

Scott Sawyer, Scott Sawyer (AMS)
Vice President – Regulatory Affairs and Counsel
(401) 834-3377
ssawyer@conversent.com

Alan M. Shoer
Director – Regulatory Affairs and Counsel
Conversent Communications of New York, LLC
(401) 834-3370
ashoer@conversent.com

Dated: Sept. 1, 2004