

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

Entered: March 4, 2009

CASE NO. 08-0656-T-GI

VERIZON WEST VIRGINIA INC.,
BELL ATLANTIC COMMUNICATIONS, INC.,
DBA VERIZON LONG DISTANCE, MCIMETRO
ACCESS TRANSMISSION SERVICES, LLC,
DBA VERIZON ACCESS TRANSMISSION
SERVICES AND MCI COMMUNICATIONS,
a corporation.

Petition by Verizon West Virginia Inc., Bell Atlantic Communications, Inc., dba Verizon Long Distance, MCIMetro Access Transmission Services LLC, dba Verizon Access Transmission Services, and MCI Communication Services Inc., dba Verizon Business Services requesting that Commission initiate a general investigation of the intrastate switched access charges of competitive local exchange carriers operating in WV and motion for confidential treatment of certain information provided under seal.

RECOMMENDED DECISION

On April 25, 2008, Verizon West Virginia Inc. (Verizon WV), Bell Atlantic Communications, Inc., dba Verizon Long Distance, MCIMetro Access Transmission Services and MCI Communications Services, Inc., dba Verizon Business Services (collectively Verizon), filed a petition requesting that the Commission initiate a general investigation into the intrastate switched access charges of competitive local exchange carriers (CLECs) operating in West Virginia. In support of the petition, Verizon stated that CLECs in West Virginia currently charge intrastate switched access rates that are substantially higher than those of incumbent local exchange carrier (ILEC) Verizon WV. According to Verizon, CLEC access charges in excess of those of the competing ILEC distort the competitive market and violate statutory requirements that carriers' rates be just and reasonable. Verizon requested that the Commission find, pursuant to West Virginia Code §§24-2-2, 24-2-3 and 24-2-7(a), that any CLEC switched access rates that are higher than the intrastate switched access rates charged by the competing ILEC in the same service area are unjust and unreasonable; that CLECs have a continuing obligation to maintain their switched access rates at levels no higher than those of the applicable ILEC; and that any CLEC be prevented from charging for switched access functions that it does not actually provide.

Also on April 25, 2008, Verizon filed a Motion for Pro Hac Vice Admission of Jeffrey A. Rackow together with a Verified Statement of Application of Jeffrey A. Rackow for Pro Hac Vice Admission in support of

said motion. Verizon also filed a Verified Motion for Confidential Treatment of certain information included with the proprietary version of its petition filed herein on April 25, 2008. Specifically, Verizon requested confidential treatment for (1) the average revenue per minute (ARPM) data for Verizon WV's usage sensitive switched access rate elements provided by Verizon WV to other carriers; and (2) the ARPM for the switched access charges paid by the Verizon companies to specifically named carriers.

On May 2, 2008, the Consumer Advocate Division (CAD) of the West Virginia Public Service Commission filed a Petition to Intervene. As grounds for said motion the CAD stated that: (1) it is authorized by statute and rule to represent the interests of residential and non-residential ratepayers in utility rate cases and related proceedings; and (2) Verizon's petition requesting that the Commission initiate a general investigation regarding the intrastate switched access charges of CLECs in West Virginia constitutes a proceeding with potential for adverse effects on ratepayers in West Virginia.

On May 23, 2008, AT&T Communications of West Virginia, Inc. (AT&T) filed a Petition to Intervene. In support of said petition AT&T stated: (1) that AT&T presently provides local exchange services in West Virginia as a CLEC; (2) that AT&T supports Verizon's request for the institution of a general investigation into CLEC access charges; (3) that AT&T agrees with Verizon that reductions in switched access rates are appropriate; (4) that said reductions will promote the further development of competition, will more appropriately align carriers' prices and costs, will help preserve the vibrancy and viability of the wireline network and will help to eliminate gaming scenarios whereby some carriers allegedly mask or misreport the jurisdictional nature of certain traffic to avoid higher access rates; (5) that the relief requested by Verizon will serve the public interest and will benefit West Virginia consumers, the West Virginia telecommunications industry and West Virginia's economic development; (6) that AT&T stands ready to reduce the West Virginia intrastate switched access rates of its CLEC operations the moment the Commission requires all other CLECs to do the same; and (7) that AT&T's interest in this proceeding cannot be adequately addressed or represented by any other party.

By Commission Order dated May 28, 2008, this matter was referred to the Division of Administrative Law Judges for further disposition with a decision due date of on or before November 21, 2008.

On May 29, 2008, Staff Attorney Lisa L. Wansley filed an Initial Joint Staff Memorandum to which was attached a Utilities Division Initial Memorandum dated May 27, 2008, prepared by David Howell, Utilities Analyst, Utilities Division. Commission Staff recommended the initiation of a general investigation as requested by Verizon in its April 25, 2008 Petition and that all CLECs and ILECs operating in West Virginia be made parties to this proceeding.

On June 4, 2008, Commission Staff filed a Motion to Consolidate. In support of said motion, Commission Staff stated that in Case Nos. 08-0011-T-T and 08-0827-T-T Level 3 Communications LLC and Digital Connections, Inc., respectively, were seeking approval of increased switched access rates and that it would be more efficient to consolidate

Case Nos. 08-0011-T-T and 08-0827-T-T with this proceeding to determine the appropriate access rate.

By Commission order dated June 13, 2008, the question of whether to consolidate Case Nos. 08-0011-T-T and 08-0827-T-T with this proceeding was left to the discretion of the Administrative Law Judge Division.¹

On June 19, 2008, counsel for Verizon filed a letter stating that Mr. Jeffrey A. Rackow had moved to other assignments within Verizon and was, therefore, withdrawing its Motion for Pro Hac Vice Admission of Jeffrey A. Rackow previously filed herein on April 25, 2008.

By Commission Order dated June 26, 2008, the Commission initiated a general investigation into the intrastate switched access charges of CLECs operating in West Virginia; named all CLECs and ILECs operating in West Virginia as respondents to this general investigation; changed the case designation from Case No. 08-0656-T-PC to Case No. 08-0656-T-GI; directed Commission Staff to conduct a comprehensive investigation and file its final recommendations on or before October 1, 2008; directed the respondents to file a written response to Staff's report on or before November 3, 2008; and extended the Administrative Law Judge's decision due date to February 2, 2009.

On July 3, 2008, James V. Kelsh filed a letter noting his appearance as counsel for Level 3 Communications, LLC.

On August 7, 2008, Verizon filed a Motion for Pro Hac Vice Admission of David L. Haga together with a Verified Statement of Application of David L. Haga for Pro Hac Vice Admission.

On October 1, 2008, Ms. Wansley filed a Final Joint Staff Memorandum to which was attached a Utilities Division Final Recommendation dated October 1, 2008, prepared by Mr. Howell. Commission Staff recommended that CLECs in West Virginia be required to adjust their switched access rates to mirror those of the ILEC they compete with or file a cost justification with the Commission for the higher rate they wish to charge.

On October 14, 2008, counsel for Verizon filed a letter stating that, while it generally supports Commission Staff's recommendations as set forth in the Final Joint Staff Memorandum filed herein on October 1, 2008, Verizon would be filing complete comments on or before November 3, 2008, as provided in the June 26, 2008 Commission Order.

On November 3, 2008, counsel for AT&T filed a response to Commission Staff's October 1, 2008 Final Joint Staff Memorandum. AT&T stated that

¹By Recommended Decision dated August 18, 2008, (Final September 7, 2008) in Case No. 08-0011-T-T Level 3's tariff filing, as revised, was accepted for filing, to become effective for all services on and after October 21, 2008. By Recommended Decision dated September 3, 2008 (Final September 23, 2008) in Case No. 08-0827-T-T, Digital's tariff filing for the purpose of increasing its rates for intrastate switched access services was denied and dismissed from the Commission's docket of open cases.

it supported Commission Staff's recommendation that CLECs in West Virginia should be required to adjust their switched access rates to mirror those of the ILEC they compete with or file a cost justification for the higher rate they wish to charge.

On November 3, 2008, Verizon filed its Comments on the October 1, 2008 Staff Memorandum. Verizon stated that it supported the Commission Staff recommendation that CLECs in West Virginia be required to adjust their intrastate switched access rates to mirror those of the ILECs with which they compete or be required to file a cost justification with the Commission for approval of any higher rate.

On November 3, 2008, Qwest Communications Corp. (Qwest) filed a letter stating that, as a reseller of local exchange service, it does not currently charge switched access rates in the State of West Virginia. Qwest went on to state that it supports Commission Staff's recommendations that CLEC intrastate switched access rates mirror the ILECs' intrastate switched access rates with whom the CLEC competes.

On November 3, 2008, FiberNet filed its Response to Verizon Petition and to the Final Joint Staff Memorandum. FiberNet stated that, while it did not dispute that its switched access rates currently exceed the switched access rates in place for Verizon, there is nothing in this proceeding demonstrating that Verizon's intrastate switched access rates provide a reasonable cost basis for application to CLECs in West Virginia. FiberNet stated that the Commission should not simply follow what has been done by other states, but, rather, wait to see if the FCC changes the guidelines governing intercarrier compensation. FiberNet also asserted that, if the Commission determined that capping of CLEC switched access rates was appropriate, individual CLECs that were not willing to accept a benchmark lower than their currently effective rates should be afforded a review of their costs involved in establishing their access rates and that, if a reduction in access rates was justified, such a reduction should be phased-in.

On November 13, 2008, Verizon filed a Motion to Strike and for Leave to File Reply to FiberNet, LLC's Response to Verizon Petition and Final Joint Staff Memorandum. In its motion, Verizon noted that the time for submitting comments in response to its petition had long since passed and requested that the Commission disregard any portion of the FiberNet response that responded directly to Verizon's Petition rather than the Staff Memorandum. Verizon asserted that, at a minimum, it should be permitted to respond to FiberNet's arguments regarding its Petition, as well as the new arguments FiberNet had raised regarding the Staff Memorandum and, accordingly, also moved for leave to file a Reply to FiberNet, LLC's Response to Verizon Petition and Final Joint Staff Memorandum in order to show specifically why FiberNet's arguments lack merit and should be rejected. The Reply was attached to the Motion.

On January 28, 2009, the CAD filed a Motion for Extension of the Administrative Law Judge's decision due date.

On January 29, 2009, Verizon, by counsel, filed a letter setting forth its opposition to the CAD's request for an extension of the Administrative Law Judge's decision due date.

On January 30, 2009, the CAD filed a reply to Verizon's January 29, 2009 letter opposing the CAD's motion for an extension of the Administrative Law Judge's decision due date.

Also on January 30, 2009, Verizon, by counsel, filed a letter in response to the CAD's January 30, 2009 letter.

By Commission Order dated January 30, 2009, the Administrative Law Judge's decision due date of February 2, 2009, was extended until March 4, 2009, and the CAD was directed to file its "comments and recommendations" by February 5, 2009.

By Procedural Order dated February 3, 2009, the CAD and AT&T petitions to intervene in this proceeding, the motion for the pro hac vice admission of David L. Haga and Verizon's motion to file its Reply to FiberNet's Response were granted. Verizon's motion to strike and disregard any portions of FiberNet's November 3, 2008 Response was denied. It was further ordered that, on or before February 13, 2009, Commission Staff, Verizon, FiberNet and AT&T file any response they might have to the CAD's comments and recommendations which were filed herein on or before February 5, 2009.

On February 5, 2009, the CAD filed its Comments and Recommendations in Response to All Parties' Filing. The CAD supported a cap on CLEC switched access rates, absent the provision of cost justification by the CLEC. However, the CAD went on to recommend that any reductions and capping of CLEC access charges become effective 180 days after any dispositive order entered in this proceeding becomes final; that any access charge reductions be instituted in three equal phases over a three-year period; that the ILECs be directed to pass through to their retail customers the reductions in the CLECs' intrastate switched access charges; that certain enumerated requirements be adopted to ensure that CLEC access charges match the levels imposed by competing ILECs; that, if the Commission reduces the CLECs' intrastate switched access charges to mirror the competing ILECs' rates, the Commission, in separate proceedings, address: (i) the rates CLECs pay for unbundled network elements (UNEs) provided by Verizon WV and (ii) Verizon WV's provision of certain network elements pursuant to special access rates that are significantly higher than the rates CLECs pay for UNEs; and that the Commission and its Staff remain abreast of developments regarding the FCC's proposals concerning intercarrier compensation.

On February 10, 2009, local counsel for Verizon filed a letter regarding a change in address for his co-counsel David Haga, Esquire.

On February 12, 2009, FiberNet filed its Reply to the Consumer Advocate Division's Comments and Recommendations. FiberNet stated the Commission action in this proceeding was unnecessary and unwarranted in light of anticipated FCC action which would render most any perceived problems regarding the level of CLEC switched access charges in West Virginia; that there had been no showing that CLEC access rates are unreasonable or that Verizon's access rates should be used as an appropriate benchmark for CLEC access rates; that there was no showing that West Virginia customers will realize a direct benefit from Verizon's requested rate cap and the concomitant CLEC access rate reductions; that, if Verizon's request for a rate cap is not rejected, CLECs should be

afforded the opportunity to show their costs of providing such service; and that a three-year transition period should be established for implementation of any access charge reductions.

On February 13, 2009, AT&T filed its response to the CAD's comments and recommendations. AT&T initially expressed its agreement with the CAD that the Commission should cap CLEC intrastate switched access rates at ILEC levels. However, AT&T stated that it did not support the CAD's recommendation for a transition period for access rate reductions. AT&T went on to state that it also concurred with the CAD's recommendation that CLECs should be directed to update their access rates within thirty days of any ILEC changes. AT&T was also of the opinion that, if any CLEC believed it would be harmed by the capping requirement, it should be given the opportunity to demonstrate that its incremental costs are higher than ILEC costs.

Also on February 13, 2009, Verizon filed its Reply to Consumer Advocate Division's Comments and Recommendations. Verizon stated that the CAD's recommendations for a multi-year transition period and that ILECs be directed to pass through to their retail customers the reductions in CLEC intrastate switched access charges should be rejected as unjustified and unwarranted. Verizon also addressed the CAD's recommendations regarding requirements intended to ensure compliance with the benchmark rate, if one is established in this proceeding. Verizon also expressed the view that the CAD's recommendations regarding issues not related to implementation of the CLEC rate cap, i.e., CAD's recommendation to launch two additional cases, one to examine Verizon's UNE rates and one to examine Verizon's special access rates, should be rejected because they are not linked to the implementation of a CLEC access rate cap.

DISCUSSION

Access charges compensate local exchange carriers (LECs) for originating and terminating interexchange calls placed by end users. When a consumer makes an interexchange call, its serving LEC hands off the call to the customer's chosen interexchange carrier, and that carrier then transports the call across its network and hands it off to the LEC that serves the called party, with this second LEC connecting the call to its end user customer. Each LEC charges the interexchange carrier switched access charges for its handling of the call at its end. The originating LEC bills its originating switched access rates, and the terminating carrier charges its terminating switched access rates. As indicated by this call flow, the interexchange carrier has no choice with respect to the LEC that terminates the call, because that carrier is selected by the end user who receives the call. Nevertheless, because the interexchange carrier is required to transport all traffic that is delivered to it, it must pay that terminating carrier's access rates, whatever they are. With the advent of local exchange competition, the LEC at either end of the call may be either an ILEC or a CLEC. Both groups of carriers provide switched access services in West Virginia pursuant to tariffs filed with the Commission.

Verizon claims that CLEC access rates are unreasonably high and must be reduced to the levels charged by competing incumbents. This claim is

based on the fact that CLEC intrastate switched access rates vary widely in West Virginia and, for the most part, are substantially higher than the access rates charged by Verizon, which have been steadily reduced over the past few years.² In contrast, many CLEC's access rates have remained substantially higher than Verizon's access rates. Examples of the variance in tariffed intrastate local switching charges are as follows:

<u>CLEC</u>	<u>RATE</u> ³
Granite Telecommunications, LLC	\$0.057 ⁴
AT&T Communications of West Virginia	\$0.038821 ⁵
Fibernet, LLC	\$0.030 ⁶
BullsEye Telecom, Inc.	\$0.0410 ⁷
Access Point, Inc.	\$0.0410 ⁸
NTELOS of West Virginia Inc.	\$0.019938 ⁹
Gateway Telecom, LLC d/b/a Stratus	
Wave Communications LLC	\$0.0250 ¹⁰
Hardy Telecommunications, Inc.	\$0.020 ¹¹

Verizon has asserted that there is no "principled justification" for CLECs continuing to charge intrastate rates that are significantly higher than ILEC rates and, in support of that assertion, stated that CLECs generally have the same or lower costs than ILECs, since they have no

²Per minute rates for Verizon have declined from \$0.019343 (or 1.9343¢) per minute of use (MOU) in 2001, to a current charge of \$0.003859 (or 0.3859¢) per MOU. Compare June 1, 2001 Commission Order in Case No. 00-0318-T-GI, at page 60, with Verizon WV Access Service Tariff P.S.C.-W. Va.-No. 217 at page 125.

³The rates shown apply to terminating minutes of use.

⁴Granite Telecommunications, LLC, West Virginia P.S.C. Tariff No. 2, Original Sheet 89, §5.1.2.

⁵AT&T Communications of West Virginia, Access Services Tariff P.S.C. -W. Va.-No. 10, 1st Revised Page 25, §17.15.2.

⁶Fibernet, LLC, PSC WV Tariff No. 1, Fifth Revised Page 6, § 4.3.2.3.

⁷BullsEye Telecom, Inc., West Virginia Tariff No. 2, Original Page 16, §3.9.3 A.

⁸Access Point, Inc., West Virginia Tariff No. 4, Original Page 59, §3.9.3 A.

⁹NTELOS of West Virginia Inc., Access Services Tariff WV - P.S.C. No. 2, Original Sheet 14, §17.2.3 (A).

¹⁰Gateway Telecom, LLC d/b/a StratusWave Communications LLC, WV PSC Tariff No. 2 - Access, First Revised Page 92, §9.2.4 A.

¹¹Hardy Telecommunications, Inc., PSC of W.V.A. Tariff No. 9, Original Page No. 92, §9.2.4 A.

obligation to serve residential customers in rural or other high-cost areas, do not have to maintain low retail residential rates throughout their service territory, and are free to use more efficient technologies and network configurations. Therefore, according to Verizon, allowing CLECs to impose access charges that are higher than the competing ILEC "distorts the competitive market" and "hurts the state's economy and the development of its telecommunications industry."

Verizon also noted that the FCC capped CLEC interstate access rates in 2001 and that a CLEC's per minute access rate cannot be higher than the interstate switched access rate of the ILEC with which the CLEC competes. A CLEC's access charges that do not exceed the benchmark are presumed to be just and reasonable.¹² Likewise, numerous states have adopted regulations mirroring the FCC's price cap approach for CLEC access rates.¹³ These actions by the FCC and other states are the basis for Commission Staff's recommendation that CLECs be required to reduce their access charges to mirror those of the ILECs with which they compete.

Standing alone, FiberNet has opposed Verizon's contention, and Commission Staff's recommendation, that CLEC intrastate access rates should be capped at the rates charged by the competing ILEC. Initially, FiberNet asserted that the fact that some CLECs' access rates exceeded Verizon's, by itself, did not demonstrate that CLEC access rates are unreasonable. According to FiberNet, CLEC access rates are generated by differences in underlying costs which, in turn, are generated by differences in the operations of, and areas served by, CLECs. FiberNet asserted that Verizon enjoys economies of scale that it and other CLECs do not. Specifically, FiberNet and other similarly situated CLECs in West Virginia lack the sheer size, customer base and density levels necessary to produce average per-unit costs as low as those enjoyed by Verizon. In addition, FiberNet asserted that CLECs have vastly different network architectures with proportionately more traffic-sensitive costs, fewer customers per switch and longer transport routes. Additionally, FiberNet also claimed that the greater purchasing power and creditworthiness of large companies like Verizon means that Verizon can purchase switches and other facilities at lower costs than CLECs. For all of these reasons, FiberNet stated that using Verizon's access rates as a benchmark for a CLEC's rates is inappropriate and that reducing CLEC rates to such a benchmark would be confiscatory and jeopardize the ability of CLECs to compete with Verizon in West Virginia on a going-forward basis.

¹²Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Seventh Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (CLEC Rate Cap Order).

¹³Staff referenced CLEC caps imposed in Maryland, Pennsylvania, New York, Louisiana, Connecticut, Virginia, Ohio, Missouri and New Hampshire. See Staff Memorandum at 2. Each of those states has addressed CLEC rates either through statute or commission action. As pointed out by Verizon, several other states have imposed limitations on CLEC access rates, as well, including California, Delaware, Illinois, Iowa and Texas.

FiberNet also asserted that the Commission should await the FCC's decision in the case of In the Matter of High-Cost Universal Service Support, etc., WC Docket No. 05-337, etc., FCC release 08-262, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking. However, on November 5, 2008, the FCC issued an order in that case which did not address intrastate access charges and did not affect its own CLEC interexchange access cap, the numerous other states' intrastate CLEC access caps or the ability of this Commission to impose such a cap, if warranted.

Verizon disputed FiberNet's assertions that Verizon had failed to demonstrate that CLECs' tariffed access charges are unreasonable and that the presumption that tariff rates are reasonable is inapplicable in this proceeding because the evidence demonstrates that the switched access market is not competitive and that competitive market forces have not operated to constrain the intrastate switched access rates charged by CLECs in West Virginia. Verizon went on to assert that its intrastate switched access rates have been subject to review by the Commission, and have been declining, while West Virginia CLECs have not been subject to the same level of scrutiny. Therefore, the rate that should be presumed to be reasonable is Verizon's. Verizon also disputed FiberNet's claim that West Virginia CLECs' underlying costs justify the disparity between their higher access charges and Verizon's as theoretical and which entailed a failure to account for the disparity in rates between CLECs themselves.

As asserted by Verizon, and supported by AT&T, Commission Staff and the CAD, the undersigned is of the opinion that the disparity in switched access rates between and among CLECs on the one hand, and Verizon on the other, suggests that CLEC access charges are driven less by the need to recover network costs and more by the ability to maximize revenues. The disparity among and between CLECs and Verizon becomes more marked when the intrastate switched access services' rate structures for Verizon WV and the CLECs are reduced to average access revenue per minute (ARPM). For example, Comcast's average ARPM is 97.4% higher than Verizon WV's current average ARPM; FiberNet's average ARPM is 73% higher than Comcast's; Spectrotel's average ARPM is 33.3% higher than FiberNet's; and Granite Telecommunication's average ARPM is 42.5% higher than Spectrotel's. Such disparities in rates cannot be explained by competitive forces or cost variances and, as a result, competitive forces have not operated to constrain the intrastate switched access rates charged by West Virginia CLECs.

Commission Staff, the CAD, Verizon, AT&T and FiberNet all accepted the general proposition that, if it is determined that CLEC intrastate access rates should be capped, it is necessary that the CLECs have the opportunity to submit cost studies that would justify approval of intrastate switched access rates higher than the benchmarked ILEC's rates. This approach, with which the undersigned concurs, insures that the Commission will have a chance to examine what it costs the CLEC in question to provide the service before imposing a lower rate on that CLEC.

However, the parties are not in agreement on when or how such cost studies are to be submitted. Commission Staff has remained silent on the issue, which may be construed, as espoused by the CAD, as favoring an

immediate reduction in CLEC access rates, with the CLECs being afforded the opportunity to attempt to justify higher rates with cost studies at a later date. FiberNet argued that the Commission must provide CLECs a reasonable time period to perform and submit a cost study to support access charges higher than those imposed by competing ILECs in order to avoid an order that is confiscatory. Accordingly, FiberNet recommended that any reduction in CLEC access charges be phased in over three years. The CAD has recommended that any required reductions and capping of CLEC access charges begin to take effect 100 days after a final Commission order in this proceeding and that the reductions in CLEC access rates be instituted in three equal phases over a three-year period. The CAD opines that the CLECs should be accorded the three-year transitional period because a prior reduction in Verizon's rates was conducted over a three-year period.¹⁴ Verizon and AT&T oppose the CAD's proposed three-year transitional period for the reduction of CLEC access charges as unnecessary and unwarranted. Verizon also contended that the manner in which its rates were previously reduced is entirely irrelevant to the issues in contention in this proceeding.

Having considered the arguments of the respective parties, the undersigned is of the opinion that a phase-in period is warranted, although not of the length espoused by FiberNet and the CAD. The undersigned is of the opinion that access charge reductions should be implemented in two phases over a twelve-month period, with the first reduction of 50% being implemented within six months from the date any order becomes final in this proceeding and the remaining 50% reduction taking place within one year of said final order. In the undersigned's opinion, this approach will provide West Virginia CLECs with sufficient time to prepare for a reduction in rates or to present a cost study to justify a rate higher than that charged by the ILEC with which they compete and will ameliorate any significant financial hardship that may be experienced by the involved CLEC.

The CAD has also recommended that the Commission direct ILECs to pass through to their retail customers the reductions in CLEC intrastate switched access charges. This proposal is not warranted. CLEC access charges apply to long distance traffic, not local traffic; therefore, CLECs will be reducing the rates they charge long distance carriers, not ILECs. As Verizon pointed out, the Commission has determined that long distance services are workably competitive and has deregulated them. Accordingly, the Commission could not require the type of pass-through envisioned by the CAD.

The CAD has recommended that additional compliance measures be adopted by the Commission to ensure that CLEC access charges match the benchmark rate. The undersigned is of the opinion that the CAD's proposal to require CLECs to file revised tariffs to mirror ILEC access tariff revisions within thirty days of their effective date is reasonable and should be approved. However, the CAD goes on to recommend that ILECs be required to publish a newspaper notice when they revise their access rates and provide the Commission a short summary of existing and revised tariffed access rate elements, along with the effective date of the

¹⁴See, General Investigation re: Bell Atlantic-WV Intrastate Access Charges, Case No. 00-0318-T-GI (June 1, 2001).

revisions, and that the Commission itself maintain on its website a list of each ILEC's intrastate access rate elements and levels, along with revisions. The undersigned is of the opinion that such additional compliance measures are unnecessary since the Commission's current Rules and Regulations for the Filing of Tariffs (Tariff Rules) already provide adequate notice and, as pointed out by Verizon, the ILECs' own interest in prompt CLEC compliance with the benchmark rate will assure that effective notice is provided by CLECs.

The CAD has also recommended that the undersigned include in his decision in this case a recommendation that the Commission initiate two separate cost review proceedings, one to examine Verizon's unbundled network elements (UNE) rates and one to examine Verizon's special access rates. FiberNet is in complete agreement with the CAD recommendations, while Verizon opposes such recommendations as unfounded and unwarranted. The CAD's recommendations for initiation of UNE and special access cost cases are not prerequisites to adopting a CLEC intrastate access rate cap in this proceeding and, accordingly, will not be considered or addressed by the undersigned. The undersigned will note that, if any carrier, Commission Staff or the CAD has a complaint about Verizon's UNE or intrastate special access rates, it is free to initiate a formal complaint proceeding or seek a general investigation to address its concerns. The CAD's remaining comments regarding procedural improvements in this proceeding and the need for the Commission and its Staff to remain abreast of developments regarding the FCC's proposals concerning intercarrier compensation require no comment or discussion by the undersigned.

Finally, the undersigned notes that, as part of its initial filing on April 25, 2008, Verizon filed a Motion for Confidential Treatment of the average access revenue per minute (ARPM) calculations set forth in its Petition. Although no party has formally opposed that motion, the undersigned is not inclined to grant the relief requested. Verizon sets forth in its petition that its calculation of average ARPMs is derived from a review and analysis of all of the various switched access elements in the carriers' respective tariffs, which takes into account all of the relevant access rate elements that are billed on a per-minute-of-use basis, plus any carrier common line charges. Calculations derived from information contained in publicly available tariffs on file with the Commission cannot be deemed confidential or proprietary under either W. Va. Code §29B-1-1-4(a) or 47 U.S.C. §222. Accordingly, Verizon's motion for confidential treatment of the ARPM data set forth in its Petition will be denied.

FINDINGS OF FACT

1. On April 25, 2008, Verizon West Virginia Inc. (Verizon WV), Bell Atlantic Communications, Inc., dba Verizon Long Distance, MCIMetro Access Transmission Services and MCI Communications Services, Inc., dba Verizon Business Services (collectively Verizon), filed a petition requesting that the Commission initiate a general investigation into the intrastate switched access charges of competitive local exchange carriers (CLECs) operating in West Virginia. In support of the petition, Verizon stated that CLECs in West Virginia currently charge intrastate switched access rates that are substantially higher than those of incumbent local

exchange carrier (ILEC) Verizon WV. According to Verizon, CLEC access charges in excess of those of the competing ILEC distort the competitive market and violate statutory requirements that carriers' rates be just and reasonable. Verizon requested that the Commission find, pursuant to West Virginia Code §§24-2-2, 24-2-3 and 24-2-7(a), that any CLEC switched access rates that are higher than the intrastate switched access rates charged by the competing ILEC in the same service area are unjust and unreasonable; that CLECs have a continuing obligation to maintain their switched access rates at levels no higher than those of the applicable ILEC; and that any CLEC be prevented from charging for switched access functions that it does not actually provide. (See, April 25, 2008 filing).

2. As an ILEC, Verizon's intrastate switched access rates have been subject to review by the Commission. Since 2002, those rates have been lowered and also have been found to be reasonable, while most of the West Virginia CLECs have not been subject to the same level of scrutiny and currently charge intrastate switched access rates that are substantially higher than the rate Verizon charges for the same service. Per minute rates for Verizon have declined from \$0.019343 per minute of use in 2001 to a current charge of \$0.003859 per minute of use. (See, Petition filed April 25, 2008).

3. CLEC tariffed intrastate access rates vary from \$0.057 for Granite Telecommunications, LLC, to \$0.019938 for NTELOS of West Virginia, Inc. (See, Petition filed April 25, 2008; Consumer Advocate Division's Comments and Recommendations in Response to All Parties' Filings filed February 5, 2009).

4. Noting that the FCC has capped CLEC interstate switched access rates at the per minute rate of the ILEC with which the CLEC competes and that several states have adopted regulations mirroring the FCC's price cap approach for intrastate CLEC access charges, Commission Staff recommended that CLECs in West Virginia be required to adjust their intrastate switched access rates to mirror those of the ILEC(s) with which they compete, or file a cost justification with the Commission for the higher rates they wish to charge. (See, Final Joint Staff Memorandum and attachment filed October 1, 2008).

5. Verizon, AT&T, Qwest and the CAD are in agreement with Commission Staff's recommendation that CLEC intrastate access rates be capped at the rates charged by the competing ILEC. (See, AT&T responses filed November 3, 2008, and February 13, 2009; Verizon responses filed November 3 and 13, 2008, and February 13, 2009; Qwest response filed November 3, 2008; CAD Comments and Recommendations filed February 5, 2009).

CONCLUSIONS OF LAW

1. The disparity in intrastate switched access rates between and among the CLECs on the one hand, and Verizon on the other, cannot be explained by competitive forces or cost variances between companies. Competitive forces have not operated to constrain the intrastate switched access rates charged by West Virginia CLECs.

2. The public interest would be best-served by capping CLEC intrastate access rates at competing ILEC levels, as has been required by the FCC and numerous other states.

3. Maintaining the existing disparity between CLEC and ILEC intrastate access rates is not beneficial for consumers in West Virginia. A reduction in switched access rates will promote competition, more closely align a carrier's prices and costs and remedy existing rate disparities.

4. CLECs should have an opportunity to submit cost studies to the Commission to justify intrastate switched access rates higher than the benchmarked competing ILEC rates. The access charge reductions ordered herein should be implemented in two phases or steps over a twelve-month period, with the first reduction of 50% being implemented within six months from the date any order becomes final in this proceeding and the remaining 50% reduction taking place within one year of said final order, absent a cost justification filing by any CLEC.

5. Imposing a formal rate reduction pass-through requirement on ILECs is not warranted in this proceeding, since CLEC access charges apply to long distance traffic, not local traffic, and most, if not all, long distance services have been deregulated by the Commission pursuant to W. Va. Code §24-2-3c.

6. CLECs should be required to file revised tariffs mirroring any changes in the applicable incumbent local exchange carrier's intrastate access rates within thirty days of the effective date of said rates.

7. The initiation of UNE and special access cost cases is not a prerequisite to adopting a CLEC intrastate access rate cap in this proceeding and need not be addressed.

ORDER

IT IS, THEREFORE, ORDERED that competitive local exchange carrier intrastate switched access rates in West Virginia may not exceed the intrastate switched access rates charged by the competing incumbent local exchange carrier in the same service area, absent a determination by the Commission that a specific competitive local exchange carrier has demonstrated that its actual costs require a higher rate than that charged by the benchmark incumbent local exchange carrier.

IT IS FURTHER ORDERED that the necessary reductions and capping of competitive local exchange carrier intrastate switched access rates be implemented in two steps or phases over a twelve-month period, with the first reduction in rates of 50% being implemented within six months from the date of a final Commission order in this proceeding approving said reduction in CLEC intrastate access rates and the remaining 50% reduction taking place within one year of the date of said final order, absent the filing of a cost justification petition by an affected CLEC, accompanied by relevant data supporting a departure from the benchmark ILEC rates.

IT IS FURTHER ORDERED that competitive local exchange carriers file revised tariffs mirroring any changes in the applicable incumbent local

exchange carrier intrastate access rates within thirty days of the effective date of said rates.

IT IS FURTHER ORDERED that Verizon's motion for confidential treatment of the average access revenue per minute calculations set forth in its Petition filed herein on April 25, 2008, be, and it hereby is, denied.

The Executive Secretary is hereby ordered to serve a copy of this Order upon the Commission by hand delivery, and upon all parties of record by United States Certified Mail, return receipt requested.

Leave is hereby granted to the parties to file written exceptions supported by a brief with the Executive Secretary of the Commission within fifteen (15) days of the date this order is mailed. If exceptions are filed, the parties filing exceptions shall certify to the Executive Secretary that all parties of record have been served said exceptions.

If no exceptions are so filed this order shall become the order of the Commission, without further action or order, five (5) days following the expiration of the aforesaid fifteen (15) day time period, unless it is ordered stayed or postponed by the Commission.

Any party may request waiver of the right to file exceptions to an Administrative Law Judge's order by filing an appropriate petition in writing with the Secretary. No such waiver will be effective until approved by order of the Commission, nor shall any such waiver operate to make any Administrative Law Judge's Order or Decision the order of the Commission sooner than five (5) days after approval of such waiver by the Commission.


John P. Carter
Administrative Law Judge

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