Agenda Date: 3/16/06
Agenda Item: 4F

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
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IN THE MATTER OF THE PETITION OF VERIZON NEW JERSEY INC. FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS IN NEW JERSEY PURSUANT TO SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REMAND ORDER	)	TELECOMMUNICATIONS ORDER DOCKET NO. TO05050418
IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS D/B/A COVAD COMMUNICATIONS COMPANY, SNIP LINK LLC, XO COMMUNICATIONS SERVICES, INC. AND XTEL COMMUNICATIONS, INC. FOR AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH VERIZON NEW JERSEY INC., PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, THE TRIENNIAL REVIEW ORDER AND THE TRIENNIAL REMAND ORDER	)	DOCKET NO. TO05070606
IN THE MATTER OF THE PETITION OF XO COMMUNICATIONS SERVICES, INC. FOR ARBITRATION OF AN AMENDMENT TO AN INTERCONNECTION AGREEMENT WITH VERIZON NEW JERSEY INC.	)	DOCKET NO. TO05060551
IN THE MATTER OF THE PETITION OF ATX LICENSING, INC.; CTC COMMUNICATIONS CORP.; ICG TELECOM GROUP, INC.; AND LIGHTSHIP TELECOM LLC FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH VERIZON NEW JERSEY INC. PURSUANT TO SECTIONS 251, 252 AND 271 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE TRIENNIAL REVIEW ORDER AND TRIENNIAL REVIEW REMAND ORDER	)	DOCKET NO. TO05060552

(SERVICE LIST ATTACHED)

BY THE BOARD:

By Petition dated May 10, 2005, Verizon New Jersey Inc. ("VNJ") requested that the New Jersey Board of Public Utilities ("Board") initiate a consolidated arbitration proceeding to amend its interconnection agreements with certain competitive local exchange carriers ("CLECs") to reflect changes in VNJ's unbundling obligations, in accordance with the Federal Communications Commission's ("FCC") Triennial Review Order ("TRO")[1] and the FCC's Triennial Review Order on Remand ("TRRO")[2]. The legal issues arising out the discussions between the carriers regarding the changes to existing interconnection agreements concern interpretation of the TRO and the TRRO.

VNJ is an incumbent local exchange carrier ("ILEC") as defined by section 251(h) of the 1996 federal Telecommunications Act ("the Act"). The CLECs are, individually, companies with interconnection agreements with VNJ arising under sections 251 and 252 of the Act. The underlying interconnection agreements were each approved by the Board pursuant to its authority under section 252 of the Act.

VNJ sought to amend its agreements with seven CLECs: ACN Communications Services Inc.; AT&T Communications of New Jersey L.P.; Gillette Global Network, Inc.; IDT America Corp.; Monmouth Telephone & Telegraph, Inc.; Qwest Communications Corporation; and Sprint Communications Company L.P. VNJ sought arbitration with these CLECs because their interconnection agreements might be misconstrued to call for amendment before VNJ may cease providing unbundled network elements ("UNEs") eliminated by the TRO.

When amendments to interconnection agreements are sought which affect the rights and obligations set forth in the agreement, such changes must be implemented through negotiation or arbitration according to the unbundling rules of the FCC. From this process, the attached Amendment was drafted and executed by the parties. The Board is now tasked with the duty to approve or disapprove of the Amendment based upon the associated Arbitration decisions.

BACKGROUND

On August 21, 2003, the FCC released its Triennial Review Order, which became effective on October 2, 2003. On that date, VNJ notified New Jersey CLECs of its intent to negotiate an amendment to its interconnection agreements to implement the changes of law arising under the Triennial Review Order.

Based upon this notice, VNJ filed a Petition for Arbitration on February 20, 2004, requesting that the Board initiate a consolidated arbitration proceeding to amend the interconnection

[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338);Implementation of 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), Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, released August 21, 2003 (TRO).

[2] In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, (Rel. Feb. 4, 2005) (TRRO).

agreements between VNJ and over 100 CLECs and Commercial Mobile Radio Service ("CMRS") providers in New Jersey. VNJ requested approval of its proposed interconnection agreement amendment, which it asserted would implement changes to its unbundling obligations arising under the FCC's TRO.

The D.C. Circuit Court of Appeals, on March 2, 2004, vacated portions of the rules adopted in the FCC's TRO, and remanded those rules for further proceedings before the FCC. (The "USTA II" decision)

On May 7, 2004, VNJ filed a motion seeking to hold the arbitration proceeding in abeyance until June 15, 2004. On June 18, 2004, the Board ordered VNJ to continue providing unbundled network elements to CLECs for a minimum of 90 days after issuance of the USTA II mandate. The Board stated that "[a]ny modifications to the rates, terms or conditions contained in approved interconnection agreements during and after the 90 day period must be approved by the Board, consistent with applicable law, and shall be subject to such further orders as the Board may hereafter issue."

Thereafter, on August 12, 2004, VNJ filed a Notice of Withdrawal of its Petition for Arbitration with respect to all CLECs and CMRS providers included in its original Petition except seven parties. In its Notice of Withdrawal, VNJ claimed that no amendment was required under the individual interconnection agreements with the named carriers to discontinue providing those UNEs no longer subject to an unbundling obligation under section 251(c)(3). Specifically, VNJ argued that it could unilaterally notify the named carriers of its intent to discontinue providing UNEs that were eliminated under section 251(c)(3) based upon either the TRO or the D.C. Circuit's mandate in USTA II.

On February 4, 2005, the FCC released the text of its TRRO. The rules adopted in the TRRO constitute a change in law under the individual interconnection agreements.

On May 10, 2005, VNJ filed a Notice of Withdrawal of its February 20, 2004 Petition for Arbitration with respect to the remaining seven parties and requested that the Board close Docket No. TO04040111. Contemporaneous with its Notice of Withdrawal, VNJ filed a new Petition for Arbitration with the seven parties to initiate a consolidated arbitration proceeding to amend VNJ's interconnection agreements with the seven CLECs VNJ claimed that its agreements with all other CLECs "clearly specify that VNJ may discontinue, upon notice, UNEs that it has no legal obligation to provide under federal law." Thus, VNJ argued "there is no need to amend these contracts to give contractual effect to the changes in unbundling obligations as a result of the TRO and TRRO."

AT&T Communications of NJ, L.P. (AT&T), in its response dated June 3, 2005, stated that two of its entities, TCG Delaware Valley, Inc. and Teleport Communications New York, should be included in this proceeding.

On June 6, 2005, DIECA Communications d/b/a/ Covad Communications Company, IDT America Corp.; SNiP LiNK LLC, XO Communications Services, Inc. (formerly Allegiance Telecom of New Jersey Inc. and XO New Jersey, Inc.), and XTel Communications, Inc. (collectively, the "CCC") filed a petition for arbitration and a motion that requested that the Board consolidate its filing with the petition filed by VNJ (Docket No. TO05050418) as the issues are predicated on the same legal issues arising under the TRO raised by VNJ.

On June 16, 2005, XO Communications Services, Inc. ("XO") filed a petition for arbitration seeking resolution of additional issues arising between XO and VNJ in the negotiation of an amendment to their interconnection agreement to reflect a change in law arising out of the TRO.

On June 24, 2005, ATX Licensing, Inc., CTC Communications Corp., ICG Telecom Group, Inc., and Lightship Telecom LLC (collectively, the "CCG") filed a petition for arbitration and a motion that requested that the Board consolidate this matter with the petition filed by VNJ (Docket No. TO05050418) as the issues raised in this petition are identical to the issues raised by VNJ.

By letter dated July 1, 2005, VNJ stated that it does not object to consolidating the petitions filed by the CCC and the CCG with VNJ's instant proceeding. In addition, VNJ presumed that the XO petition would be consolidated. Further, VNJ also stated that it did not object to including the two AT&T entities in this proceeding.

By letter dated July 11, 2005, XO responded to VNJ and objected to consolidation of the petition. XO stated that consolidation would unnecessarily delay resolution of XO's petition.

On August 17, 2005, the Board accepted Staff's recommendation to consolidate these matters and an RFQ was issued for an Arbitrator. Honorable Daniel O'Hern was selected to preside over this matter as Arbitrator.

On September 13, 2005, the parties convened for a Pre-hearing Conference, presided over by Arbitrator O'Hern, where the initial procedural schedule was set. Pursuant to the schedule, parties filed Initial Briefs on September 23, 2006 and Reply Briefs on September 30, 2005. On October 14, 2005, a Status Conference was convened between the parties by Arbitrator O'Hern, where the proposed schedule was revised to allow additional time for negotiation by the parties. A status conference was held in November 2005, where the parties informed Arbitrator O'Hern of the remaining issues which they had not resolved through settlement. Arbitrator O'Hern issued his Recommended Decision on December 1, 2005 ("Recommended Decision"). The parties filed their Exceptions to the Arbitrator's Recommended Decision on December 12, 2005. Arbitrator O'Hern issued his Decision on the Exceptions on January 3, 2006 ("Decision on Exceptions"). Arbitrator O'Hern held a telephonic drafting conference on January 30, 2006. The Parties filed the Amendment to the Interconnection Agreement with language conforming to the Arbitrator's Decision on February 10, 2006. VNJ concurrently filed a Letter with the Board identifying its Objections to certain conforming language in the Amendment. The Division of the Ratepayer Advocate filed its Comments on the Amendment on February 28, 2006. The CLECs also filed its response to VNJ's Objections on February 28, 2006. On March 1, 2006, VNJ filed a Motion to Strike the CLEC objections.

ARBITRATOR'S DECISIONS AND AMENDMENTS TO THE INTERCONNECTION AGREEMENTS

On August 15, 1996, the Board, in Docket No. TX96070540 issued an Order nominated I/M/O the Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996. This Order serves as the blueprint for the Board's review of the current application, and it is within this framework that the Board makes its determinations. As directed by that Order, the Arbitrator's decision has been reduced to individually executed Amendments to Interconnection Agreements, and it is this document that the Board will ultimately accept or reject. The Arbitrator's decision forms the foundation for the language in these Amendments, and thus the Board will consider and review those documents as well, but ultimately it is the Amendments that form the "decision" under review.

To the extent that the Amendments include language required by the Arbitrator's decisions but which has not been objected to by the parties, the Board has not and does not find a basis for modification or reconsideration of the Arbitrator's decision. Accordingly, rather than placing the decisions in the Order in detail, the Board HEREBY ADOPTS the reasoning of the decisions by the Arbitrator as its own, and as incorporated into the Amendments, all elements not objected to by the parties at the time or following the submission of the Amendments to the Board as if set forth here at length.

VNJ OBJECTIONS

On February 10, 2006, pursuant to Board rules, executed Amendments were filed as to VNJ and each individual CLEC. Concurrently, VNJ filed objections to portions of the amendment language decided by Arbitrator O'Hern. VNJ raised three objections to the nature of the Amendments, and calls upon the Board to require modifications on all three elements.

1 The Board Should Delete the Amendment Language Stating that VNJ's New Conversions and Commingling Obligations Took Effect on October 2, 2003. (Sections 3.11.1 and 3.11.2.6.)

VNJ objects to the inclusion of language in the Amendment that set a date of October 2, 2003 for the implementation of the FCC's new commingling and conversion requirements and rates. Specifically, VNJ asks the Board to delete the "as of October 2, 2003" phrase in sections 3.11.1 and section 3.11.2.6 in its entirety[3], and to reverse any element of Arbitrator O'Hern's ruling that might be interpreted to require VNJ to implement the FCC's new commingling and conversions requirements on a retrospective basis, back to the effective date of the TRO. In the TRO, the FCC eliminated its previous commingling restriction and accordingly modified its rules to permit CLECs to commingle UNEs and UNE combinations with non-UNE wholesale services (such as tariffed switched and special access).[4] The FCC also adopted new criteria CLECs must meet to convert existing tariffed special access circuits to enhanced extended links ("EELs")[5] offered at UNE rates.[6] VNJ claims that the ruling by Arbitrator O'Hern and subsequent Amendment

[3] The full text of Section 3.11.2.6 reads as follows:

> As required by the Arbitration Order and 47 C.F.R. § 51.318, Verizon must provide ***CLEC Acronym TXT***, as of October 2, 2003, commingling and conversions, subject to the requirements of Section 3.11.2 above. For any new or converted EEL, Verizon shall bill, and ***CLEC Acronym TXT*** shall pay the applicable rate for the equivalent UNE (if any) or Combination (if any) as of the date that ***CLEC Acronym TXT*** made the relevant conversion or commingling request to Verizon, subject to Section 3.11.2.5 above.

Verizon argues that if the Board agrees that the Arbitrator's ruling regarding the October 2, 2003 effective date should be reversed, then there is no need for Section 3.11.2.6 at all, as its only purpose is to implement the Arbitrator's ruling in cases where Section 3.11.2.5 would not otherwise govern the timing intervals for application of UNE rates.

[4] See TRO, 18 FCC Rcd at 17342, ¶ 579; 47 C.F.R. § 51.309 (e) & (f). Commingling means attaching, connecting or otherwise linking a UNE or UNE combination to one or more facilities a CLEC has obtained from the ILEC at wholesale. See 47 U.S.C. § 5.1.5 ("Commingling" definition).

[5] An EEL is a combination of a UNE loop and UNE dedicated transport. See 47 C.F.R. § 51.5 ("Enhanced extended link" definition).

[6] See TRO at 17342, 17351-366, ¶¶ 577, 591-619; 47 C.F.R. §§ 51.316 & 51.318. The EEL eligibility criteria are intended to ensure that carriers requesting EELs have demonstrated a commitment to serving the local voice market

language is unlawful because the FCC required parties to negotiate amendments to implement the new commingling and conversions rules adopted in the TRO before those obligations go into effect, and thus requiring an effective date prior to this amendment for those requirements would be in violation of the TRO.

VNJ states that Arbitrator O'Hern correctly recognized that the new commingling and EEL eligibility rules imposed in the TRO were changes of law that must, therefore, be implemented through amendments to existing interconnection agreements. The Recommended Decision, moreover, asserts that nothing in the TRO suggested that the "base entitlement provisions" for commingling and conversions "do not require ["Interconnection Agreement"] ICA Amendment though § 252 processes." Recommended Decision, at 58. Likewise, in the Decision on Exceptions, VNJ believes Arbitrator O'Hern found that because existing interconnection agreements continue to apply until amended, "any revised EEL/UNE pricing does not go into effect until the effective date of the ICAs in the proceeding." Decision on Exceptions, at 13.

Accordingly, VNJ contends that Arbitrator O'Hern should have recommended that CLECs may take advantage of the TRO's new commingling and EEL eligibility rules only once they have executed an amendment addressing these new rules. VNJ states that, despite Arbitrator O'Hern's recognition of the guiding legal principles, he inexplicably adopted Amendment language that arguably could be read to require VNJ to implement the TRO's new commingling and conversions rules, without any contract amendments, and retroactively, "as of October 2, 2003." Amendment, §§ 3.11.1, 3.11.2.6. VNJ believes this decision could allow CLECs to claim that they are entitled to retroactive UNE pricing as of the date they submitted a conversion order, as far back as October 2, 2003, even though their agreements in effect at the time did not permit commingling or address the new EEL eligibility criteria.

VNJ further states that it has no obligation to perform commingling or conversions under the FCC's new rules in the absence of an interconnection agreement amendment. VNJ claims Arbitrator O'Hern recognized that the FCC required carriers to use the Act's § 252 negotiation and amendment process to implement the new obligations imposed in the TRO, including those relating to conversions and commingling.[7] Further VNJ argues that the FCC expressly declined to "override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." TRO, ¶ 701. VNJ asserts that "individual carriers should be allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from different interpretations of our rules." Id., ¶ 700. VNJ contends, to the extent parties could not resolve their disputes through negotiation, the FCC expected them to initiate arbitrations. Id., ¶¶ 703-04.

The FCC, claims VNJ, required carriers to translate its new commingling and conversions rules into "specific terms and conditions" before ILECs were expected to comply with these new obligations. VNJ stated that the FCC never suggested that ILECs were required to undertake the new obligations first, and only later work out the terms or conditions governing these obligations. This mechanism is different than that imposed by the TRRO. [8] In the TRRO, the FCC made its "nationwide bar" on new UNE-P arrangements and other de-listed elements

[7] Recommended Decision, at 58, 68. Neither the Board nor the Arbitrator determined (or were ever asked to determine) that the terms of particular existing agreements automatically gave effect to Verizon's commingling and conversion obligations under the TRO.

[8] See Order, Implementation of the FCC's Triennial Review Order (N.J. B.P.U. March 24, 2005), cited in Recommended Decision at 7-11.

effective on March 11, 2005, without the need for amendments to interconnection agreements and regardless of any terms in existing agreements. In the TRO, however, the FCC took a very different approach and directed the parties to follow the section 252 process to amend existing interconnection agreements, to the extent such amendments were needed. Accordingly, VNJ argues, the new obligations imposed under the TRO, including these new EEL eligibility and commingling requirements, and unlike the TRRO's transition regime, cannot be enforced except through a valid interconnection agreement amendment.

Thus, VNJ calls upon the Board to reject the language in sections 3.11.1 and 3.11.2.6 that suggests that the FCC's new commingling and conversions obligations applied as soon as the TRO took effect, without any amendment to implement them, and instead direct the parties to execute a modified Amendment in conformity with this understanding.

2 The Board Should Reject the Amendment Language Incorrectly Suggesting that the FCC's Fiber Unbundling Rules Distinguish Among Customer Groups. (Sections 3.1.2, 3.1.3.1, 4.7.27.)

VNJ asks the Board to reject all of the Amendment language suggesting that the FCC's fiber unbundling rules distinguish between mass market customers and other customers for purposes of applying the FCC's fiber unbundling rules (specifically, the "Mass Market Customer" definition in § 4.7.27, the "Mass Market" reference in § 3.1.2, and the phrase, "to a Mass Market Customer's premises" in § 3.1.3.1). In short, VNJ states that the Amendment must reflect the FCC's rules as drafted and that those rules, including the FCC's fiber-to-the-home ("FTTH") and fiber-to-the-curb ("FTTC") definitions and its substantive rules on new builds and overbuilds, expressly encompass all "customer premises," and do not make any distinction among customer types.[9] VNJ argues that the FCC deliberately removed language from the original version of its rules that could have been read to suggest such distinctions. Therefore, VNJ calls upon the Board to reject the noted language in Amendment sections 3.1.2, 3.1.3.1, and 4.7.27.

3 The Board Should Reject the Amendment Language Requiring VNJ to Determine the Lowest Available Rate for Repricing a Non-Compliant EEL Circuit When the CLEC Fails to Obtain a Replacement Service. (Section 3.11.2.2)

Section 3.11.2.2 provides that if a CLEC's EEL circuit is or becomes non-compliant with the FCC's eligibility criteria, and the CLEC fails to request disconnection or obtain a replacement service from VNJ, then VNJ may reprice the non-compliant facility equivalent to the rate for an

[9] See 47 C.F.R. § 51.319(a)(3)(iii) ("A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end-user's customer premises ..."); 47 C.F.R. § 51.319(a)(3)(i)(B) ("A fiber-to-the-curb loop is a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises, or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in a fiber-to-the-curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises."); 47 C.F.R. § 51.319(a)(3)(ii) ("An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility."); 47 C.F.R. § 51.319(a)(3)(iii) ("An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility," except that the ILEC must maintain the existing copper loop connected to "the particular customer premises" unless the LEC retires the loop) (all emphases added).

analogous arrangement back to the date on which the circuit became non-compliant. Arbitrator O'Hern required the inclusion of language stating that "[t]he new rate shall be no greater than the lowest rate [CLEC] could have otherwise obtained for an analogous access service or other analogous arrangement." VNJ requests that the Board reject this quoted language.

VNJ claims that the lowest available rate offered out of VNJ's access tariff is typically a term plan rate or promotional rate, and such rates require the CLEC to either qualify or agree to keep the service in place for a period of years to obtain the benefit of the discounts. To the extent the language at issue might be construed to grant the CLECs such discounted rates without meeting the tariff qualifications or terms for obtaining these rates, or committing to the required service term period, VNJ finds the language objectionable and asks that the Board delete it from the arbitrated Amendment.

RATEPAYER ADVOCATE COMMENTS

As provided for by the Board's regulations, the Division of the Ratepayer Advocate filed comments on the Amendments. The Ratepayer Advocate noted a number of concerns:

1 Effective date of the Amendments

The Ratepayer Advocate asserts that the Amendments can not be effective until the date approved by the Board. Therefore, the Ratepayer Advocate notes that the effective date of February 7, 2006, in the Amendments must be revised to coincide with the date the Amendments are approved by the Board.

2. The Board Should ask the Arbitrator to Clarify and Supplement the Arbitrator's Discussion of Issues 4 and 5 to Affirm that 1) VNJ Must Give Prior Written Notice Of Delisting Before The Additional Wire Centers are added for delisting and 2) Notice Of Delisting Must Be Provided To The Board, Ratepayer Advocate And The CLECs.

The Ratepayer Advocate notes that Arbitrator O'Hern established a notice and a structured transition process as a means of insuring smooth transition for eliminating access to high capacity loops. The Ratepayer Advocate asks that the Board clarify that VNJ must give prior written notice of proposed delisting before adding additional wire centers to the list of wire centers where unbundling is limited. The RPA requested that advance notice of delisting be provided to the Board, the RPA and CLECs prior to and consistent with the time periods established by Arbitrator O'Hern before any action is taken by VNJ to implement delisting of additional wire centers.

3. Packet Switching

The RPA comments that, based upon the FCC's TRO decision, Arbitrator O'Hern required that the Amendments contain language to preclude unbundled access to packet switching. The RPA believes that such a conclusion usurps the Board's inherent authority to regulate and order packet switching unbundling under state law. The RPA urges the Board to revisit this issue to clarify that the Board has independent authority to order access to packet switching under Sections 251, 252 and 271 of the Act.

4 Sub-loop Access

The RPA claims Arbitrator O'Hern opined that the Amendments must direct VNJ to provide requesting CLECs with the most cost effective alternatives that are technically feasible, whether

relating to line conditioning, customer premises wiring in multi-unit premises, or narrowband services. One such method is sub loop unbundling. The RPA noted that the Board, as part of the UNE case, has not approved NJ's sub loop unbundling offering. Therefore, the RPA recommends that the Board clarify that a separate cost proceeding recommended by Arbitrator O'Hern for pricing associated with sub-loop access be conducted as part of the unfinished sub loop unbundling portion of the UNE proceeding.

5. The Board Should ask the Arbitrator to Clarify and Supplement the Arbitrator's Discussion of Issue 21 to Reaffirm the Board's Authority to 1) Review and Approve Routine Network Modifications ("RNM") Rates Included in ICAs and 2) Initiate a Proceeding to Establish RNM Generic Rates Consistent with Sections 251 and 252 of the Act.

The RPA comments that Arbitrator O'Hern directed that the Amendments should contain specific language which mirrors the language in 47 C.F.R. §51.319(a)(8), regarding VNJ's obligation to perform RNMs necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where VNJ is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. part 51.

The RPA asks that the Board clarify and supplement Arbitrator O'Hern's decision on this issue to reaffirm the Board's authority under the TRRO. Further, the RPA believed that the Board should affirmatively state that RNM rates may be arrived at by either of the following two methods: 1) RNM rates may be established through agreement by the parties subject to Board approval, 47 U.S.C. §252(e)(1) or 2) the Board may on its own initiate a proceeding to establish RNM rates. Also, the RPA urged the Board to address RNM generic rates as part of sub-loop unbundling issues that remains open in Docket TO00060356.[10]

6. The Board Should Clarify the Arbitrator's Discussion of Issue 27 and Modify its Prior Position on Section 271 of the Act.

The RPA asserts that Arbitrator O'Hern found that ICAs should not include requirements to provide network elements under Section 271 and that Section 271 of the Act does not serve to expand the scope of §§ 251 or 252. The RPA notes Arbitrator O'Hern's findings that "[N]othing in § 271 can be read as establishing state-commission arbitrated ICAs as a remedy for failure of a BOC to meet any conditions required as part of § 271." While the RPA accepts that this statement reflects the Board's current position, the RPA calls upon the Board to modify its position and assert jurisdiction under Section 271 of the Act.

Further, the RPA asks the Board to modify its Order of March 24, 2005 and reaffirm its prior 1998 Order[11] finding that the Board has the authority under the Act to order ILECs to continue to provide UNE-P in New Jersey even when the FCC decides to eliminate UNE-P as a network

[10] I/M/O the Board's Review of Unbundled Network Elements Rates, Terms, and Conditions of Bell Atlantic-New Jersey, Inc.: Summary Order of Approval, BPU Docket No. TO00060356 (Mar. 6, 2002). I/M/O the Board's Review of Unbundled Network Elements Rates, Terms, and Conditions of Bell Atlantic-New Jersey, Inc.: Order on Reconsideration, BPU Docket No. TO00060356 (Sep. 13, 2002).

[11] See I/M/.O the Investigation Regarding Local Exchange Competition, et al: telecommunications Order, BPU Dockets No. TX95120631, TO9607050519, TO98010035, TO98060343, at 5-12 (Oct. 22, 1998).

element.[12] The RPA argues that this authority applies to any network element eliminated by the FCC.

7. The Board Should Clarify the Arbitrator's Discussion of the Term "Rate" in Issue 28.

The RPA seeks further clarification of the term "rate" discussed in Issue 28. The RPA believes that it is unclear whether the reference to "rates" relates to UNE rates or transition rates. The RPA states that Arbitrator O'Hern proposed there should be a rate proceeding, including a cost study to evaluate any rate proposed by VNJ as just and reasonable, where CLECs are given an opportunity to participate. Therefore, the RPA asserts that Arbitrator O'Hern should clarify the term "rates" referenced in light of his Section 271 analysis.

8. Responses to VNJ's Objections

Regarding VNJ's first objection, the RPA comments that, under Section 252 of the Act, the effective date of any and all obligations arising from the arbitration should be the date on which the Board issues its approval of the Amendments. The RPA states that VNJ's initial argument, that the retroactive effective date could affect existing agreements that are not the subject of this arbitration, is misplaced. Those agreements (agreements with no change of law provision), according to the RPA, are already excluded. Further, the RPA claims that the Amendments at issue should have prospective effect only and the Board should reject the Arbitrator's finding and return the matter to the Arbitrator for action consistent with the Board's direction.

Concerning VNJ's second objection, the RPA proffers that it must be acknowledged that the FCC found that the mass market (including small businesses) was adversely affected whereas the enterprise market was not; and therefore Arbitrator O'Hern's reference to the applicability of the fiber unbundling rules to the mass market is a permissible interpretation. The RPA submits that the Board should reject VNJ's second objection. If, the RPA adds, the Board adopts VNJ's objection, then the matter must be remanded to Arbitrator O'Hern for further disposition so that revisions can be made and the revised Amendments re-submitted for Board approval.

In regard to VNJ's third objection, the RPA claims that VNJ's objection is premature and should be rejected as unripe for consideration. Further, the RPA asserts that, in the event of an active dispute, VNJ can avail itself of the dispute resolution processes established by the Board for resolution of issues that arise under the affected interconnection agreements. The RPA continues that, should the Board adopt VNJ's objection, the matter must be remanded to Arbitrator O'Hern for further disposition so that revisions can be made and the revised Amendments resubmitted for Board approval.

JOINT CLEC COMMENTS

The Joint CLECs opposed VNJ's objections to Arbitrator O'Hern's decisions establishing amendment language, claiming they are contrary to the just and reasonable decisions rendered in this proceeding.

[12] Section 261(c) of the Act permits the Board to "impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the Commission's regulations to implement this part.

1 The Board Should Adopt the Amendment Language that Limits the Broadband Unbundling Relief Afforded to ILECs in the TRO to the Mass Market

The CLECs state that the Board should reject VNJ's request that the Amendment not limit the FCC's fiber unbundling rules associated with the broadband unbundling relief the FCC afforded to ILECs in the TRO and subsequent decisions. The CLECs assert that the FCC made clear in the TRO and subsequent orders that its FTTH and FTTC rules only apply to the mass market and the FCC rules do not trump the FCC's orders and must be read in conjunction with the FCC's orders that established such rules.[13] The CLECs believed that it was clear from these orders that the FCC limited its broadband unbundling relief to the mass market to provide ILECs with an incentive to construct new fiber loops to mass market end users because the FCC feared that unbundling obligations would otherwise dissuade such deployments to this limited class of customers.[14] Regarding enterprise customers, the CLECs believed that the FCC determined that ILECs need no economic incentives through § 251(c)(3) unbundling relief to deploy such fiber facilities and services to such customers.

The CLECs add that state commissions in California, Illinois, Maine and Indiana have also determined that the FCC's FTTH and FTTC rules apply only to mass market customers[15] and recommended that the Board affirm Arbitrator O'Hern's decision regarding this issue and the related language included in the Amendment.

2. The Board Should Adopt the Amendment Language Requiring VNJ to Utilize the Lowest Available Rate for Repricing a Non-Compliant EEL Circuit Under Certain Circumstances. (Section 3.11.2.2.)

The CLECs state that, in assessing the reasonableness of VNJ's objection, the Board should consider that the language at issue falls under Section 3.11.2.2 of the Amendment, which allows VNJ to unilaterally "reprice" a circuit that becomes non-compliant. Because VNJ has such broad authority under this provision, claims the CLECs, Arbitrator O'Hern decided to check such power with a clause that would limit VNJ's ability to impose unjust or unreasonable rates upon unsuspecting CLECs.

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13 TSR Wireless v. US West, 15 FCC Rcd 11166, ¶¶ 20-21 (explaining that its rules established in the Local Competition Order must be "read in conjunction with the rest of the Order").

14 See CCC's Position on the Economic Dynamics Associated with Unbundling Broadband Services in the Enterprise Market.

15 See Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, Application 05-07-024, Decision Adopting Amendment to Existing Interconnection Agreements, at 7-9 (Cal. P.U.C. Jan. 26, 2006); In The Matter Of The Indiana Utility Regulatory Commission's Investigation Of Issues Related To The Implementation Of The Federal Communication Commission's Triennial Review Remand Order And Remaining Portions Of The Triennial Review Order, Cause No. 42857, Order at 11-12 (Ind. U.R.C. Jan. 11, 2006). Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order, Case No. 05-0442, Arbitration Decision, at 22 (Ill. C.C. Nov. 2, 2005); VNJ-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Docket No. 2002-682, Order, at 17 (Me P.U.C. Sep. 13, 2005).

The CLECs concluded that Arbitrator O'Hern's decision represents a reasonable balance between the interests of VNJ on the one hand and the CLECs on the other. Further, the CLECs state, Arbitrator O'Hern's decision is consistent with the principle that a determination of compliance or non-compliance under the Amendment should not result in a windfall to either VNJ or the CLECs. In conclusion, the CLECs state that Arbitrator O'Hern's reasoned and fair approach does just that by allowing VNJ to take unilateral re-pricing actions, but with some reasonable limits on such authority.

VNJ MOTION TO STRIKE

On March 1, 2006, VNJ filed a Motion to Strike, claiming that the Joint CLEC Response filed in reply to VNJ's February 10, 2006 Objections to the executed Amendments should be stricken from the record. VNJ stated that neither the scheduling orders issued by Arbitrator O'Hern nor the Board's 1996 Procedures For Arbitrations under Section 252 of the Telecommunications Act authorize the filing of a reply to Objections. Therefore, VNJ stated that the Joint CLEC Response should be stricken from the record in this proceeding.

DISCUSSION

The Board, after careful consideration and a full review of the record in this matter, makes the following determinations:

VNJ's first objection centers upon the effective date of commingling and conversion provisions of the agreement. The Arbitrator held that, to the extent that pending requests have not been converted, CLECs are substantively entitled to the appropriate pricing (upon certification and request) but no earlier than October 2, 2003. Because conversions and commingling may take some time to process, Arbitrator O'Hern allowed ninety (90) days as a reasonable period of transition. Thus, Arbitrator O'Hern recommended that pricing for commingling and conversions under the TRO be (1) effective as of the date of the amendment of the ICAs and (2) be trued up to ninety (90) days from the certification of entitlement to the conversion or commingling.

The TRO states that the unbundling provisions of Section 251 are, in large part, implemented through the execution of interconnection agreements between carriers. The FCC intended its rulings to be implemented through the 252 process of the Act. The FCC has stated that the commingling and conversion rules are new rules, not clarifications of existing rules. TRO, ¶ 579. The TRO states that these rules are not self-executing; they require amendment of interconnection agreements to be effective. TRO, ¶ 701. The rules are carried out through implementation of interconnection agreement amendments, and as such they cannot be considered effective absent the execution of the amended agreement. The FCC, unlike in the TRRO, declined to establish a transition period for the time from when the agreements are negotiated to the implementation of new agreement language. Accordingly, the Board concludes that the commingling and conversion rules should become effective upon the execution of the amendment to the interconnection agreement.

Thus, the Board HEREBY REJECTS the language of the interconnection agreements set forth in Sections 3.11.1 and 3.11.2.6 which reflects the date of October 2, 2003 as the effective date for commingling and conversions. The Board HEREBY ORDERS the parties to refile executed amendments with language conforming with the Board's findings that the implementation date for commingling and conversions is not October 2, 2003, but rather the date of execution of the interconnection agreement.

VNJ's second objection concerns the issue of the FCC fiber unbundling rules for mass market and enterprise customers. The threshold question here is whether the FCC's fiber unbundling rules and definitions are limited to the mass market or to all customer classes. The TRO held that CLECs are not impaired without access to fiber optic cable loops connecting a customer's premises with an ILEC wire center. The question then became the definition of customers, and the possible distinction in intent and impact upon the mass market and the enterprise market.

Arbitrator O'Hern found a distinction between mass market customers and other customers in applying the FCC fiber unbundling rules. Upon review of the various referenced rules, Orders and decisions in other jurisdictions, the Board concurs with the Arbitrator in this instance. The Board agrees with the position of the Ratepayer Advocate that the FCC found that the mass market, including small businesses, was adversely affected, whereas the enterprise market was not, and that therefore Arbitrator O'Hern's determination is a reasonable interpretation of what can only be described as a confusing collection of precedents and recommendations. In the absence of a clear indication by the FCC that mass market is the same as the enterprise market from a fiber point-of-view, the Arbitrator's determination is not clearly erroneous. Thus, the language in the Amendment is HEREBY AFFIRMED.

VNJ's third objection concerns Section 3.11.2.2 of the Amendment, which pertains to situations regarding non compliant High Capacity EEL circuits. The language of the Amendment states:

> [if] the CLEC has not submitted an LSR or ASR or other documentation and the CLEC has not separately secured from VNJ an alternative arrangement to replace the noncompliant High Capacity EEL, then VNJ is obligated to reprice the EEL circuit, by application of a new rate (or in VNJ's sole discretion by application of a surcharge to an existing rate) equivalent to an analogous access service or other analogous arrangement that VNJ shall identify in a written notice to the CLEC.
>
> [Amended Agreement at 20.]

This Section also states, "the new rate shall be no greater than the lowest rate [CLEC] could have otherwise obtained for an analogous access service or other analogous arrangement."

VNJ asserts that this language could be construed to enable CLECs to obtain discounted rates without qualifying under the appropriate tariff or terms for obtaining the discounted rates or absent a commitment by the CLEC to the required service term period for the discount. The Board finds that VNJ's assertion is unfounded and does not warrant a change in the executed amendment language.. The Board agrees with RPA's recommendation that VNJ's objection is premature and should be rejected as unripe for consideration. A non-qualifying CLEC should not be permitted to obtain the benefits of a discounted tariff it does not qualify for by virtue of this interconnection agreement. VNJ's obligation does not extend to providing a rate that the CLEC does not otherwise qualify for, based upon volume, guarantee, or any other foundation. The CLECs should not, and it is expected will not, present this argument, and unless and until they do, the Board need not take explicit action. The Board does, however, note to all parties that any action along this line will be dealt with in the standard enforcement and arbitration process, and in light of the notation herein. Accordingly, the Board finds that the language contained in the agreement found in Section 3.11.2.2 need not be modified and thus the language is HEREBY AFFIRMED.

The concerns raised by the Ratepayer Advocate have also been considered by the Board. The Board agrees, as noted above, with a number of the Ratepayer Advocate's recommendations with respect to Verizon's objections, but disagrees with the others set forth above. The Board declines to require separate unbundling under sections 251, 252 and 271 of the Act, see Implementation of the FCC's Triennial Review Order, Docket No. TO03090705 (April 2, 2005), and disagrees with the need to institute any additional rate review proceedings at this time. As such, the remainder of the Amendment, with the exceptions noted above, is HEREBY AFFIRMED.

CONCLUSION

In summary, the Board accepts the Amended Agreements as filed with the following exceptions and HEREBY DIRECTS the parties to execute new Agreements in conformance with this Order. Specifically, the Board HEREBY DIRECTS the parties to delete the language "as of October 2, 2003" in Section 3.11.1 and delete Section 3.11.2.6 in its entirety.

With respect to all other objections by VNJ and the RPA, the Board HEREBY DENIES all other requests for modification of the Amendment for the reasons above. Finally, the Board HEREBY REJECTS VNJ's Motion to Strike the Joint CLEC comments in the interest of maintaining a full and accurate record of the positions of the parties.

The Board directs that the parties re-execute the amendment to conform to this decision and re-file with the Board no later than five (5) business days after the issuance of this Order.

DATED: 3/27/06

BOARD OF PUBLIC UTILITIES
BY:

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PRESIDENT

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ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service in New Jersey Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order and the Triennial Review Remand Order
Docket Nos. TO05050418, TO05070606, TO05060551, & TO05060552

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