STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by **SBC MICHIGAN** and **VERIZON**.	)))))	Case No. U-14447

At the February 27, 2007 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER RESOLVING REMAINING DISPUTED ISSUES

The Commission initiated this case in order to provide a forum for competitive local exchange carriers (CLECs) and incumbent local exchange carriers (ILECs) to negotiate amendments to their respective interconnection agreements to conform those agreements to the requirements stated in the Federal Communications Commission's (FCC) *Triennial Review Order (TRO)*[1], *Triennial Review Remand Order* (*TRRO*)[2], and implementing rules. On September 20, 2005, the

[1]Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 16984 (2003), vacated in part, *United States Telecom Assn* v *FCC*, 359 F3d 554 (DC Cir 2004).

[2]*In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338* , rel'd February 4, 2005.

Commission issued an order in which, among other things, it found that Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (collectively, Verizon) should be permitted additional time to negotiate with contracting CLECs. The September 20, 2005 order set out a procedure for an abbreviated collaborative process for Verizon and all CLECs that had interconnection agreements with Verizon to pursue an appropriate amendment to those agreements.

On November 18, 2005, Verizon and the CLECs that participated in the collaborative process with Verizon filed a joint petition to terminate the abbreviated collaborative process and modify the September 20 order to permit any interested carrier to negotiate with Verizon separately for an appropriate amendment, unrestricted to the dates and timeframes set forth in the order. The joint petition explained that all but two of the parties to the collaborative process opted to either forgo negotiation for an amendment at this time, or to negotiate with Verizon separately. For those two remaining carriers, TelNet Worldwide, Inc. (TelNet), and TC3 Telecom, Inc. (TC3) (collectively, the CLECs), Verizon agreed to negotiate outside the collaborative process.

In an order dated December 20, 2005, the Commission granted the joint request to amend the process established in the previous order. Among other things, the Commission determined that if the two remaining carriers and Verizon have unresolved issues on January 9, 2006, they could submit those issues on that date along with all supporting documentation and arguments to support their respective positions to the Commission for resolution under 47 USC 251 *et seq*., with any responses due February 6, 2006. The Commission offered the mediation services of the Commission Staff to assist the parties' negotiations upon their request.

After four stipulations to extend the time to submit unresolved issues, the parties filed a proposed amendment on September 22, 2006, highlighting each party's proposed competing

language related to the remaining disputed issues. On September 26, 2006, TelNet and TC3 filed additional suggested language.

On October 23 and November 7, 2006, the parties filed briefs and reply briefs, respectively, to support their positions regarding the disputed issues and proposed competing contract language.

Previous Agreement in Case No. U-13931

In certain issues presented in this case, Verizon argues that its proposed language has already been agreed to in Case No. U-13931, and is thus the current contract language between TelNet and Verizon. The CLECs argue that the agreement in Case No. U-13931 was a placeholder agreement, to be used until the Commission issues a final order in this dispute. The CLECs argue that they should not be required to maintain what was a temporary arrangement that contemplated the possibility of timely change. Moreover, they argue, TC3 was not a party to Case No. U-13931, and should not be held bound by that agreement.

The Commission finds that the existence of the placeholder agreement should not dictate the result of any issue presented in this case.

Performance Measures Sections 3.5.1.3 and 3.6.2

Verizon takes the position that performance measures should not be included for provisioning commingled facilities and services and provisioning loops or transport (including dark fiber transport) for which routine network modifications are performed. It states that the *TRO* ¶ 579 removed restrictions against commingled unbundled network elements (UNEs) and combinations of UNEs with other wholesale services, subject to eligibility criteria that apply to enhanced extended loops (EELs). Moreover, it states, *TRO* ¶ 632 requires ILECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested

transmission facility has already been constructed. In Verizon's view, the Commission's October 14, 2004 order adopting the arbitration panel's decision in Case No. U-13931, an interconnection arbitration between TelNet and Verizon, demonstrates that Verizon's proposed exclusionary language is fair and reasonable. Verizon argues that its position is consistent with the FCC's position on the issue as well as with other states that have decided it.

TelNet and TC3 argue that performance measures play an important role in ensuring that Verizon provides service to CLECs at the same quality level it provides to itself and consistent with the federal Act. 47 USC 251(c)(2)(C). TelNet and TC3 argue that there is no convincing reason to exclude these services from performance measures and remedies. They assert that commingling is essentially an administrative, not physical, action, and no special exclusion is needed. These parties argue that there is no such provision in the AT&T Michigan amendment approved by the Commission in this case.

The Commission finds that Verizon's proposed language for these sections should not be included. In lieu thereof, the following sentence should be included as Section 3.5.1.3: "Any carrier-to-carrier service quality measurements that might be adopted or approved by the Commission at any future date will apply notwithstanding any voluntary reporting by Verizon of its performance under other provisions of the Amended Agreement." The Commission notes that no provision similar to Verizon's proposal was included in the AT&T Michigan amendment to comply with the *TRO* and *TRRO*. There is no compelling reason to exclude network modifications from performance measures that would otherwise apply under these parties' interconnection agreements.

Auditing Procedures – Section 3.5.2.9

The parties propose competing provisions permitting Verizon to periodically audit TelNet and TC3 to determine compliance with service eligibility criteria for obtaining EELs. TelNet and TC3 argue that their proposed language is based on that used in the AT&T Michigan amendment the Commission approved in this matter. They state that the Commission's September 20, 2005 order in this case determined whether CLECs should be required to pay disputed amounts into escrow during a dispute and the extent of a CLEC's responsibility to pay audit costs. TelNet and TC3 state that the language approved for AT&T Michigan's interconnection agreements is more balanced than that proposed by Verizon.

Verizon responds that ILECs have the right "to obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." Verizon's Initial Brief, p. 4. Citing *TRO* ¶ 626. Further, if the auditor determines that the CLEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis. *Id.* ¶ 627. Verizon states: "If the auditor concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." Verizon's Initial Brief, citing *TRO*, ¶ 627.

Additionally, Verizon claims that the language proposed by the CLECs is "long, confusing, and full of ambiguities that invite disputes." Verizon's Initial Brief, p. 6. Therefore, Verizon claims, the Commission should adopt the language proposed by Verizon, which it claims "tracks precisely the obligations imposed under the [*TRO*]." Verizon Initial Brief, pp. 6-7. In Verizon's

view, TelNet and TC3 propose language that limits Verizon's right to an audit without any basis in the FCC's orders.

The Commission finds that the language proposed by the CLECs should be adopted, with minimal modification. That language mirrors the language approved by the Commission for Section 6.3.8 and subsections following the amendment to AT&T Michigan's interconnection agreements in this proceeding, with appropriate changes to correctly identify the companies and contract sections. As the Commission noted in its order establishing the extension of the collaborative proceeding for Verizon's interconnection agreement amendment, the "Commission is not likely to reject what it has already approved or approve what it has already rejected." Id., p. 52.

Perhaps the biggest difference between the two parties is Verizon's proposed requirement that a CLEC pay for the entire cost of an audit if any one DS1[3] or equivalent circuit is found noncompliant, which contrasts with the Commission-approved requirement that the CLEC pay 100% of the audit expenses if the number of circuits found noncompliant is 10% or greater. If noncompliance is less than 10%, the CLEC would pay a portion of the ILEC's audit costs. The Commission remains persuaded that the language approved for the AT&T Michigan amendment is more appropriate for adoption here. Verizon's quotation from the *TRO* is misleading for lack of the words that the company judiciously omitted. The full sentence reads: "Thus, to the extent that the auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor." *TRO*, ¶627 (emphasis supplied). Verizon's quotation was missing the underlined words. Contrary to Verizon's arguments, this language, at least in its full

[3]DS1 stands for digital signal level one having a capacity of 1.544 megabytes per second (Mbts).

context, does not support finding that the CLEC must reimburse the ILEC for all audit related costs whenever a single circuit is found not to be in compliance.

The Commission rejects Verizon's objection to the dispute resolution provision in the CLECs' proposed language. Although an independent auditor should be the model of an appropriate arbiter, an auditor will conduct its audit based on the parameters provided by the party seeking the audit. The CLEC should have an opportunity to challenge those parameters as well as the conclusions before being forced to convert or face other consequences of non-compliance. As to Verizon's argument that the CLEC should be required to pay amounts found due as a result of the audit even if it disputes that audit, the Commission finds that the provision in the CLECs' proposed language requiring payment into escrow of amounts due pursuant to the audit is sufficient to protect Verizon's interests.

The Commission further rejects Verizon's claim that it should not be required to provide the audit report to the CLEC because Verizon has paid for the audit to be done. The Commission finds that complying with the audit request will necessarily involve expenditure of the CLEC's resources. It seems little to ask that the report be furnished to the CLEC, which has an interest in recording what was audited and the result of that audit. Although Verizon claims it should be compensated for the report, it does not suggest an amount that should be required. The Commission finds that Verizon may request payment for the reasonable cost of copying the audit report to furnish it to the CLEC and the parties should agree on language that provides for that payment.

Further, the Commission rejects Verizon's objection to the contractual limitation of actions to two years prior to the notice of audit and prevents re-auditing EELs for the time period already subjected to audit. Imposing some limitations renders the right to audit reasonable, which may be

inferred from the FCC's discussion establishing that right. Verizon should not be permitted to back bill over an unreasonably extended period of time for non-compliant EELs. Verizon has not suggested a longer period; it argues only that there should be no restrictions on its ability to audit and back bill.

Moreover, the Commission rejects Verizon's argument concerning the use of "12-month period" rather than "calendar year" for the limitation on audit frequency. Verizon's position would permit the ILEC to impose a second audit on a company that just finished an audit within the previous few months (e.g., December 2006 and February 2007), and is unreasonable. The FCC provided in the *TRO*, ¶ 626 that incumbents have a "limited right to audit compliance with the qualifying service eligibility criteria. In particular we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis. . .." (emphasis supplied.) That order does not say that the incumbent has a right to audit once each calendar year. Verizon points to no current federal rule supporting its position.

As to Verizon's final three objections regarding this language, the Commission finds them without merit. First, Verizon objects to a requirement that the independent auditor not be "substantially dependent upon either Party for work." Contrary to Verizon's argument, this is a reasonable criterion for independence. An auditor that makes a substantial portion of his or her living working for one of the parties may legitimately be seen as not independent at all.

Second, the auditor's report should be expected to conclude whether the CLEC complied in all material respects with the eligibility requirements in addition to compliance for each DS1 and DS3[4] circuit. The Commission sees no problem with this language, and finds Verizon's objection to it unclear.

[4]DS3 refers to a digital signal level three, which has the capacity of approximately 28 DS1s.

Third, the Commission finds no basis to change the 45-day compliance period to 30 days, and Verizon provides none, except its acceptance in another jurisdiction. The AT&T Michigan amendment uses 45 days, and the Commission approves that period in the instant case.

However, the Commission agrees with Verizon's claim that it need not suspect specific non-compliance to initiate an annual audit. Therefore, the Commission finds that the third paragraph of section 3.5.2.9 should be modified as follows:

> To invoke its right to audit, Verizon shall send a Notice of Audit to CLEC, identifying examples of particular High-Cap EELs, if any, for which Verizon alleges non-compliance. The Notice of Audit shall state the proposed scope of the audit and shall be delivered to CLEC no less than thirty (30) days before the date upon which Verizon seeks to commence the audit. The Notice of Audit shall identify the proposed independent auditor. Such auditor shall not be substantially dependent upon either Party for work.

The modifications to the CLECs' proposed language are intended to permit Verizon to audit compliance without need for a specific allegation of non-compliance before asserting the right to audit compliance. However, if Verizon does suspect non-compliance, it should identify its suspicions in the Notice of Audit. In that manner, the CLEC and the ILEC may be able to work out their differences without the necessity for the disruption and use of time and financial resources that an audit may require.

Definition of DS1 and DS3 Sections 4.7.8 and 4.7.9

The parties disagree on language to define DS1 and DS3 loops. Verizon proposed to use the same definitions to which TelNet and TC3 had agreed in the existing interconnection agreement. TelNet and TC3 object to the inclusion of reference to Verizon's Technical Reference 72575 – a technical publication that specifies how Verizon applies the industry standards for particular loop types, including DS1 and DS3 loops, in its network. Verizon argues that because those standards will be followed with or without the contract containing their reference, it is appropriate to include

them in the amendment. Verizon argues that by doing so, it is ensuring that Verizon and the CLECs have a common understanding of the technical details relating to unbundling particular facilities. Verizon claims that the Pennsylvania, Washington, and Florida commissions have adopted Verizon's definitions as part of the interconnection agreement.

Moreover, Verizon argues, the CLECs desire to add language to the definitions providing that DS1 and DS3 loops include "'all electronics, optronics, and intermediate devices used to establish the transmission path to the end user customer premises as well as' inside wiring owned or controlled by Verizon that is part of the transmission path." Verizon's Initial Brief, p. 13. Verizon argues that this language does not appear in the FCC's definition of DS1 and DS3 loops, although Verizon admits it does appear as part of the general definition of local loop. Verizon argues this language should not be added here.

The CLECs argue that their proposed language is based on that approved for AT&T Michigan's amendment and that there is no reason to change that language to include by reference a document that changes from time to time. Again citing the Commission's statement that it would be unlikely to reject that which it had already approved or to accept that which it had previously rejected, they argue that the Commission should adopt the CLECs' proposed language.

Further, they argue that Verizon has failed to cite any Michigan authority for including a reference to Verizon's technical reference. They note that Vermont rejected the identical proposal because it found that reference to Verizon's own technical reference documents failed to provide needed "transparency" to the interconnection agreement. Moreover, TelNet and TC3 state that in Case No. U-13931, the arbitration panel declined to include by reference a collocation tariff into the interconnection agreement. The panel rejected that provision because Verizon could change the tariff, thereby creating a situation in which TelNet would be held to have accepted contract

changes to which it had not agreed – thus eliminating the negotiation process mandated by 47 USC 251 and 252. Similarly, the CLECs argue, they should not be required to accept a provision that would permit Verizon to alter definitions as it sees fit without the need to negotiate those changes. Such a situation, they argue, would create impermissible uncertainty for the CLECs.

Moreover, they argue, Verizon's objection to including all of the specifics from the definition of a local loop found in 47 CFR 319(a) for DS1 and DS3 loops should be rejected. The CLECs argue that because both DS1 and DS3 loops are sub-categories within the universe of local loops, their definition should include all the pieces that the definition of local loops includes. The CLECs conclude that their proposed language more closely follows the FCC's rules, is more definite, and is based on the definitions already established and approved by the Commission in the AT&T Michigan amendment in this proceeding.

The Commission is not persuaded that Verizon's proposal to include its changeable technical reference should be adopted. Although Verizon states that it will follow that technical reference anyway, this does not support inclusion within the contract over the opposition of the other party. The Commission is averse to requiring a party to accept as a referent term one that may be unilaterally altered by one of the parties to the contract. If the referent term is not included, the CLECs would have the ability to challenge any aberrant technical interpretations that might be included in the technical reference after the amendment has been approved.

The Commission finds that the language defining DS1 and DS3 loops should mirror that approved for the AT&T Michigan amendment in sections 0.1.14 and 0.1.17. Therefore, the Commission adopts the language proposed by the CLECs.

Pricing Attachment, Sections 1.2, 1.3, and 1.5

A. Price Stability

Originally, TelNet and TC3 objected to the inclusion of the Pricing Attachment in its entirety. However, they state that Verizon removed the prices to which the CLECs objected, so they no longer seek to reject the entire attachment, but only the pieces addressed in their comments (Section 1.2 and 1.3). The CLEC, object to Verizon's proposed language for these sections because, in their view, the language permits Verizon to alter its charges for services not only when new charges are required by a Commission or FCC order (to which the CLECs would not object), but also whenever new charges are "otherwise approved or allowed to go into effect" by the Commission or the FCC. They object to this wording as creating price (CLEC cost) uncertainty. These parties suggest that, because Verizon's language would permit the ILEC to charge new rates based on a tariff filed, but not specifically approved by the Commission or the FCC, there would be nothing to stop Verizon from altering the terms of the contract.

Verizon argues that this issue should not be in dispute, because it has agreed and the pricing attachment demonstrates that Verizon will not seek to impose, in connection with the performance of new obligations established in the *TRO,* any new charges not already contained in the existing interconnection agreements until such time as those charges have been duly established with the appropriate regulatory authority. Verizon argues that its pricing attachment merely clarifies that those charges are established, and that they will apply to the performance of any obligations under the *TRO* amendment. Verizon suggests that TelNet and TC3 may hope to delay the application of any new rates that are set in the future. However, Verizon argues, there is no justification for any such delay. In Verizon's view, if either the Commission or the FCC authorizes new charges, Verizon should be permitted to collect them under the terms of this amendment.

The Commission finds that the pricing attachment may be included in the amendment, but should have the language to which the CLECs object deleted. Without the disputed language, the prices included in the underlying interconnection agreement apply. If the agreement has a provision for future price changes, that also will apply to any service provided under the amendment. There is no compelling reason to alter any of the underlying agreement with respect to pricing at this time.

B. Loop Conditioning and Routine Maintenance

The CLECs argue that Verizon's proposed language seeks to impose a charge for routine network maintenance (loop conditioning) without a Commission approved cost study supporting the charge. These parties point to the Commission's September 20, 2005 order in which the Commission prohibited AT&T Michigan from imposing new charges without an approved cost study supporting the charge. The CLECs argue that the Commission was persuaded by the argument that expenses for routine network maintenance items were presumably recovered in the basic charge for the loop, and should not be recovered by additional charges. At the last minute, the CLECs state, Verizon determined to rely upon the language of the underlying agreements, which provides for "interim charges" for loop conditioning that will be trued up after a Commission determination following approval of a cost study. The CLECs argue that Verizon has not even filed a cost study, much less completed one. Thus, they argue, the interim charges remain without cost study support – to be trued up at some indefinite later date. They argue that over time, the interim charges effectively become permanent. The CLECs further argue that this case is a proper one in which to address the issue, and they urge the Commission to find that conditioning loops is routine network maintenance for which no additional charge is necessary or appropriate. This result will flow from the CLECs' proposed language for Section 1.5.

Verizon argues that language proposed by the CLECs for Section 1.5 of the Pricing Attachment would eliminate charges for loop conditioning contained in the parties' current interconnection agreements. Further, Verizon argues that such a step would not be proper as line conditioning is not new, and there has been no change of law that would warrant changing those charges now. Verizon states that the FCC has distinguished line conditioning and routine network modifications. It states that the line conditioning obligation existed before the *TRO*. As to the remaining portion of the language proposed by the CLECs, Verizon argues that language in Sections 1.2 and 1.3 sufficiently address how new charges will be established. Verizon concludes that existing charges continue to apply, and the Commission should reject any ambiguous prohibition that the CLECs may argue would bar such charges.

The Commission is persuaded that the CLECs' proposed language for Section 1.5 should not be included in the approved amendment, given that the parties currently have in place interim rates to which they have agreed. Moreover, the contract provides for a true up at the conclusion of a cost case.

However, the Commission is sensitive to the claim that interim rates may become effectively permanent unless a cost case is filed and completed in a timely manner. The Commission initiated a cost case for Verizon in Case No. U-14013 in response to a complaint filed by MCI WorldCom in Case No. U-13944. That case was dismissed after MCI and Verizon requested the Commission to do so. At that time, the Commission indicated the probable need for a Verizon cost case after the FCC clarified its rules concerning the provision of UNEs and any modifications to the total element long run incremental cost (TELRIC) rules. At this time, the Commission finds that Verizon should file that cost case. To that end, in an order issued today in Case No. U-15210, the Commission directs Verizon to complete and file support for a review of the ILEC's costs to

provide services and UNEs required to be offered pursuant to the federal Act. The commencement of that proceeding ensures that the interim prices will not be *de facto* permanent.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq*.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 *et seq*.; 1969 PA 306, as amended, MCL 24.201 *et seq*.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq*.

b. Within 30 days of the date of this order, the parties should file in their respective interconnection agreement proceedings, a joint application for approval of an amendment to their respective interconnection agreements, consistent with the findings and conclusions in this order.

THEREFORE, IT IS ORDERED that, within 30 days of the date of this order the parties shall file in their respective interconnection agreement proceedings, a joint application for approval of an amendment to their respective interconnection agreements, consistent with the findings and conclusions in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party aggrieved by this order may file an action in the appropriate federal District Court pursuant to 47 USC 252(e)(6).

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of February 27, 2007.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party aggrieved by this order may file an action in the appropriate federal District Court pursuant to 47 USC 252(e)(6).

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

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Commissioner

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Commissioner

By its action of February 27, 2007.

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Its Executive Secretary