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March 23, 2005

Ms. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket Nos. 041269-TL; 050170-TP; 050171-TP

Dear Ms. Bayó:

BellSouth respectfully requests that the Commission take official recognition of the attached decision from Maine Public Service Commission, which deny MCImetro Access Transmission Services LLC's Petition for Emergency Declaratory Relief and the CLEC Coalition's Motion for Temporary Order in support of BellSouth's March 15, 2005, Motion to Consolidate and Response in Opposition to Emergency Petitions filed in the above-listed dockets. This letter serves as BellSouth's Motion for Official Recognition, pursuant to Florida Statutes, Section 120.569(2)(i).

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith Mays

Enclosures

cc: Parties of Record
Nancy White

578171

CERTIFICATE OF SERVICE
Docket No. 050171-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 23rd day of March, 2005 to the following:

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STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)

March 17, 2005

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny MCImetro Access Transmission Services LLC's (MCI) Petition for Emergency Declaratory Relief and the CLEC Coalition's[1] Motion for Temporary Order. We also remind Verizon of its obligation to follow federal law concerning certification of wire centers for purposes of ordering certain loop and transport unbundled network elements (UNEs). Finally, we put Verizon on notice that we may pursue the imposition of penalties for any failure to comply with our September 3, 2004 Order in this Docket, which requires Verizon to include all of its wholesale offerings in its wholesale tariff, including UNEs provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), and to continue provisioning 271 UNEs at "Total Element Long Run Incremental Cost (TELRIC)" rates until we, or the Federal Communications Commission (FCC), approve new rates.

II. BACKGROUND

On February 4, 2005, the FCC issued its *Triennial Review Order Remand Order (TRRO).*[2] In the *TRRO*, the FCC eliminated certain unbundling requirements pursuant to section 251 of the TelAct and established new criteria for access to certain loop and transport UNEs. *TRRO* at ¶ 5. The effective date of the *TRRO* is March 11, 2005. On February 10, 2005, in a letter posted on its website (UNE Industry Letter), Verizon announced that on March 11, 2005, it would stop accepting orders for those UNEs which the FCC had de-listed in the *TRRO*.

On March 2, 2005, MCI filed a Petition for Emergency Declaratory Relief (Petition), asserting the need for injunctive relief to prevent Verizon from rejecting orders for de-listed UNEs, including UNE-Ps. In MCI's view, Verizon is obligated to provide

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[1] A coalition comprised of Mid-Maine Communications, Oxford Networks and Pine Tree Network.

[2] *Triennial Review Remand Order*, *Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers ("TRRO"),* FCC Docket Nos. 04-313, 01-338 *Order on Remand*, FCC 04-290, issued Feb. 4, 2005, effective Mar. 11, 2005.

access to the de-listed UNEs pursuant to the September 2, 1997 Interconnection Agreement between MCI and Verizon and, by announcing its intent to stop accepting orders for such UNEs on March 11, 2005, Verizon is in anticipatory breach of the agreement.

On March 2, 2005, Verizon issued a second Industry Letter (Wire Center Industry Letter) attaching a list of rate centers it asserted met the FCC's new business line/fiber collocator criteria related to submission of orders for DS1 and DS3 loops and transport. Verizon further stated that by issuing its letter it was placing CLECs "on notice of the Wire Center classifications" thereby providing them with "actual or constructive knowledge" of the wire center classification. Finally, Verizon informed CLECs that if they should "attempt to submit an order for any of the aforementioned network elements notwithstanding your actual or constructive knowledge . . . Verizon will treat each such order as a separate act of bad faith carried out in violation of federal regulations and a breach of your interconnection agreements, and will pursue any and all remedies available to it."

On March 4, 2005, the CLEC Coalition joined in MCI's request by filing a Motion for Temporary Order (Motion). On March 7, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation (InfoHighway) filed a Petition to Intervene and Comments in Support of MCI's Petition.[3]

Verizon responded to MCI's Petition by filing opposition papers on March 8, 2005, (Ver. Opp.) arguing that the FCC's *TRRO* takes precedence over any provisions of the Interconnection Agreement that are contrary to it. Verizon also claims that we lack the authority to provide the relief sought by MCI's Petition.

On March 10, 2005, MCI withdrew its Petition, explaining that it had entered into an interim commercial agreement for UNE-P replacement services. Later that same day, the CLEC Coalition filed a letter-brief in which it addressed Verizon's response to the MCI Petition, and urged that its own request for injunctive relief be granted despite the fact that the party first seeking such relief (MCI) had withdrawn its request. Finally, in a series of e-mail messages sent on March 10 and 11, 2005, Verizon, the CLEC Coalition, and InfoHighway described the rulings of several regulatory agencies in other states that have recently confronted the same issues raised by the MCI Petition.

A special deliberative session was held on March 11, 2005, to consider the pending motions.

[3] We grant InfoHighway's petition to intervene.

III. POSITIONS OF THE PARTIES

A. The CLECs

According to the CLECs,[4] Verizon's obligation to provide UNEs derives from their interconnection agreements with Verizon. The *TRRO* triggered the so-called "change of law" provisions in the interconnection agreements – provisions which require the parties to "arrive at mutually acceptable modifications or cancellations," of the interconnection agreement whenever such changes are "required by a regulatory authority or court in the exercise of its lawful jurisdiction." In the view of the CLECs, Verizon cannot unilaterally impose its understanding of what the *TRRO* requires. Instead, the parties must negotiate changes to the interconnection agreement in light of the *TRRO*. Injunctive relief is necessary to prevent Verizon from implementing its plan to discontinue the provision of certain UNEs, as described in Verizon's February 10, 2005, Industry Letter, and thereby disrupting the status quo during the negotiation period.

The CLECs also argue that while the *TRRO* removes certain UNEs from the list of those which must be offered pursuant to section 251(c)(3) of the TelAct, it has no bearing on Verizon's separate and continuing obligation to provide those UNEs pursuant to section 271 of the TelAct. Thus, the CLECs request that we enforce our September 3, 2004 Order requiring Verizon to meet its commitment to us in our 271 Proceeding[5] to file a wholesale tariff and to continue to provide 271 UNEs at TELRIC rates until the wholesale tariff is approved.

B. Verizon

Verizon takes issue with the CLECs' characterization of the "change of law" provisions of the interconnection agreements. According to Verizon, those provisions are meant merely to ensure that the language of interconnection agreements is updated to reflect new rules issued by the FCC – rules that Verizon insists are binding on the parties as soon as they are pronounced. The request for emergency injunctive relief is misguided, claims Verizon, because the *TRRO* changed the status quo, effective March 11, 2005, and subsequent changes to interconnection agreements will serve only to acknowledge the new state of affairs.

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[4] The CLEC Coalition and InfoHighway explicitly adopted the arguments of MCI before MCI withdrew its Petition, and also articulated their own arguments. For the purposes of this Order, we will treat the arguments of these parties collectively as those of the "CLECs."

[5] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849.

Verizon also claims that its obligation to provide UNEs, as memorialized in the interconnection agreements, derives solely from section 251 of the TelAct, and "not state law, section 271, or anything else." Verizon Opp. at 4. Even if section 271 did form the basis for such obligations, Verizon adds, the Commission is powerless to act because the FCC is "solely responsible for interpretation and enforcement of any section 271 obligations." *Id*. Thus, Verizon contends not only that we should deny the petitions for emergency injunctive relief but also that we lack the authority, under concepts of federal preemption, to impose the relief sought by the CLECs and enforce our September 3, 2004 Order.

IV. DECISION

A. Implementation of the *TRRO*

We have considered the arguments of all parties, the language of the *TRRO*, decisions reached by other state commissions, and the practical implications of our decision. We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective. We further find that it is in the best interests of all parties to implement the changes required by the *TRRO* immediately and move forward on the pending litigation of other contested issues. The decisions set forth in the *TRRO* come after years of seemingly endless litigation involving the FCC and federal courts; delaying the implementation of the new rules will only delay the inevitable.

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, *albeit* with some delay. We recognize that there may be other provisions in the *TRRO* which require negotiations before the interconnection agreements can be amended. We encourage parties to move forward swiftly with those negotiations and stand ready to address any disputes that may be brought before us.

In addition, we reject the reasoning of the Georgia Public Service Commission in its March 8, 2005 Order (Docket No. 19341-U) regarding the applicability of the *Mobile Sierra*[6] doctrine because the contracts at issue here contain change of law provisions and therefore already contemplate regulatory changes. Further, the Georgia PSC seems to be saying that, without a showing of heightened public interest, the FCC cannot unilaterally override an interconnection agreement but can, without a showing of

[6] The *Mobile Sierra* doctrine allows the government to modify the terms of a private contract upon a finding that such modification will serve the public need. *United States Gas Pipeline Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.,* 350 U.S. 348 (1956).

heightened public interest, order parties to amend their agreements to be consistent with the FCC's new rules. We do not find this distinction persuasive.

Finally, as Verizon correctly noted, the FCC stated repeatedly throughout its Order that ILECs would have no obligation to provide CLECs with access to the de-listed UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs. We find the FCC's specificity regarding these issues to be clear and thus, we do not believe it to be appropriate or necessary to ascribe anything but their plain meaning to the FCC's directives. Accordingly, we deny the requests of MCI and the CLEC Coalition for an order staying implementation of the FCC's rules pending interconnection agreement negotiations.

B. Self-Certification of Wire Centers

As stated above, the FCC's new rules place limitations on a CLEC's ability to order certain loops and transport UNEs, depending upon the number of business lines and/or fiber collocators associated with the particular wire center in which it would like to purchase the UNE. The FCC, however, clearly found that CLECs, after a diligent inquiry, could self-certify that a particular wire center does not meet the FCC's criteria. *TRRO* at ¶ 234. Further, upon submission of an order involving self-certification, an ILEC must provision the order first and then dispute the classification of the wire center in front of a state commission pursuant to the dispute resolution procedures of most interconnection agreements. *Id*.

While the March 2, 2005 Industry Letter posted by Verizon on its website does not explicitly state that it will not follow the FCC's rules, i.e. that it will reject a CLEC order involving a rate center contained on Verizon's list, it comes very close. Indeed, apart from appearing unnecessarily hostile, the language is inconsistent with the spirit of the *TRRO* and with the specific findings in paragraph 234. Thus, we remind Verizon of its obligation to comply with the FCC's rules and paragraph 234 of the *TRRO*. We also remind CLECs that they must make a good faith inquiry concerning the characteristics of any wire center that might be implicated by the FCC's criteria. If necessary, we will investigate the factual underpinnings of Verizon and/or CLEC assertions concerning the characteristics of wire centers in Maine which may meet the FCC's criteria.

C. Enforcement of Verizon's 271 Obligations

Having resolved the motions pending before us, we need go no further. Nonetheless, prompted by certain comments made by Verizon in its Brief in Opposition to the motions, we remind Verizon of its continuing obligation to comply with both the standing orders of this Commission, including our Order of September 3, 2004, and section 271 of the TelAct. The following discussion is intended to summarize, but not in any way to supplant or modify, our findings of September 3, 2004. In our view, this summary is sufficient to put Verizon on notice that any failure on its part to comply with

our September 3rd Order may lead to the imposition of penalties pursuant to 35-A M.R.S.A. § 1508-A.

On September 3, 2004, we issued an order in this proceeding requiring Verizon to include all of its wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to section 271 of the TelAct. We further specified that Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. TELRIC for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. Finally, we held that Verizon must continue to provision 271 UNEs at TELRIC prices pending approval of the wholesale tariff and/or new rates. Verizon did not seek reconsideration of the Order nor did it appeal the Order pursuant to 35-A M.R.S.A. § 1320.

Now, some six months after we issued our Order, Verizon asserts that the Order has no force and that Verizon has no obligation to comply with its requirements. We find Verizon's assertions both troubling and procedurally improper. Unless and until a Commission order is amended, vacated, or otherwise modified pursuant to the requirements of Title 35-A or other applicable law, the order retains the force of law and must be obeyed. Accordingly, our September 3, 2004 Order in this proceeding stands and Verizon must comply with it or risk being found in contempt of a Commission order and subject to the fining provisions of 35-A M.R.S.A. § 1508-A. Verizon remains free, as it has been since September 3rd, to request that the Commission alter or amend its September 3rd Order. It is not free, however, to unilaterally determine that it does not have to comply.

We take very seriously the commitments Verizon made to us during our 271 proceeding and expect that Verizon will honor those commitments. We will not repeat the reasoning and rationale supporting our assertion of jurisdiction to enforce Verizon's 271 commitments. We laid that reasoning out quite clearly in our September 3rd Order and find that there has been no intervening change in law that would impact our analysis.[7]

[7]The cases cited by Verizon can, and have been, distinguished. First, in both *Verizon North Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), the state commissions ordered the incumbent local exchange carrier (ILEC) to file a state wholesale tariff pursuant to state authority, which is entirely different from Verizon voluntarily agreeing to file a wholesale tariff in exchange for this Commission's support of its federal 271 application. Further, this Commission has never stated that the wholesale tariff would replace the obligation of parties to enter into interconnection agreements. Second, *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004), involved a state commission's assertion of authority to order a performance assurance remedy plan under state law. Again, this is clearly distinguishable from the situation here in Maine where Verizon agreed to file a wholesale tariff.

Verizon has had over six months since our September 3rd Order to submit a tariff for its 271 obligations and/or obtain FCC approval of the specific rates it intends to charge for 271 UNEs. Verizon has taken no action. Thus, the interim provisions that we put in place, i.e. the requirement that Verizon continue to provision 271 UNEs at TELRIC rates until other rates are approved, continues to govern. To the extent that there is legitimate disagreement concerning which UNEs qualify as 271 UNEs, we encourage the parties to bring those issues to us as soon as possible. We note that the Hearing Examiner in this proceeding recently issued a procedural order with an attached matrix outlining the status of all UNEs and requesting legal argument from the parties concerning their correct categorization. Thus, we expect that in the absence of particular disagreements, we will have an opportunity to resolve the issue of which UNEs are considered 271 UNEs within the next couple of months.

A decision by Verizon to ignore the requirements of our September 3rd Order may trigger application 35-A M.S.A. §1508-A. Indeed, to the extent that Verizon fails to comply with the September 3rd Order by refusing to provision uncontested 271 UNEs, such as unbundled switching, on the grounds that our September 3rd Order is not enforceable, it is suspect to an enforcement proceeding pursuant to 35-A M.R.S.A. §1508-A(1)(B). If Verizon refuses to provision a 271 UNE based on a good faith disagreement concerning whether the UNE qualifies as a 271 UNE, we will conduct a proceeding to determine whether the UNE qualifies. If Verizon continues to refuse to provision the UNE after we find that it does qualify, it risks the initiation of enforcement and penalty proceedings.

Dated at Augusta, Maine, this 17th day of March, 2005.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.