COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SOUTH CENTRAL TELECOM LLC FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED AGREEMENT WITH VERIZON SOUTH INC. PURSUANT TO THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996	))))))	CASE NO. 2001-261

O R D E R

On August 21, 2001, pursuant to The Telecommunications Action of 1996, South Central Telecom LLC ("South Central") petitioned for arbitration of 48 issues in its proposed interconnection agreement with Verizon South, Inc. ("Verizon"). On November 21, 2001, Verizon filed a response to South Central's petition. On December 12, 2001, the parties participated in an informal conference during which they agreed that, except for four issues that are unique to South Central, the issues in this arbitration are substantially similar to those presented in the arbitration between Verizon and Brandenburg Telecom LLC decided in Case No. 2001-224.[1] Therefore, to avoid duplication of that proceeding, the parties agreed to submit this matter for decision on the basis of (1) the direct testimony in the record of this case, (2) the transcript of the hearing in Case No. 2001-224, and (3) the post-hearing briefs filed in Case No. 2001-224. South Central further agreed to waive its right to arbitrate the four issues that are

[1] Case No. 2001-224, Petition of Brandenburg Telecom LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement With Verizon South Inc. Pursuant to the Telecommunications Act of 1934, As Amended by the Telecommunications Act Of 1996.

unique to its petition and both parties agreed to withdraw all pending motions, responses, and replies. Accordingly, on December 18, 2001, the Commission cancelled the hearing set for this proceeding and adopted the procedure agreed upon by the parties. As a result of the parties' agreement, 28 issues remain in dispute.

Issues 1 and 14: 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 South Central 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 South Central to 60 days, but otherwise insists on including the standard provisions in its proposed contract with South Central.

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

The Commission agrees with South Central. The Commission finds that South Central'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 South Central customers that it provides to its own customers. Nevertheless, South Central opposes the inclusion of labor unrest under *force majeure* provisions.

South Central argues that labor disputes are not *force majeure* events and that they constitute no excuse for failure to perform obligations under the contract. South Central is not reassured by Verizon's concession that the *force majeure* provisions do not excuse it from providing services to South Central customers that it is able to provide during a labor dispute to its own customers.

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."[2] However, the agreement should provide that, in the event of a labor dispute that specifically affects Verizon and South Central customers in Glasgow,

[2] Black's Law Dictionary (7th Ed. 1999).

Verizon must continue to provide the same level of service to South Central 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.[3]

Issue 7: 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, South Central'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 South Central 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 South Central greater investigative services than it offers to other carriers. Therefore, the additional language proposed by Verizon should be included in the agreement.

Issue 8: Employer's Liability Coverage

The dispute here involves the amount of coverage that Verizon will require South Central to carry for Workers' Compensation and employer's liability insurance. South Central 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 has determined to be sufficient to protect the public interest. According to South Central,

[3] 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).

that amount is $500,000 per occurrence. Verizon proposes that, at a minimum, South Central should be required to carry $1,000,000 per occurrence. However, Verizon offers no reason for requiring the additional coverage. The Commission agrees with South Central and sees no reason to require more coverage than the minimum required by law.

Issues 9, 17, 21, 25, 27, 30, and 47: 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 Web site. South Central 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. South Central 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 South Central's interpretation and expressly maintains that the contract does not incorporate the contents of its Web site as contractual obligations. Verizon notes that the contract makes only three references to the Web site, and that South Central has agreed to each such provision. Furthermore, Verizon notes that in one of those instances the contract provides that Verizon must follow specific guidelines 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 Web site apply equally to all competitive local exchange carriers ("CLECs") with whom Verizon interconnects. Moreover, the limited scope of the incorporation of the Web site's

procedures appears to prevent the sort of broad unilateral change that concerns South Central. Accordingly, South Central's proposed language is rejected.

Issue 11: Notice of Technology Upgrades

Verizon's proposed contract gives Verizon the discretion to upgrade its facilities. South Central 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 refers to 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 South Central's concerns, this issue is resolved.

Issue 12: 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 makes this occurrence a definite possibility. South Central seeks protection from such an occurrence by proposing that the contract survive the sale. The Commission agrees with South Central and finds that language should be included in the agreement specifying that the contract bind any successor in interest.

Issue 15: 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. South Central does not appear to object to reflecting recent FCC decisions, but strongly opposes allowing Verizon to define the local calling areas. South Central 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 South Central 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 16 and 35: 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. South Central 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, South Central proposes that neither party charge the other for such calls.

The Commission finds that South Central should designate a centralized message distribution center host company ("CMDS") to act as its clearinghouse 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 18: Directory Listings

The issue here is one of pricing for directory listings. South Central 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. The Commission agrees with Verizon.

If South Central were reselling Verizon's service, these listings as retail services would be available at a wholesale discount. However, as South Central will provide facilities-based service, the wholesale discount is no longer applicable and South Central would pay the appropriate tariffed rate. Thus, when Verizon provides additional listings, they are not network elements necessary to provide telecommunications service and South Central should pay the appropriate tariffed rate. However, when Verizon provides a newly ported number, the cost of a directory listing is included in the tariff for that service and no additional charges may be assessed. Accordingly, the contract should include language that reflects this decision.

Issues 17, 21, 25, 27, and 47: Duties of an Account Manager

The issues relating to an account manager are similar to the issues raised by South Central concerning the need to consult Verizon's Web site. South Central argues that as problems arise, it needs a specific Verizon contact person who is familiar with South Central's operations. Accordingly, South Central 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 South Central 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 South Central. Nevertheless, the Commission also agrees with South Central that Verizon should designate a point of contact who will address South Central's problems in a timely and reasonable fashion. However, Verizon should be permitted to determine the number of persons designated as South Central contacts.

Issues 23 and 48: Pricing

South Central 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.

Verizon asserts that 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 South Central'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 also 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 South Central's ability to compete.

The FCC has declared that incumbents must provide UNEs at cost-based rates.[4] 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. South Central'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.

Issue 22: Referral and Intercept Announcements

South Central argues that Verizon should provide South Central's customers referral and announcement services free of charge for a specified period. South Central recommends that the period be 120 days for business customers and 30 days for

[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.

residential customers. In addition, South Central 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. South Central is concerned that Verizon might use such charges to interfere with recent customer transfers from Verizon to South Central.

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 South Central, Verizon reserves the right to reduce the period if a number shortage condition requires reassignment of a number. Verizon disagrees that this places South Central at a disadvantage since, under the Act, it is required to charge the same fees to Verizon customers that it charges to South Central customers. Verizon notes that it currently does not charge for the services. Consequently, under its current practice, it would not be entitled to charge South Central'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 24: Termination of OSS License

The proposed contract provides South Central 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 South Central to provide telecommunications

services to South Central customers; (b) termination of the license in accordance with Section 8; or (c) expiration or termination of the agreement." South Central accepts conditions (b) and (c), but objects to condition (a).

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

Issue 26: Poles, Conduits, and Rights-of-Way

Verizon proposes to allow South Central 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.

South Central objects to Verizon's agreement, asserting that the rates are too high. South Central lists a number of costs that are included in Verizon's standard agreement, which it states Verizon should not be permitted to recover from South Central.[5] Instead, it prefers the rates set forth in its own pricing attachment, which South Central states is taken from Verizon's CATV pole attachment and conduit occupancy tariff. It also details its specific objections to the standard agreement.[6] South Central and Verizon agree that the annual rate for two-user poles should be $12.12 per

[5] Prefiled testimony of Danny Bishop at 2 and 3.

[6] Id. at 2.

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 South Central proposes a three-user pole rate of $5.64 per year.[7] South Central also objects to paying a $200 fee for processing the pole attachment or conduit occupancy fee included in Verizon's standard agreement. Finally, South Central argues that the agreement should include authorization to attach facilities for the provision of digital video and Internet.[8]

Verizon's CATV tariff has been on file with the Commission since September 1982.[9] The current tariff was approved on December 1, 2000. Over the years, the rules 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 South Central, as well as with other CLECs, concerning pole attachments and conduit occupancy issues. However, the proposed

[7] Pre-filed testimony of Lee Berkley, Exhibit A; Pre-filed testimony of Eileen M. Bodamer, Exhibit A.

[8] Pre-filed testimony of Danny Bishop at 4.

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

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. South Central and other CLECs should not pay the application fee when CATV providers, under the existing tariff, do not. Verizon claims that not charging South Central 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.

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 27: LEC Freezes

South Central 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, South Central 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 South Central, cites the Commission's decision in In the Matter of Tel-Save, Inc. vs. BellSouth Telecommunications, Inc.[10] 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.

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

Issue 28: Points of Interconnection

South Central asks that its agreement with Verizon reflect that Verizon will interconnect with South Central 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 South Central 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.

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 South Central 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 29 and 31: Interconnection Points

The parties argue over who should pay to deliver traffic to points of interconnection. South Central 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 South Central should prevail on this issue.[11] Thus, the Commission finds that South Central has the right to establish a minimum of one point of interconnection per LATA. South Central is also required to establish another POI when the amount of traffic passing through a Verizon access tandem switch reaches a DS3 level. Verizon has failed to demonstrate that the costs it will incur to reach South Central'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.

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 South Central 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 33: Payment of Reciprocal Compensation

Reciprocal compensation refers to the rates that a carrier may charge for terminating traffic on its network that originated on another carrier's network. Verizon

[11] 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.

has proposed language that prescribes when reciprocal compensation will be due and how it will be calculated. South Central is concerned about where the interconnection points, which are a factor in the calculations, will be located. That issue is resolved in Issue 31 and, therefore, no further discussion is necessary here.

South Central is also concerned about the language in Section 50.2 of the agreement, which gives Verizon the right to terminate its obligations to pay reciprocal compensation on 30 days' notice to Verizon, but does not give the corresponding right to South Central. This issue was not addressed at the hearing in Case No. 2001-224, or in the testimony prefiled in this proceeding. However, it was raised subsequent to the hearing in Case No. 2001-224, and it is presumed to be a matter of concern to South Central.

While Section 50.2 gives Verizon the right to unilaterally terminate the provisions relating to reciprocal compensation, it recognizes that Verizon remains obligated under "Applicable Law" to pay such compensation. Therefore, the situation South Central finds itself in by virtue of this provision is not so one-sided that it should be allowed a remedy at this time.

Issue 37: Tandem Transit Traffic

As traffic crosses a tandem switch and is terminated on a carrier's network, the carrier owning the tandem switch will often be billed by the terminating traffic carrier regardless of whether or not the tandem-owning carrier is the originating carrier. Verizon, as the tandem switch owner, seeks to pass these costs to the originating carrier. Verizon represents 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.

South Central 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 40: Forecasting

South Central 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 South Central as South Central provides to terminate reciprocal compensation traffic to Verizon. Moreover, Verizon commits to providing additional trunks based upon forecasts from reliable engineering data from South Central. Verizon indicates that it will only reduce the number of trunks that South Central 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 South Central, Verizon's response thereto, and the evidence of the record in this proceeding, and having been otherwise sufficiently advised, HEREBY ORDERS that, 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 January, 2002.

By the Commission

ATTEST:

Deputy Executive Director