

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BRANDENBURG TELECOM LLC)	
FOR ARBITRATION OF CERTAIN TERMS AND)	
CONDITIONS OF PROPOSED AGREEMENT WITH)	CASE NO.
VERIZON SOUTH INC. PURSUANT TO THE)	2001-224
COMMUNICATIONS ACT OF 1934, AS AMENDED)	
BY THE TELECOMMUNICATIONS ACT OF 1996)	

O R D E R

Brandenburg Telecom LLC (“Brandenburg”) petitioned for arbitration of 49 issues in its proposed interconnection agreement with Verizon South, Inc. (“Verizon”). Verizon has filed a response to Brandenburg’s petition. The parties have participated in an informal conference and a public hearing was held October 11, 2001. Post-hearing briefs have been filed. There are 28 issues in dispute.

After the hearing, Brandenburg filed a motion to exclude Verizon’s testimony and documents submitted after September 28, 2001. Brandenburg asserts that it has had insufficient time to address this late-filed material. Verizon contends, however, that this material was filed in rebuttal. Verizon also asserts that Brandenburg has had adequate time to respond to this material. The Commission finds that the material is relevant and should not therefore be stricken from the record. Pursuant to 47 U.S.C § 252(b), a state commission must “proceed on the basis of the best information available to it from whatever source derived” in order to conclude arbitration proceedings by the statutory deadline. We implement that mandate here.

Issues 1 & 13: Change in Applicable Law

Verizon has included provisions in its standard agreement that would allow it to terminate a service, payment, or benefit provided under the agreement, on 30 days' notice if, as a result in a change in the law, Verizon is no longer required to provide the service, payment, or benefit. In addition, the standard agreement provides that Verizon may recover any payment made under its terms to Brandenburg if a change in the law removes the obligation to make the payment. By way of compromise, Verizon has offered to extend the notice period to Brandenburg to 60 days, but otherwise insists on including the standard provisions in its proposed contract with Brandenburg.

Brandenburg opposes the provisions and maintains that they should be stricken from the contract. Brandenburg is particularly concerned about the reimbursement provisions that would require it to refund payments rightfully received under the contract. Brandenburg proposes that when changes are made in the law that affect obligations previously agreed upon, the parties be required to negotiate amendments to the contract that will bring it into conformity with the applicable law.

The Commission agrees with Brandenburg. The Commission finds that Brandenburg's proposal produces a firm commitment from both parties. At the same time it requires the parties to amend the contract prospectively whenever that is necessary for it to remain in conformity with the law. Therefore, the contract should provide that changes in applicable law should be incorporated into the contract through the negotiation process that either party may initiate. Further, the Commission notes that such negotiations need not occur unless the change in law actually renders a

contractual provision unlawful. A change in law that merely reduces or removes an obligation is not cause for renegotiation during the term of the contract.

Issue 5: Labor Disputes

Verizon defines *force majeure* in its standard agreement to include labor unrest, under which it lists strikes, work stoppages, slowdowns, pickets and boycotts. As proposed by Verizon, the company would be excused from performing any obligation under the contract if it were prevented from doing so by any of those events. Verizon concedes that labor unrest would not excuse it from providing the same services to Brandenburg customers that it provides to its own customers. Nevertheless, Brandenburg opposes the inclusion of labor unrest under *force majeure* provisions.

Brandenburg argues that labor disputes are not *force majeure* events and that they constitute no excuse for failure to perform obligations under the contract. Brandenburg is not reassured by Verizon's concession that the *force majeure* provisions do not excuse it from providing services to Brandenburg customers that it is able to provide during a labor dispute to its own customers. Brandenburg notes that Verizon is a large company and that the average level of service it provides to its customers generally could be lower than the level of service it provides in Elizabethtown and Hardin County.

The Commission agrees that labor unrest activities are not *force majeure* events which, by definition, are events that a party to a contract “could not have anticipated or controlled.”¹ However, the agreement should provide that, in the event of a labor

¹ Black’s Law Dictionary (7th Ed. 1999).

dispute that specifically affects Verizon and Brandenburg customers in Hardin County, Verizon must continue to provide the same level of service to Brandenburg customers that it provides to its own customers in that area. Verizon cannot be required to provide service to a competitor that is superior to that it provides to itself.²

Issue 6: Fraud Investigations

Both parties propose that each be responsible for fraud associated with its customers and that they cooperate with one another in investigating and minimizing cases of fraud. However, Brandenburg's proposal contains specific measures that the parties would agree to utilize when appropriate in the course of such cooperation. Verizon opposes including the specific proposals and instead offers to provide the same investigative service to Brandenburg that it provides to other carriers. It has offered language to that effect to add to Section 17 of its proposal.

The Commission agrees with Verizon that the issue is one of parity and that it has no obligation to offer Brandenburg greater investigative services than those it offers other carriers. Therefore, the additional language proposed by Verizon should be included in the agreement.

Issue 7: Employer's Liability Coverage

The dispute here involves the amount of coverage that Verizon will require Brandenburg to carry for Workers' Compensation and employer's liability insurance. Brandenburg asserts that it should be required to carry only the amount of insurance required by applicable law, which, it argues, is the amount that the General Assembly

² Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753 (8th Cir. 1997), vacated in part on other grounds, 525 U.S. 366 (1999).

has determined to be sufficient to protect the public interest. According to Brandenburg, that amount is \$500,000 per occurrence. Verizon proposes that, at a minimum, Brandenburg should be required to carry \$1,000,000 per occurrence. However, Verizon offers no reason for requiring the additional coverage. Moreover, Verizon concedes that there should be no issue since Brandenburg stated at the hearing that its insurance policy would cover employer's liability up to \$10 million.³ The Commission agrees with Brandenburg and sees no reason to require more coverage than the minimum required by law.

Issues 8, 16, 20, 26, 28, 32, and 48: References to External Documents

To fulfill their obligations under these provisions of Verizon's proposed contract, the parties would be required to refer to guidelines and operating procedures published on Verizon's Website. Brandenburg does not object to utilizing procedures in a document separate from the contract, but is concerned that Verizon will be able to change the procedures unilaterally. Brandenburg proposes that language be added to the agreement that would prevent Verizon from changing any procedure or practice except upon mutual agreement of the parties.

Verizon disagrees with Brandenburg's interpretation and expressly maintains that the contract does not incorporate the contents of its Website as contractual obligations. Verizon notes that the contract makes only three references to the Website, and that Brandenburg has agreed to each such provision. Furthermore, Verizon notes that in one of those instances the contract provides that Verizon must follow specific guidelines

³ Transcript of Evidence ("TE") at 60.

before it can alter or change the terms and conditions of its Operations Support Systems (“OSS”).

The Commission finds that the procedures published on the Website apply equally to all competitive local exchange carriers (“CLECs”) with whom Verizon interconnects. Moreover, the limited scope of the incorporation of the Website’s procedures appears to prevent the sort of broad unilateral change that concerns Brandenburg. Accordingly, Brandenburg’s proposed language is rejected.

Issue 10: Notice of Technology Upgrades

Verizon’s proposed contract gives Verizon the discretion to upgrade its facilities. Brandenburg does not object to this provision. It does, however, desire reasonable notice of such an upgrade. As noted by Verizon, the language in its proposal references 47 CFR 51.325 through 51.335, which require an incumbent local exchange carrier (“ILEC”) to give notice of any network change in specific instances, including changes that will affect a competing service provider’s ability to provide service. As federal requirements satisfy Brandenburg’s concerns, this issue is resolved.

Issue 11: Transfer of Assets; Sale of Verizon Territory

Verizon’s proposed contract would allow Verizon to terminate the agreement upon 90 days’ notice if it sells or transfers its operations in the territory affected by the agreement to a third party. Verizon’s recent announcement that it has agreed to sell its operations in this state make this occurrence a definite possibility. Brandenburg seeks protection from such an occurrence by proposing that the contract survive the sale. The Commission agrees with Brandenburg and finds that language should be included in the agreement which specifies that the contract bind any successor in interest.

Issue 14: Definition of "Local Traffic"

Both parties wish to include a definition for "local traffic" in the glossary of their interconnection agreement. Verizon, which prefers to refer to the traffic as "Reciprocal Compensation Traffic," wants the definition to reflect the Federal Communications Commission's ("FCC") recent decisions concerning local traffic, reciprocal compensation and Internet service providers, and to base the determination on Verizon's local calling areas as defined by Verizon. Brandenburg does not appear to object to reflecting recent FCC decisions, but strongly opposes allowing Verizon to define the local calling areas. Brandenburg argues that this provision would enable Verizon to change the definition of "local traffic" unilaterally during the term of the agreement.

While the Commission does not construe the language proposed as Brandenburg construes it, the Commission agrees that it should not be included in the agreement. Pursuant to KRS 278.160, local calling areas should be altered by tariff procedures established by applicable statutes and Commission regulations. Those procedures allow for objections to be made to proposed changes by parties in interest. The same procedures shall continue to be applicable under the interconnection contract.

Issues 15 & 37: Alternate Billed Calls

Verizon's proposed agreement provides that alternate billed calls originated or authorized by the parties' respective customers shall be settled in accordance with a mutual agreement. Brandenburg objects to Verizon's language as too broad, and prefers a settlement practice that has been mutually agreed upon by the parties. In the

absence of such an agreement, Brandenburg proposes that neither party charge the other for such calls.

The Commission finds that Brandenburg should designate a centralized message distribution center host company ("CMDS") to act as its clearing house for such calls and to notify Verizon of its selection. The contract should provide that in the absence of such a selection, the language proposed by Verizon shall apply.

Issue 17: Directory Listings

The issue here is one of pricing for directory listings. Brandenburg maintains that it should be required to pay only the discount or wholesale rate. Verizon disagrees, arguing that directory listings are not a "telecommunications service" under the Telecommunications Act and, therefore, do not qualify for the discount. There is no challenge to the proposition that the cost of a directory listing is included in providing a newly ported number. It is the charge associated with additional listings that is the center of the dispute. The Commission agrees that additional listings are not network elements necessary to provide telecommunications service. If Brandenburg were reselling Verizon's service, these listings as retail services would be available at a wholesale discount. However, as Brandenburg will provide facilities-based service, the wholesale discount is no longer applicable and Brandenburg would pay the appropriate tariffed rate. Accordingly, the contract should include language that reflects this decision.

Refers to Issues 18, 16, 20, 26, 28, 32, and 48: Duties of an Account Manager

The issues relating to an account manager are similar to the issues raised by Brandenburg concerning the need to consult Verizons's Website. Brandenburg argues

that as problems arise, it needs a specific Verizon contact person who is familiar with Brandenburg's operations. Accordingly, Brandenburg proposes language that would require each party to assign the other an "Account Manager" who will be required to resolve problems brought to his attention by the other party. The Account Manager would further be required to begin addressing a problem within 5 days after it is brought to his attention.

Verizon objects to the provision on the grounds that it is an attempt by Brandenburg to dictate how Verizon does business. Verizon states that it has assigned one person to deal with problems that CLECs encounter in Kentucky.

The Commission finds that this is essentially a matter of parity and non-discrimination. Whatever problem solving services that Verizon furnishes to other CLECs and to its own operations must likewise be furnished to Brandenburg. Nevertheless, the Commission also agrees with Brandenburg that Verizon should designate a point of contact who will address Brandenburg's problems in a timely and reasonable fashion. However, Verizon should be permitted to determine the number of persons designated as Brandenburg contacts.

Issues 23 & 49: Pricing

Brandenburg requests this Commission to adopt its position that retail rates are not applicable for DS1/DS3 trunking. Section 251(c)(2)(D) of the Telecommunications Act requires an ILEC to interconnect on rates, terms and conditions that are just, reasonable, and nondiscriminatory. Furthermore, Section 252(b)(4)(B) gives each state commission the power to arrive at its best decision based upon the information provided during the arbitration process.

During a September 7, 2001 informal conference, the Commission Staff required Verizon to provide a rate list to Brandenburg before September 28, 2001. Verizon missed this date and the ensuing prices arrived just prior to the arbitration hearing. This untimeliness resulted in a lack of reasonable opportunity to review the prices, so a mutually agreed upon arrangement permitted Verizon and Brandenburg to revisit pricing. Yet in its post-hearing brief Verizon asserts that last-minute inquiries into cost support are not relevant as this is an arbitration, not a cost, proceeding. Verizon is in error. Pricing is clearly crucial to Brandenburg's ability to compete as a CLEC. More vitally, it is a central issue to any arbitration, as the Federal Court of the Eastern District of Kentucky has found. See AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 20 F. Supp. 2d 1097, 1102 (E.D. Ky. 1998) (finding that the PSC was required to set interconnection rates during the statutory period allowed for arbitrations).

Verizon takes the position that its DS1 and DS3 offerings are located in the No. 6 Intrastate Access Tariff on file and that this open arrangement allows anyone, including CLECs, an opportunity to review prices. However, these prices are tariffed as opposed to cost-based and are not, therefore, appropriate unbundled network elements ("UNE") prices under 47 U.S.C. § 252(d). UNE pricing must be applied to trunking as it is a necessary network element required by a CLEC to effectively compete. Denial of trunking as a UNE would in fact impair Brandenburg's ability to compete.

The FCC has declared that incumbents must provide UNEs at cost-based rates.⁴

⁴ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket 96-98, Aug. 8, 1996), at ¶ 231.

This Commission finds that DS1 and DS3 trunks are UNEs and that the tariffed prices on file are not cost based and must be rejected. Brandenburg's request for cost-based intrastate DS1 and DS3 trunking is both reasonable and timely. Verizon is therefore ordered to provide cost-based pricing for these elements.

Issues 21 & 22: Referral and Intercept Announcements

Brandenburg argues that Verizon should provide Brandenburg's customers referral and announcement services free of charge for a specified period. Brandenburg recommends that the period be 120 days for business customers and 30 days for residential customers. In addition, Brandenburg states that neither party should be allowed to charge the other party's customers for a local exchange carrier change during the intercept and referral period. Brandenburg is concerned that Verizon might use such charges to interfere with recent customer transfers from Verizon to Brandenburg.

Verizon argues that, in the interest of efficient network management, it has the right to determine the length of the referral and intercept periods, and to establish such charges as it deems appropriate. Accordingly, while Verizon proposes the same referral and intercept periods as those proposed by Brandenburg, Verizon reserves the right to reduce the period if a number shortage condition requires reassignment of a number. Verizon disagrees that this places Brandenburg at a disadvantage since, under the Act, it is required to charge the same fees to Verizon customers that it charges to Brandenburg customers. Verizon notes that it currently does not charge for the services. Consequently, under its current practice, it would not be entitled to charge Brandenburg's customers either.

The Commission finds that Verizon must provide this service at parity and generally agrees with Verizon. However, the contract should further provide that when a customer's number is changed, no charge should be made for these services.

Issue 25: Termination of OSS License

The proposed contract provides Brandenburg with a non-exclusive license to use Verizon's OSS information. At issue is when that license expires. Verizon's proposed contract sets forth three conditions, namely: "(a) the time when the Verizon OSS Information is no longer needed by Brandenburg to provide telecommunications services to Brandenburg customers; (b) termination of the license in accordance with Section 8; or (c) expiration or termination of the agreement." Brandenburg accepts conditions (b) and (c), but objects to condition (a).

Brandenburg argues that condition (a) gives Verizon discretion to terminate the license when Verizon alone determines that Brandenburg no longer requires the information. Brandenburg states that such discretion is unreasonable given the fact that such information could be essential to Brandenburg's implementation of the agreement. The Commission agrees with Brandenburg. Condition (a) should be removed from the agreement.

Issue 27: Poles, Conduits, and Rights-of-Way

Verizon proposes to allow Brandenburg access to its poles, conduits and rights-of-way under the terms and conditions of its standard Pole Attachment and Conduit Attachment and Conduit Occupancy Licensing Agreement. This agreement was submitted as a part of Verizon's Best and Final Offer in this proceeding.

Brandenburg objects to Verizon's agreement as too complex. It also points out that it is not based on Verizon's existing CATV Pole Attachment and Cable Duct Arrangement tariff on file with the Commission. Brandenburg's alternative is an agreement that, according to the company, has as its basis the CATV tariff. In Brandenburg's opinion its proposal is simpler and more efficient. Brandenburg details a number of the differences between its proposal and Verizon's standard agreement.⁵ It also details its specific objections to the standard agreement.⁶ Brandenburg and Verizon agree that the annual rate for two-user poles should be \$12.12 per year; however, the companies disagree on the annual fee for three-user poles. Verizon proposes a three-user pole rate equal to the two-user pole rate, while Brandenburg proposes a three-user pole rate of \$5.64 per year. Brandenburg also proposes a four-user pole attachment rate of \$2.64 per year and objects to paying a \$200 fee for processing the pole attachment or conduit occupancy fee included in Verizon's standard agreement. Finally, Brandenburg argues that the agreement should include authorization to attach facilities for the provision of digital video and Internet services and that the term of the agreement should be 10 years as opposed to 2, with consecutive 1-year renewals and a 90-day notice of termination by either party.

Verizon's CATV tariff has been on file with the Commission since September 1982.⁷ The current tariff was approved on December 1, 2000. Over the years, the rules

⁵ Prefiled testimony of Dennis Ray Willoughby at 3 and 4.

⁶ Id. at 5 - 6.

⁷ Administrative Case No. 251, The Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments.

and regulations contained in the tariff have provided a clear and concise method for dealing with pole attachments and conduit occupancy issues. CATV providers have operated under the regulations of the tariff for many years, abiding by the rules and prices contained therein. The tariff generally mirrors Verizon's standard attachment agreement, although the agreement contains significantly more terms and conditions that the Commission has determined are necessary to have an effective agreement and to protect Verizon's property rights.

Therefore, the Commission finds that Verizon's proposed agreement should govern Verizon's relationship with Brandenburg, as well as with other CLECs, concerning pole attachments and conduit occupancy issues. However, the proposed agreement should be amended to include a three-user pole attachment rate of \$5.64 per year and to eliminate the \$200 processing fee for pole attachment and conduit occupancy applications. Brandenburg and other CLECs should not pay the application fee when CATV providers, under the existing tariff, do not. Verizon claims that not charging Brandenburg the application processing fee is discriminatory because other CLECs have paid the fee; however, the Commission finds that charging the fee to CLECs and not to CATV providers is no less discriminatory. Verizon should amend its existing agreements to avoid problems under KRS 278.170. The Commission does not, at this time, require that a four-user pole rate be included in the agreement. As Verizon points out, safety concerns remain unaddressed. Moreover, the Commission has not sanctioned such a rate in Verizon's tariff.

Finally, Verizon must modify the provisions regarding the term of the agreement to reflect that either party may terminate the agreement upon 180 days' notice to the other, subject to the right of the other party to demand arbitration of the termination.

Issue 28: LEC Freezes

Brandenburg argues that the contract proposed by Verizon does not specify procedures for a CLEC to follow in order to lift a LEC freeze. In the absence of such language, Brandenburg recommends that the procedures established by the Commission in 807 KAR 5:062 relating to changes of primary interexchange carriers be incorporated into the proposed agreement. Verizon appears to agree with this position and, like Brandenburg, cites the Commission's decision in In the Matter of Tel-Save, Inc. vs. BellSouth Telecommunications, Inc.⁸ Based on the apparent agreement of the parties, the Commission finds that the procedures established in 807 KAR 5:062 should be incorporated into the interconnection agreement.

Issue 29: Points of Interconnection

Brandenburg asks that its agreement with Verizon reflect that Verizon will interconnect with Brandenburg at any technically feasible point in the network pursuant to 47 U.S.C. § 251(c)(2)(B). Verizon, on the other hand, views the inclusion of this statutory language in its agreement as “a blank check.” Verizon asks that Brandenburg expressly define in the agreement the location or the methods for interconnection. Verizon does indicate it is willing to carry out its statutory duty to interconnect at any technically feasible location.

⁸ Case No. 97-381 (Ky. P.S.C., July 7, 1999).

It appears that the parties have no real disagreement here. Accordingly, the agreement shall include the statutory standard. If the parties agree on inclusion of a mid-span copper or fiber meet or other types of locations, then that language too may be included in their agreement. If Brandenburg and Verizon do not reach agreement on the specific types of locations to be included, then the executed contract should include merely the statutory language of “interconnection at any technically feasible point.”

Issues 30 & 33: Interconnection Points

The parties argue over who should pay to deliver traffic to points of interconnection. Brandenburg asserts that each party should be financially responsible for delivering its traffic to the other party’s point of interconnection (“POI”). For reasons stated at length in the Commission’s recent Orders in Case No. 2000-404, the Commission finds that Brandenburg should prevail on this issue.⁹ Thus, the Commission finds that Brandenburg has the right to establish a minimum of one point of interconnection per LATA. Brandenburg is also required to establish another POI when the amount of traffic passing through a Verizon access tandem switch reaches a DS-3 level. Verizon has failed to demonstrate that the costs it will incur to reach Brandenburg’s POI will not be covered by the rates Verizon charges its own customers. In absence of this showing, the Commission will not deviate from the well-established principle that each carrier must pay the originating costs of its own traffic.

⁹ The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996 (Order dated March 14, 2001) at 134, as modified on April 23, 2001, at 1 and 2.

The parties' agreement should reflect that their arrangement complies with the standards set forth by FCC Rule 51.703(b), which states that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originate on the LEC's network." The agreement must also comply with the standards of 47 U.S.C. § 251(c)(2)(B), requiring Verizon to interconnect at any technically feasible point. If, as the agreement is implemented, Verizon believes that Brandenburg has located its points of interconnection outside of Verizon's franchise calling area, thus requiring Verizon to incur unnecessary costs, then Verizon may file a complaint with this Commission.

Issue 35: Payment of Reciprocal Compensation

Verizon has proposed language that prescribes when reciprocal compensation will be due and how it will be calculated. Brandenburg makes no objection to the provisions, but is concerned about where the interconnection points, which are a factor in the calculations, will be located. That issue is resolved in Issue 33, and therefore, no further discussion is necessary here.

Issue 39: Tandem Transit Traffic

As traffic crosses a tandem switch and is terminated on a carrier's network, the carrier owning the switch will often be billed by the terminating traffic carrier regardless of whether or not the owning carrier is the originating carrier. Verizon, as the tandem switch owner, seeks to pass these costs on to the originating carrier. Verizon goes on to represent that it retains all billing records. All carriers must have their reciprocal compensation rate agreements on file with the Commission, therefore making them part of the public record.

Brandenburg states that it would be willing to pay the cost incurred by the tandem switch owner from the terminating carrier if the costs were reasonable and known in advance. As these are published rates available for inspection by all carriers, the Commission agrees with Verizon on the issue. Verizon must be more forthcoming with information delineating the price list.

Issue 41: Forecasting

Brandenburg and Verizon do not appear to have substantially differing views on the issue of forecasting. Verizon proposes a methodology to establish an initial number of trunks. It will provide the same number of trunks to terminate reciprocal compensation traffic to Brandenburg as Brandenburg provides to terminate reciprocal compensation traffic to Verizon. Moreover, Verizon commits to providing additional trunks based upon forecasts from reliable engineering data from Brandenburg. Verizon indicates that it will only reduce the number of trunks that Brandenburg or any other CLEC uses if it receives adequate notice. Verizon has also committed that under no circumstance will it sever a CLEC's only tie to Verizon's network because of trunk under-utilization. Verizon has even proposed additional language to the contract to cover this last issue. Given this common ground, the parties should be able to negotiate contract language on which they can mutually agree.

The Commission, having considered the petition of Brandenburg, Verizon's response thereto, and the evidence of the record in this proceeding, and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Brandenburg's motion to exclude testimony and documents filed after September 28, 2001 is denied.

2. Within 30 days of the date of this Order, the parties shall submit their executed interconnection agreement complying with the Commission's decisions ordered herein.

Done at Frankfort, Kentucky, this 15th day of November, 2001.

By the Commission

ATTEST:


Executive Director