

D.T.E. 01-20

June 12, 2001

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts.

INTERLOCUTORY ORDER ON CLEC COALITION'S APPEAL OF
HEARING OFFICERS' MAY 18, 2001 RULING

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INTERLOCUTORY ORDER ON CLEC COALITION'S APPEAL
OF HEARING OFFICERS' MAY 18, 2001 RULING

I. INTRODUCTION

On May 8, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") and AT&T Communications of New England, Inc. ("AT&T") submitted to the Department of Telecommunications and Energy ("Department") their direct cases in Part A of D.T.E. 01-20. Verizon's direct case includes its TELRIC-based cost models, inputs, pre-filed direct testimony, supporting documentation and proposed rates addressing unbundled network elements, including xDSL and line sharing, and collocation; AT&T's direct case includes its TELRIC-based cost models, inputs, pre-filed direct testimony, supporting documentation and proposed rates addressing unbundled network elements, including xDSL and line sharing.

On May 14, 2001, Allegiance Telecommunications of Massachusetts, Inc., Covad Communications Company, El Paso Networks, LLC, and Network Plus, Inc. (collectively "CLEC Coalition") filed a Motion to Strike Verizon Testimony and for Extension of Time to File Rebuttal Testimony ("Motion"). Verizon, AT&T, and WorldCom, Inc. ("WorldCom") filed replies to the

Motion on May 16, 2001; AT&T and WorldCom's replies only addressed the CLEC Coalition's request for additional time to file rebuttal testimony.

On May 18, 2001, the Hearing Officers denied, in part, and granted, in part, the CLEC Coalition's Motion ("May 18 Ruling"). More precisely, the Hearing Officers denied the CLEC Coalition's request to strike Verizon testimony concerning collocation and xDSL, but granted a one week extension to file rebuttal testimony based upon the delay parties encountered in receiving the proprietary agreement from Verizon in order to access the proprietary materials contained in Verizon's direct case filing. On May 23, 2001, the CLEC Coalition appealed the May 18 Ruling to the Commission ("Appeal"). Verizon filed its response to the Appeal on May 30, 2001.

II. CLEC COALITION APPEAL

A. Positions of the Parties

1. CLEC Coalition

The CLEC Coalition argues that, because the Hearing Officers abused their discretion the May 18 Ruling must be overturned (Appeal at 8-9).

a. Collocation

The CLEC Coalition insists that the May 18 Ruling's assumptions that it had notice that collocation would be included in this docket are unfounded for the following reasons. First, the CLEC Coalition reiterates its claim that the Department's Vote and Order¹ did not state or imply that collocation rates would be examined in this proceeding (id. at 9). Second, the CLEC Coalition argues

¹ Vote and Order to Open Investigation, D.T.E. 01-20 (January 12, 2001) ("Vote and Order").

that Verizon's Anglin Affidavit only states that collocation studies were conducted in parallel with its UNE studies, not that Verizon planned to offer these studies in this docket, and that the Department's February 22, 2001 Interlocutory Order on Verizon's appeal did not provide notice that the focus of this proceeding had broadened beyond UNE rates (id. at 10-11). Last, the CLEC Coalition reiterates its argument that comments made in other dockets should not constitute notice of the Department's intent to review collocation rates in the present proceeding, and further states that the one-day notice provided by the Department's Order on Reconsideration, D.T.E. 01-38 (May 7, 2001) was of little consequence (id. at 11-12).

Next, the CLEC Coalition asserts that the basis upon which its request to establish a separate track for collocation issues was denied is unsound because it fails to recognize that the Department previously reviewed collocation in a separate phase of the Consolidated Arbitrations (id. at 12-13). According to the CLEC Coalition, it makes sense to examine UNE costs and collocation costs separately, which would minimize confusion and provide carriers with greater certainty that the rates are fully sound (id. at 13).

b. xDSL/Line Sharing

The CLEC Coalition restates its request that the Department strike from Verizon's direct filing all testimony and cost studies pertaining to xDSL and line sharing issues previously addressed in D.T.E. 98-57 Phase III ("Phase III"), including loop qualification and conditioning, wideband testing, splitter installation, and splitter monthly administrative support (Appeal at 2, 14). In further support of its argument that issues litigated in D.T.E. 98-57 Phase III ("Phase III") should not be relitigated, the CLEC Coalition urges the Department to consider its motion to strike the xDSL testimony in the

context of the competitive DSL market (id. at 14). According to the CLEC Coalition, the recent difficulties of many DSL providers which have filed for bankruptcy or withdrawn from the market are due not only to “Verizon’s performance failures and excessive rates,” but also the expense of protracted and repetitive litigation (id. at 15). The CLEC Coalition argues that, with the cost to parties of lawyers and expert witnesses, duplication of efforts expended in Phase III would be too taxing given the financial pressures of trying to compete in the current market (id.).

c. Extension of Time

The CLEC Coalition appeals the partial denial of their motion to extend the rebuttal testimony deadline to June 29, 2001, plus two additional weeks if collocation or xDSL issues are included in Part A of this proceeding (Appeal at 16). The CLEC Coalition maintains that the Hearing Officers abused their discretion by ignoring most of the justifications provided which warrant an extension for longer than the one week that was granted (id.). In particular, the CLEC Coalition states that the Hearing Officers did not account for the need for an extension in view of the rescheduling of the technical conference to June 4 and 5, 2001 (id. at 17; Ankum Affidavit at ¶¶ 10-11). Furthermore, the CLEC Coalition states that its belief that these issues were not included was genuine and reasonable, and that additional time is necessary to prepare testimony if collocation or xDSL issues are ultimately included in this proceeding (Appeal at 17; see also Ankum Affidavit at ¶ 6). The CLEC Coalition also notes that Verizon did not object to its original motion for extension of the rebuttal deadline, and that the Hearing Officers’ decision to limit the extension appears to have been motivated by the Department’s desire to complete this proceeding by December 31, 2001 (id. at 18). However, if its full extension is granted,

the CLEC Coalition would have no objection to a comparable extension to the Department's target date for completion of this case (id.).

The CLEC Coalition requests that the Department extend the testimony deadline to June 29, 2001, or four weeks after a Department decision, plus an additional two weeks if collocation or xDSL issues are included (id.).

2. Verizon

a. Collocation

Verizon states that the CLEC Coalition's argument concerning the Ruling on collocation is the same as it presented in its Motion of May 14, 2001, and that the Hearing Officers did not abuse their discretion when they correctly rejected the CLEC Coalition's claim (Reply at 2). Verizon notes that the CLEC Coalition is the only party that has professed any confusion regarding the fact that collocation costs are being investigated in this docket, and that, contrary to the CLEC Coalition's claim, the Anglin Affidavit identified collocation cost studies among the many studies that Verizon was conducting for its direct case filing in this proceeding (id. at 2-3, citing Anglin Affidavit at ¶¶ 10-11). Verizon asserts that the Hearing Officers reviewed all the relevant factors that indicated that the Department intended collocation costs to be addressed in this investigation, and the CLEC Coalition failed to show that there was any abuse of discretion (id. at 3).

Verizon further states that the Hearing Officers fully addressed and rejected the CLEC Coalition's request to establish a separate track for collocation, and that this procedural decision

concerning the conduct of the case is not unreasonable or an abuse of discretion that provides cause for the Commission to overturn the Ruling (id.).

b. xDSL/Line Sharing

Verizon states that the Hearing Officers did not abuse their discretion in denying the CLEC Coalition's motion to strike Verizon's xDSL and line sharing cost studies and testimony, and requests that the appeal of the Hearing Officers' Ruling be denied (Reply at 3). Verizon argues that the reasons given by the Hearing Officers for refusing to exclude xDSL and line sharing issues were sound; namely, that examining all rates was consistent with the Department's intention to conduct a five-year review of Verizon's costs, and that considering all rates at this time, regardless of when initially set, was appropriate to ensure that rates were set using consistent cost methods and inputs (id. at 3-4). Verizon asserts that the CLEC Coalition's Appeal does not address these bases for the Hearing Officers' May 18 Ruling and presents no factors to show the ruling was an abuse of discretion (id. at 3, 4).

Verizon reiterates that its xDSL and line sharing analyses largely consist of updates to the analyses that the Department previously reviewed and approved in Phase III with more current information, including updated cost factors being used in the current studies (Reply at 4). Thus, Verizon states, it properly included cost analyses for these arrangements in its filing in this case so that the rates going forward would be based on the same inputs and factors as the rates for other services (id.). Therefore, Verizon states, the Hearing Officers' decision not to strike xDSL and line sharing testimony was reasonable (id.).

c. Extension of Time

Verizon does not object to the CLEC Coalition's requested extension of time to June 29, 2001

for parties to file rebuttal testimony, or four weeks after a Department decision on the Appeal, plus an additional two weeks if collocation or xDSL and line sharing issues are included in the case (Reply at 1-2). Verizon states that, if such an extension were granted, corresponding adjustments to the remainder of the schedule would have to be made (id. at 2).

III. ANALYSIS AND FINDINGS

We have had the opportunity to review the Ruling, the Appeal, and the response to the Appeal. We conclude, for the reasons detailed below, that the Ruling rests upon a reasonable foundation, is consistent with the delegation of authority we have vested in hearing officers, and will aid the Department in its TELRIC inquiry.

First, we determine that the CLEC Coalition has failed to show that the Hearing Officers abused their discretion by refusing to strike collocation from Part A of this docket. We have publicly stated our intent to review all rates in this docket, including collocation rates, and the Hearing Officers' Ruling is consistent with our intent. Significantly, as Verizon correctly notes, no other party has professed any confusion regarding the fact that collocation costs are being investigated in this docket.

Additionally, we find that the CLEC Coalition has failed to show any abuse of discretion by the Hearing Officers in refusing to establish a separate track for collocation. We agree with the Hearing Officers' conclusions that updating all TELRIC-based costs simultaneously will minimize confusion regarding the Department-approved methodology by implementing rates that are all based upon the identical methodology, factors and inputs.

Likewise, we find that the Hearing Officers did not abuse their discretion by refusing to strike xDSL and line sharing from Part A of this proceeding. As the Hearing Officers correctly note, the fact

that certain rates set in Phase III have only been in effect for a limited time does not preclude our review of these rates at the end of the five-year cycle. Moreover, we note that Verizon filed in May 2000 its revised M.D.T.E. Tariff No. 17 provisions² in compliance with the Department's Tariff No. 17 Order, D.T.E. 98-57 (2000) and the Federal Communications Commission's Line Sharing Order.³ Pursuant to G.L. c. 25 § 18, the Department was then required to review Verizon's revised tariff within six months; therefore, approving the Phase III rates near the end of the five-year cycle was unavoidable. Nevertheless, the current docket is a new investigation into Verizon's rates for network elements and services and is intended to be a comprehensive review of these rates, including those established relatively recently. As Verizon notes, the rates going forward for xDSL and line sharing should be based on the same inputs and factors as the rates for other services.

Turning to the extension to file rebuttal testimony, the May 18 Ruling's denial of additional time beyond the one week granted for the filing of rebuttal testimony was not unreasonable and did not constitute an abuse of discretion by the Hearing Officers. Not only did the one-week extension granted by the May 18 Ruling restore the 23 business-day interval for the filing of rebuttal testimony established in the February 22, 2001 procedural schedule, but also, the technical sessions, which parties are invited to attend, are convened for the Department's benefit, and thus, the rescheduling of the technical

² The proposed revisions included Verizon's proposed xDSL and line sharing offerings. Verizon modified its May 2000 compliance filing on June 14, 2000. The Department docketed this proposed tariff filing as D.T.E. 98-57-Phase III.

³ Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-355, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket 96-98 (rel. Dec. 9, 1999).

sessions did not warrant any further extension for the filing of rebuttal testimony.

Furthermore, the claim that inclusion of collocation and xDSL issues warranted an extension beyond the one week granted is an insufficient basis to overturn the May 18 Ruling. We emphasize our intent in this docket to review all rates, including those for collocation, xDSL, and line sharing. The CLEC Coalition's belief, reasonable or not, that these issues were not within the scope of this investigation, does not establish an abuse of discretion by the Hearing Officers in refusing to grant the full extension requested. Moreover, even though Verizon did not oppose the extension of the procedural schedule, this is not determinative of whether an extension shall be granted. Accordingly, we refuse to overturn the Hearing Officers' May 18 Ruling on the extension request.

In conclusion, we note that the CLEC Coalition raises in its Appeal, and the Affidavit of August Ankum attached to its Appeal, circumstances that occurred after the issuance of the Hearing Officers' May 18, 2001 Ruling; however, delays occasioned after the May 18 Ruling are not to be considered here but by the Hearing Officers in response to the CLEC Coalition's May 30, 2001 Motion for Extension of Time to file Rebuttal Testimony based upon the events subsequent to the May 18 Ruling. We note that the procedural schedule was stayed on June 5, 2001 pending the Hearing Officers' review and decision on that motion, and we are sympathetic to the need for further extensions because of the continued inability to access Verizon's proprietary materials, particularly in light of the CLEC Coalition's acknowledgment that extensions may prevent the Department from completing this investigation by year end.

IV. ORDER

Accordingly, after review and consideration, it is

ORDERED: That the Appeal by Allegiance Telecommunications of Massachusetts, Inc., Covad Communications Company, El Paso Networks, LLC, and Network Plus, Inc. of the Hearing Officers' May 18, 2001 Ruling is hereby DENIED; and it is

FURTHER ORDERED: That all parties comply with all other directives contained herein.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

