ISSUED: January 23, 2004

D.T.E. 03-59-A

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops.

ORDER DENYING MOTION OF DSCI CORPORATION AND INFOHIGHWAY COMMUNICATIONS CORPORATION FOR PARTIAL CLARIFICATION AND RECONSIDERATION OF ORDER CLOSING INVESTIGATION

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ORDER DENYING MOTION OF DSCI CORPORATION AND INFOHIGHWAY COMMUNICATIONS CORPORATION FOR PARTIAL CLARIFICATION AND RECONSIDERATION OF ORDER CLOSING INVESTIGATION

I. INTRODUCTION

On November 25, 2003, the Department of Telecommunications and Energy ("Department") closed its investigation of whether the Department should petition the Federal Communications Commission ("FCC") for a waiver of the FCC's national finding in its Triennial Review Order[1] that denial of access to unbundled switching would not impair a competitive local exchange carrier's ("CLEC") ability to serve enterprise markets.[2] Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops, Order Closing Investigation, D.T.E. 03-59 (2003) ("Order Closing Investigation"); Triennial Review Order at ¶¶ 451-53. In the Order Closing Investigation, the Department held that the participants did not offer proof of facts necessary to support a waiver petition, and that the Department does not have jurisdiction to enforce unbundling obligations under Section 271 of

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[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and 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 (rel. Aug. 21, 2003) ("Triennial Review Order").

[2] The FCC defines enterprise markets as medium and large business customers that can be served with a DS-1 capacity or above loop. Triennial Review Order at ¶ 209. A DS-1 loop is a digital loop providing a transmission speed of 1.544 megabits per second. Id. at ¶ 202 n.634.

the Telecommunications Act of 1996.[3] Order Closing Investigation at 15-17, 19. The Department noted, however, that carriers could continue to seek informal assistance from the Department's Telecommunications Division to resolve operational problems in transitioning their facilities from UNE-platform ("UNE-P") arrangements[4] to alternative arrangements, where those problems threaten to disrupt or degrade service to consumers. Id. at 20 n.17.

On December 15, 2003, DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") filed a joint motion for partial clarification and reconsideration of the Order Closing Investigation. On December 31, 2003, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed an opposition to the motion.

II. STANDARD OF REVIEW

The Department's procedural rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison

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[3] Communications Act of 1934, 47 U.S.C. §§ 151 et seq., amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 86 (1996) (collectively, the "Act").

[4] UNE-P is a complete set of unbundled network elements used by CLECs to provide an end-to-end circuit.

Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would warrant a material change to a decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A

at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

III. POSITIONS OF THE PARTIES

A. DSCI and InfoHighway

DSCI and InfoHighway seek clarification of the Department's findings regarding its authority to review rates, terms, and conditions for Verizon's Section 271 checklist items (Motion at 7-8, citing Triennial Review Order at ¶ 656; 47 U.S.C. § 271(c)(2)(A)).[5] DSCI and InfoHighway argue that the Department's statement in the Order Closing Investigation that the FCC has exclusive jurisdiction over "post-impairment prices"[6] conflicts with the Department's statement that carriers can pursue interconnection disputes before the Department under 47 U.S.C. § 252 (id. at 7). DSCI and InfoHighway claim that "[s]tate commissions are responsible for establishing the rates in interconnection agreements and Verizon must offer Section 271 checklist items in an interconnection agreement" (id.). DSCI and InfoHighway assert that the FCC has only provided "guidance" that the rates for Section 271 checklist items

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[5] Pursuant to 47 U.S.C. § 271 ("Section 271"), an incumbent LEC seeking to provide in-region, interLATA service must demonstrate compliance with a "14-point checklist." As a result of the FCC's grant of authority to Verizon to provide in-region, interLATA service in Massachusetts under Section 271, Verizon has an independent obligation under 47 U.S.C. § 271(c)(2)(B) to continue to provide loops, transport, switching, and signaling to CLECs in Massachusetts. See Triennial Review Order at ¶¶ 653-67.

[6] DSCI and InfoHighway use the term,"post-impairment pricing," to refer to the pricing for Section 271 checklist elements that will be in effect in accordance with the FCC's ruling that local switching need no longer be provided as an unbundled network element for the enterprise market.

that have been "de-listed" (i.e., items that are no longer required to be unbundled under Section 251) must comply with the just and reasonable pricing standard found in Sections 201 and 202 and in many state statutes (id. at 8, citing Triennial Review Order at ¶ 663). DSCI and InfoHighway argue that while the FCC can provide guidance, it is the states that would review rates for such elements in interconnection agreements under 47 U.S.C. § 252, according to the "just and reasonable" standard (id. at 8-9). DSCI and InfoHighway urge the Department to clarify that interconnection disputes involving pricing can continue to be reviewed by the Department, or alternatively, they urge the Department to modify the Order Closing Investigation to "note the existence of a dispute over the extent of the Department's jurisdiction over interconnection pricing issues" and reserve its decision on whether the Department may review pricing until a petition is filed with the Department under 47 U.S.C. § 252 (id. at 10).

DSCI and InfoHighway also seek reconsideration of the Department's statement that carriers may seek informal assistance from the Department's Telecommunications Division to resolve operational issues that may arise if carriers must seek alternatives to UNE-P arrangements (id. at 11, citing Order Closing Investigation at 20 n.17). DSCI and InfoHighway argue that "given the size of the Massachusetts DS-1 UNE-P market that is at risk of disruption and loss," informal resolution of such problems is unlikely to be sufficient (id.). DSCI and InfoHighway argue that because the issue of how to proceed with transitional issues was not the focus of their offer of proof or Verizon's response to the offer of proof, the

Department should reconsider its reliance on informal resolution and should open a docket to provide oversight to the transitional process (id. at 11-12).[7]

B. Verizon

Verizon argues that the Department's conclusion in the Order Closing Investigation that the Department does not have jurisdiction to freeze Verizon's rates for Section 271 elements at current TELRIC rates was correct and requires no clarification (Opposition at 2). Verizon contends that DSCI and InfoHighway's argument that states review whether rates for Section 271 elements are just and reasonable in the context of an interconnection dispute under Section 252 is a misreading of the law (id.). Verizon argues that DSCI and InfoHighway fail to distinguish between network elements required to be unbundled under Section 251 and network elements that are required to be provided solely by reason of Section 271 (id.). Verizon maintains that Section 252 does not apply to obligations imposed solely by Section 271 (id.). In particular, Verizon maintains that Section 252(c)(2) authorizes states to establish rates "according to subsection (d)," but that subsection (d) provides pricing standards for network elements required to be unbundled by Section 251 only (id. at 2-3). Thus, Verizon argues that the Department's statement that it lacks jurisdiction to enforce Section 271 obligations does not conflict with the Department's statement that states have a role in arbitrating disputes under

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[7] The carriers point to the New Hampshire Public Utilities Commission's recent decision to open a docket to investigate the transition process (Motion at 12 n.23, citing Review of No-Impairment Presumption for DS-1 Switching Network Element, Order Closing Investigation of Impairment and Initiating a New Docket for Investigation and Facilitation of Transition Process, DT 03-174, New Hampshire P.U.C. Order No. 24,237 (Nov. 10, 2003)).

Section 252, because the Department limited that observation "to the extent that carriers must renegotiate terms of their interconnection agreements . . . ." (id. at 4, citing Order Closing Investigation at 19).

Finally, Verizon contends that DSCI and InfoHighway have offered no grounds for opening a new docket to "address post-impairment issues" (id. at 4, citing Motion at 10). Verizon argues that DSCI and InfoHighway's suggestion that service outages that "might" result from the process of migrating DS-1 loops from UNE-P to alternate arrangements is speculative and does not justify opening a new docket at this time (id. at 5).

IV. ANALYSIS & FINDINGS

We find no ambiguity in the Order Closing Investigation that requires clarification. The claimed ambiguity in the Order Closing Investigation, i.e., whether the Department retains authority to arbitrate pricing disputes for interconnection agreements, arises only because DSCI and InfoHighway attempt improperly to read into the list of matters that state commissions must arbitrate under Section 252(c) the pricing of elements required to be unbundled solely by virtue of Verizon's Section 271 obligations. Section 252(c) refers only to the compulsory arbitration of rates and conditions for network elements in compliance with local exchange carriers' obligations under Section 251, without any reference to Section 271. The FCC recognized that the pricing standard under Section 252(d) does not apply to network elements required to be unbundled only by Section 271. Triennial Review Order at ¶¶ 657-59. Because the FCC found that new entrants are not impaired without unbundled access to local switching at TELRIC rates to serve enterprise customers, only Section 271(c)(2)(B)(vi)

obligates Verizon to provide local circuit switching for high capacity loops. Nothing in Section 252 gives the Department authority to arbitrate or otherwise formally enforce Verizon's Section 271 obligations.[8] Cf. 47 U.S.C. § 271(d)(6); Triennial Review Order at ¶ 664 (noting that "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the [FCC] will undertake in the context of . . . an enforcement proceeding brought pursuant to section 271(d)(6)").

The Department's observation that parties may seek arbitration of unresolved disputes between carriers in renegotiating their interconnection agreements in response to changes in the law does not contradict the Department's statement that it does not have authority to enforce Verizon's Section 271 obligations. Local circuit switching for the enterprise markets is no longer subject to compulsory arbitration under Section 252, because it is not required to be unbundled under Section 251.[9] The Triennial Review Order finds, however, that CLECs will not be impaired in the enterprise market without access to unbundled local circuit switching,

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[8] We do note the Department's authority to enforce Verizon's Performance Assurance Plan and the Consolidated Arbitrations performance standards, which are designed to prevent "backsliding" on wholesale provisioning. See, e.g., Section 271 Proceeding, Order Adopting Performance Assurance Plan, D.T.E. 99-271 (Sept. 5, 2000); Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 Phase 3-F (June 8, 2000); see 47 U.S.C. § 252(e)(3).

[9] We do, however, expect Verizon to file the new rates, terms, and conditions for approval in a wholesale tariff, because the services are jurisdictionally intrastate common carriage subject to Department approval. The tariff rates are not to be frozen at TELRIC, but are to be market-based. Order Closing Investigation at 19. Whether those market-based rates continue to meet Verizon's Section 271 obligations, however, is for the FCC to determine. See 47 U.S.C. § 271(d)(6).

because CLECs can initiate service on a parallel digital loop provisioned with a CLEC-provided switch before disconnecting a customer's UNE-P loop.[10] Triennial Review Order at ¶ 451. Verizon therefore must ensure that its process for migrating CLEC customers by initiating service on a parallel digital loop does not cause service disruption to customers during the transition process.

We emphasize our previous statement, however, that until the carriers have attempted to negotiate modifications to their interconnection agreements according to the Section 252 framework, it is premature for the Department to review this process. Order Closing Investigation at 20; see also Triennial Review Order at ¶¶ 700-06 (requiring carriers to begin good faith negotiations upon the effective date of the Triennial Review Order). Likewise, reviewing the scope of potential disruption to the entire enterprise switching market is premature, and whether there will be any disruption at all is still only speculative. Therefore, we find no reason to open a separate docket to oversee the transition process at this time. DSCI and InfoHighway also present no facts sufficient to demonstrate that the Telecommunications Division will be unable to provide informal assistance to carriers sufficient to address the situation.

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[10] If CLECs choose instead to avoid migrating an enterprise customer line to a parallel digital loop by taking local circuit switching offered by Verizon under Section 271(c)(2)(B)(vi), we cannot mandate arbitration of the terms of such an offering. If parties seek to include terms for local circuit switching for high capacity loops in their interconnection agreements or separate agreements, those terms must be consistent with Verizon's tariff.

V. ORDER

After due notice and consideration, it is

ORDERED that the motion of DSCI Corporation and InfoHighway Communications Corporation for partial clarification and reconsideration of the Department's Order Closing Investigation is DENIED.

By Order of the Department

/s
Paul G. Afonso, Chairman

/s
James Connelly, Commissioner

/s
W. Robert Keating, Commissioner

/s
Eugene J. Sullivan, Jr., Commissioner

/s
Deirdre K. Manning, Commissioner