

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

On December 5, 2001, Verizon South, Inc. ("Verizon") filed a motion, pursuant to KRS 278.400, for rehearing of the Commission's Order of November 15, 2001 (the "Order") with respect to two issues. The motion was filed in conjunction with its response to a motion filed by Brandenburg Telecom LLC ("Brandenburg") on November 19, 2001 for clarification of the Order. On December 6, 2001, Brandenburg filed its response to Verizon's motion. On December 11, 2001, the Commission entered an Order on the issues raised by Brandenburg's motion for clarification, but deferred ruling on the issues raised by Verizon in its motion for rehearing. This Order addresses the issues that were deferred.

Verizon is an incumbent local exchange carrier ("ILEC") in several areas of this state, including the city of Elizabethtown. Brandenburg is a competing local exchange carrier ("CLEC") that is seeking an interconnection agreement with Verizon to enable it to provide local exchange service in Elizabethtown. The parties have not been able to resolve all the issues between them during their negotiations and the purpose of this

proceeding is to arbitrate a resolution for the unresolved issues. This Order addresses two of those issues.

1. Transfer of Assets; Sale of Verizon Territory (Issue 11)

In Section 43.2 of its draft interconnection agreement submitted on August 31, 2001 as its best and final offer, Verizon proposed that it be allowed to terminate the agreement upon 90 days' notice if it sold or transferred to a third party its operations in the territory affected by the agreement. Brandenburg objected to this proposition and counter-proposed that the agreement should remain in effect until a new agreement could be negotiated. In the Order the Commission agreed with Brandenburg and directed the parties to negotiate an agreement that would survive such a sale. In its motion for rehearing, Verizon requests that the Commission reconsider its decision, contending that it is not supported by either the law or the facts. The Commission disagrees with Verizon and reaffirms the Order on this issue.

Concerning the law, Verizon states that an agreement may only bind the parties who execute the agreement and cannot bind third parties that have not consented to its terms. No one disputes this proposition. The key phrase is "non-consenting." The Commission's Order does not attempt to bind a non-consenting party to the agreement.

A contract has been defined as a "promise or set of promises, for breach of which the law gives a remedy." *Watkins vs. Department of Highways*, Ky., 290 S.W.2d 28 (1956). The interconnection agreements proposed by both parties meet this definition. Their clear purpose is to create a stable relationship between the parties by establishing mutually enforceable obligations that the parties are able to rely upon in conducting their affairs. That stability would be jeopardized if Verizon were able to

avoid its obligations simply by transferring the assets necessary to perform the contract to a third party. Thus, the Commission's Order prevents Verizon from transferring the assets to a third party that does not consent to the terms of the interconnection agreement.

Verizon also argues that the Order errs as a matter of fact. Verizon states that the Order incorporates procedures and conditions that are specific to Verizon and that a third party would find difficult, if not impossible, to perform or satisfy. If this is a problem, then Verizon must address it in the negotiation of the sale, and not seek to avoid by negotiation its interconnection agreements.

Furthermore, as a regulated utility, Verizon cannot simply transfer its operations to anyone willing to accept them. KRS 278.020(4) and (5) require Commission approval of any proposed transfer. Those subsections further provide that such approval be given only if the Commission determines that the transferee has the financial, technical and managerial ability to provide reasonable service, and that the transfer is consistent with the public interest. The statute contemplates that the Commission ensure a utility's customers are not placed at risk by the sale of its assets. The statute's protections extend to CLECs with whom an ILEC interconnects. Therefore, the transfer of Verizon's operations cannot be approved unless the purchaser demonstrates the ability to continue to provide the services to its customers that Verizon now provides to its customers.

2. DS-1/DS-3 Trunking Prices (Issue 49)

Verizon's motion also requests clarification of the Order's directive that Verizon provide cost-based pricing for the DS-1 and DS-3 trunking services that it has offered to Brandenburg. On December 11, 2001, the same issue was addressed in a Commission Order arising out of Brandenburg's November 19, 2001 motion. In that Order the Commission further directed Verizon to provide cost support for the DS-1 and DS-3 rates it will propose when it submits the interconnection agreement. Although neither party has questioned that directive, this Order will also apply to it.

The rates Verizon has proposed for these services are found on Page 124 of the draft interconnection agreement filed by Verizon on August 31, 2001. In its motion, Verizon agrees with the Order that DS-1 and DS-3 trucking services are unbundled network elements ("UNEs"), and that 47 U.S.C. § 252(d)(1)(A) of the 1996 Telecom Act requires them to be cost-based. In this context, cost-based rates refer to rates that are based on forward looking or total element long running incremental costs ("TELRIC"). The rates in the interconnection agreement appear to be tariffed rates based on historic costs and, as such, are not applicable to interconnection agreements. Therefore, the Order's directive that Verizon provide cost-based rates for DS-1 and DS-3 services and furnish the cost data supporting the rates should be reaffirmed.

The Commission, having considered Verizon's motion for rehearing on Issues 11 and 49 and Brandenburg's response thereto, and the evidence of the record in this

proceeding, and being otherwise sufficiently advised, HEREBY ORDERS that the motion is denied and the Order's rulings on those issues are hereby reaffirmed.

Done at Frankfort, Kentucky, this 19<sup>th</sup> day of December, 2001.

By the Commission

ATTEST:

  
Executive Director