COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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 Mass Market Customers	)	D.T.E. 03-60 Track A

February 20, 2004

HEARING OFFICER RULING ON MOTION TO STRIKE OF THE LOOP/TRANSPORT CARRIER COALITION

I. INTRODUCTION

On January 13, 2004, the Loop/Transport Carrier Coalition ("LTTC")[1] filed with the Department of Telecommunications and Energy ("Department") a Motion to Strike portions of the Direct Testimony and Supplemental Testimony filed by Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") in this proceeding.[2] Pursuant to a schedule established by the hearing officer, on January 30, 2004, AT&T Communications of New England, Inc. ("AT&T") and Conversent Communications of Massachusetts, LLC ("Conversent") filed comments in support of LTCC's motion. Also on January 30, 2004, Verizon filed an opposition to LTCC's motion. Both LTCC and Verizon filed reply comments.

II. POSITIONS OF THE PARTIES

A. LTCC

In its Motion to Strike, LTCC argues that Verizon has failed to present any relevant evidence concerning wholesale competitive facilities on any of the transport routes or to any of the customer locations identified by Verizon in either its Direct or Supplemental Testimony

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[1] The Loop/Transport Carrier Coalition includes Broadview Networks, Inc, Choice One Communications of Massachusetts, Inc., Focal Communications Corporation of Massachusetts, and XO Massachusetts, Inc.

[2] Verizon filed its Direct Testimony with the Department on November 14, 2003, and its Supplemental Testimony on December 19, 2003.

(LTCC Motion at 2). LTCC argues that in the Triennial Review Order,[3] the Federal Communications Commission ("FCC") required that incumbent carriers seeking to challenge the FCC's national determination of "impairment" for loops and transport would need to provide evidence on a customer-specific and location-specific basis (id. at 3). LTCC argues that Verizon admits that it has not presented specific evidence of wholesale availability, but relies instead upon a "general willingness to wholesale" evidenced by carriers' representations on their websites and other criteria (id. at 3-4).

LTCC argues that Verizon's general assertions of wholesale availability should be stricken because the evidence does not comply with the FCC's requirement of route-specific and location-specific evidence (id. at 4). The purpose of requiring state commissions to apply the "triggers" included in the Triennial Review Order, argues LTCC, is to identify where actual deployment demonstrates that requesting carriers would not be impaired (id. at 5). LTCC argues that because Verizon has failed to connect its wholesale evidence with any of the challenged transport routes or customer locations, Verizon's testimony on wholesale availability should be stricken as irrelevant (id.).

In the event that the Department decides not to strike Verizon's testimony regarding wholesale availability in general, LTCC argues that the Department should nevertheless strike all Verizon's claims that DS1 loops or transport are available on a wholesale basis (id. at 8). LTCC argues that Verizon has provided no evidence that wholesale carriers offer transport and loops to other carriers at a DS1 level, other than to merely assert that carriers offer service "at speeds up to OC 48" (id. at 9, citing Verizon Direct Testimony at 46). LTCC argues that because Verizon makes this assumption without providing any support for it, the Department should strike Verizon's assertions regarding the availability of DS1 at wholesale (id.).

In its reply to Verizon's opposition, LTCC argues that an assumption-based case is not what the FCC, or the Department, intended and may lead to erroneous findings of non-impairment (LTCC Reply Comments at 2-3, citing D.T.E. 03-60, at 6, Hearing Officer Ruling on Motion for Protective Treatment of Highly Sensitive Confidential Information of SBC Telecom, Inc.; Motion of Wiltel Local Network, LLC for Protective Treatment of Highly Sensitive Confidential Information; and Motion of AT&T Communications of New England, Inc. for Heightened Protection of its Response to Department's Request Number 11 (October 31, 2003) ("October 31 Hearing Officer Ruling")). For example, LTCC asserts that,

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[3] 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 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 01-36 (rel. Aug. 21, 2003) ("Triennial Review Order").

out of the ten carriers Verizon identified in its testimony as wholesale providers, four of the carriers did not provide information regarding the types of facilities and services offered in response to Department discovery, and the Department should not permit Verizon to satisfy its burden through the silence of carriers (id. at 3).

B. AT&T

Consistent with LTCC's arguments, AT&T maintains that Verizon's wholesale transport triggers claim is not supported by the requisite granular evidence described in the FCC's Triennial Review Order (AT&T Comments at 3). More specifically, AT&T argues that Verizon offers no specific evidence to show that any CLEC which Verizon claims to be a wholesale transport provider actually makes transport facilities over specific routes available on a wholesale basis (id.). Instead, argues AT&T, Verizon asks the Department to rely on "evidence of a carrier's general willingness to offer its transport facilities on a wholesale basis" (id., citing Verizon Direct Testimony at 45). In other words, AT&T argues, Verizon asks that the Department rely on generalized evidence absent specific evidence to the contrary (id.). AT&T argues that, with such a request, Verizon seeks to create a rebuttable presumption that wholesale transport is available over the routes specified in Verizon's testimony (id.). However, AT&T argues, the Triennial Review Order established the opposite rebuttable presumption, namely, that impairment exists on a nationwide basis with regard to dedicated transport, and that route-specific evidence is required to overcome this presumption (id. at 3-4). Additionally, AT&T argues that Verizon ignored available route-specific evidence, stating that had Verizon relied on AT&T's response to DTE-CLEC-4, this response would have undermined Verizon's wholesale transport claim (id. at 4).

C. Conversent

Conversent supports LTCC's Motion to Strike insofar as Verizon's testimony claims that certain Verizon-specified transport routes meet the FCC's wholesale triggers for dark fiber, DS1 and DS3 transport (Conversent Comments at 1). Conversent argues that Verizon has failed to demonstrate: (1) that the carriers upon which Verizon relies to meet the wholesale triggers for the specified routes in Verizon's testimony are "operationally ready" to provide transport along the specified routes; and (2) that any of these carriers make dark fiber, DS1 or DS3 transport "widely available" along the specific routes for which Verizon is seeking a non-impairment finding (id.). Accordingly, Conversent argues that the Department can have no confidence that any of the routes identified by Verizon satisfy the FCC's wholesale triggers for dark fiber, DS1 and DS3 transport (id.).

D. Verizon

In its opposition, Verizon argues that nothing in the Triennial Review Order establishes a new standard of admissibility limiting the evidence on which a state commission may rely in

identifying routes, to individualized facts unique to each route (Verizon Opposition at 2, 6). Verizon argues that 220 C.M.R. § 1.10(1) is the applicable rule of evidence in this proceeding; under which its evidence is relevant and admissible (id. at 3). As to relevance, Verizon maintains that the Department's evidentiary rule only excludes evidence which is "unduly burdensome or cumulative or such evidence as is not of the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs" (id., citing 220 C.M.R. § 1.10(1)). Verizon asserts that in Massachusetts courts, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." (id. at 3, citations omitted). Additionally, Verizon argues that the Supreme Judicial Court has defined relevant evidence as that which has a "rational tendency to provide an issue in the case" and that the Court further explained that to be relevant, evidence "must render the desired inference more probable than it would be without the evidence" (id., citations omitted). Verizon claims that its evidence in support of its wholesale transport and loops triggers case falls within this definition of relevance (id. at 3-5).

Further, Verizon argues that the FCC delegated to the states the task of identifying carriers which can be counted towards satisfying the triggers because the states are in a better position to gather such evidence (id. at 6). However, argues Verizon, the FCC does not suggest the level of detail that a state commission must reach in order to find "no impairment" on a given set of routes or locations (id.). Verizon asserts that there is more than one way to prove that a set of loops or dedicated transport routes is available at wholesale, such as by demonstrating, as Verizon claims it has done, that a particular carrier has deployed fiber along certain routes and generally offers to sell access to its routes (id.).

With regard to AT&T's contention that AT&T does not offer dedicated transport to other carriers, Verizon asserts that the inconsistency between AT&T's claim and the discovery response of carriers that they have purchased dedicated transport from AT&T raises an issue of fact and credibility that can only be determined after hearing (Verizon Reply Comments at 2). Furthermore, Verizon argues that AT&T's definition of dedicated transport is in direct conflict with FCC rules and, therefore, does not contradict Verizon's evidence that AT&T offers dedicated transport routes to other carriers (id. at 2-3).

Verizon also asserts that LTCC has presented no reason why a judgment should be passed on Verizon's wholesale transport case before any CLEC has filed testimony and before Verizon has filed rebuttal testimony (Verizon Opposition at 12). Verizon argues that LTCC cannot identify any prejudice if the case is allowed to proceed to hearing, and Verizon urges the Department to deny the LTCC motion and allow the case to proceed through pre-filed testimony and hearing (id. at 12-13). Verizon argues that if the Department then finds the routes in issue do not meet the FCC's wholesale triggers, the Department can make its findings based on a full record (id. at 13). Finally, Verizon urges the Department to deny

LTCC's alternative request to strike Verizon's testimony concerning DS1 loops and transport because Verizon's testimony is fully supported by information in the record (id.).

III. ANALYSIS AND FINDINGS

LTCC urges the Department to strike as irrelevant portions of Verizon's Direct and Supplemental Testimony because, LTCC argues, general evidence of wholesale availability does not comply with the requirements in the FCC's Triennial Review Order for route-specific and location-specific evidence (LTCC Motion at 4). The information LTCC requests the Department strike consists of Verizon's summary of CLECs' representations on their websites and in tariffs, as well as CLECs' responses to Department discovery relating to the wholesale availability of dedicated transport and loops in Massachusetts (id. at Att. A). For the following reasons, I do not agree that Verizon's pre-filed testimony must be stricken.

Department regulations state, in pertinent part, that "[t]he Department shall follow the rules of evidence observed by courts when practical." 220 C.M.R. § 1.10(1). Our regulations further state that "[t]here shall be excluded such evidence as is unduly repetitious or cumulative or such evidence as is not of the kind on which reasonable persons are to rely in the conduct of serious affairs." Id. Additionally, the Supreme Judicial Court has defined relevant evidence as that which has a "rational tendency to prove an issue in the case," and explained that in order to be relevant, evidence "must render the desired inference more probable than it would be without the evidence." Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989) (citations omitted).

In addition, the FCC did not define in the Triennial Review Order what it would consider to be "relevant evidence" in a state impairment proceeding.[4] Nor did the FCC otherwise limit the types of evidence that may be considered by a state commission to determine whether the wholesale triggers have been satisfied. Rather, the FCC stated that actual marketplace evidence is the "most persuasive and useful kind of evidence," and stated that it was "most interested in granular evidence." Triennial Review Order at ¶ 93. But this is very different from prohibiting in its entirety the evaluation of information such as the kind submitted by Verizon in its pre-filed testimony, as LTCC requests us to do.

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[4] In the Triennial Review Order at ¶ 417, the FCC stated that state commissions "need only address routes for which there is relevant evidence in the proceeding that the route satisfies one of the triggers . . . ." However, the FCC did not require that only certain evidence would be considered "relevant evidence" for the purposes of a state commission's evaluation. See also Triennial Review Order at ¶ 339 (similar language concerning loops evaluation).

Also, despite LTCC's claim to the contrary, the Department has not limited Verizon to submitting only route-specific and location-specific information in this proceeding. When the Department denied certain CLECs' requests to prevent Verizon and the parties in this case from having access to CLECs' responses to Department discovery, the Department emphasized the need to allow Verizon to have access to information regarding the existence of CLEC facilities in Massachusetts when Verizon had the burden to prove a "triggers case." See October 31 Hearing Officer Ruling at 6. However, the Department did not specify in its ruling that only certain information was permissible when attempting to satisfy the FCC's wholesale triggers.

Turning to the portions of Verizon's pre-filed testimony at issue in this dispute, I determine that, pursuant to Department rules and practice, and the FCC's directives in the Triennial Review Order, the information contained in Verizon's pre-filed testimony is relevant because it purports to show that certain carriers offer at wholesale to other carriers dedicated transport and loops in Massachusetts. I make no determinations as to the sufficiency of the information to satisfy the FCC's wholesale triggers, because it would be inappropriate, as well as premature, to make determinations regarding the sufficiency of the information in response to a pre-hearing motion to strike on the basis of relevance. Likewise, it is premature at this stage to determine the probative weight to be assigned to the information submitted thus far, or to determine whether the information contained in Verizon's pre-filed testimony is even admissible as evidence in this proceeding. A ruling on admissibility will only ensue when and if Verizon seeks to enter its pre-filed testimony into the evidentiary record. The only issue to be addressed in this ruling is the relevance, based upon Department rules and practice, and the FCC's directives in the Triennial Review Order, of the information LTCC seeks to have stricken. As I have determined that the information in Verizon's pre-filed testimony is relevant to the issues to be decided in this proceeding, LTCC's motion to strike is denied.

Lastly, regarding LTCC's alternative motion to strike as irrelevant Verizon's assertions that DS1 loops and transport are available on a wholesale basis in Massachusetts, I determine that LTCC's alternative argument also goes to the sufficiency of the information presented, not to its relevance. Therefore, striking the disputed information is inappropriate. Accordingly, LTCC's alternative motion is also denied.

IV. RULING

The Motion filed by the Loop/Transport Carrier Coalition to Strike Portions of the Direct and Supplemental Testimony filed by Verizon New England, Inc. d/b/a Verizon Massachusetts is hereby denied.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within three (3) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: February 20, 2004 _____/s/_____
Paula Foley, Hearing Officer

cc: Mary L. Cottrell, Secretary
Paul G. Afonso, Chairman
James Connelly, Commissioner
W. Robert Keating, Commissioner
Eugene J. Sullivan, Commissioner
Deirdre K. Manning, Commissioner
Andrew O. Kaplan, General Counsel