



Agenda Date: 12-19-07
Agenda Item: 4A

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
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TELECOMMUNICATIONS

IN THE MATTER OF THE BOARD INVESTIGATION)
REGARDING THE RECLASSIFICATION OF INCUMBENT)
LOCAL EXCHANGE CARRIER (ILEC) SERVICES AS)
COMPETITIVE)

ORDER ON
RECONSIDERATION

DOCKET NO. TX07110873

(SERVICE LIST ATTACHED)

BY THE BOARD:

By Order dated November 28, 2007, in response to a request from Verizon New Jersey ("VNJ"), the Board determined that it is appropriate at this time to conduct a full investigation of and hearing on the question of whether incumbent local exchange carrier ("ILEC") provided mass market retail services should be declared competitive pursuant to N.J.S.A. 48:2:21-19 (b), after review and consideration of the necessary criteria. The Board indicated that it seeks to determine if ILEC mass market retail telecommunications services satisfy the necessary elements of ease of market entry, presence of other competitors, and availability of like or substitute services in the relevant geographic area.

In order to provide a full record and to allow for an inclusive and transparent process, the Board stated that it would conduct this hearing with the input of any and all interested parties. ILEC providers in the State that seek competitive status for their retail mass market services were invited to participate. Additionally, the Board invited the input of the New Jersey Division of Rate Counsel ("Rate Counsel"), and any other interested parties with the intent of providing insight into the process. Because of the possibility of significant participation, the Board also set forth a schedule for the proceeding which was part of its order. In addition, the Board designated Commissioner Frederick F. Butler as the presiding officer who is authorized to rule on all motions that arise during the proceeding and modify the schedule as necessary. Finally, a copy of the Order was sent to registered telecommunications providers in the State, as well as other parties that may have an interest in this matter, and it was posted on the Board's website.

By letter dated December 3, 2007, Rate Counsel is seeking reconsideration of the Board's November 28, 2007 Order. In its letter Rate Counsel seeks an extended schedule. Rate Counsel further states that numerous issues remain unaddressed by the Order, and that those issues adversely affect the fundamental fairness of the proceeding. Consequently, according to Rate Counsel, substantial changes in the schedule are necessary so that a full and complete record can be developed, while affording participants appropriate due process. The Rate Counsel letter goes on to make the following specific arguments in support of its motion:

- 1) Rate Counsel submits that the Board should first require that a petition be filed by any ILEC that seeks relief, which identifies the services for which reclassification is sought and establishes a prima facie showing that the criteria in N.J.S.A. 48:2-21.19 is met. Each carrier must file a petition and each carrier must demonstrate in that petition that the requirements for reclassification are met. Individually, therefore, each ILEC seeking to have its rate regulated services reclassified as competitive is required to demonstrate the existence of sufficient competition and that its rates are above cost. According to Rate Counsel, services that are below cost cannot be declared competitive. This requires the submittal of a full cost of service study for each service sought to be reclassified.
- 2) The Board should hold a prehearing conference to establish a workable schedule. As a contested matter, the proceeding must adhere to the Uniform Administrative Procedure Rules ("Uniform Rules"). The Board's schedule as outlined in the Scheduling Order fails to follow such rules. Also, the Board should modify the schedule to permit the filing of surrebuttal testimony and discovery thereon.
- 3) The schedule also fails to provide for any public hearings. Public hearings are necessary, required, and essential so that the Board can receive comments from the public. Rate Counsel suggests 3 public hearings.
- 4) The ending of all rate regulation requested by Verizon, if granted, would terminate Verizon's Plan for Alternative Regulation or require its modification. This requires notice and hearing under N.J.S.A. 48:2-21.18. The Board's order is silent as to this matter.
- 5) No schedule should be set until Board Staff and the parties have negotiated and signed a confidentiality agreement that permits use of confidential information in this proceeding.
- 6) Rate Counsel requests that the Board include in the record of this proceeding all testimony, discovery and/or filings from the five proceedings identified in its November 26, 2007 letter, and will supplement its request for inclusion of the record from other proceedings, if necessary, once it is determined what other ILECs will file for reclassification.
- 7) Rate Counsel maintains that the schedule set by the Board also fails to take into account the complexity of the factual issues to be addressed in this investigation. For example, with the ending or modification of PAR-2, the contribution from Yellow Pages will no longer support retail local exchange service, and this implicates whether retail mass market services are below cost. Finally, Rate Counsel argues that the Board has not resolved the fact that intra-state access rates are above cost for VNJ and other ILECs.

By letter dated December 13, 2007, VNJ responded to Rate Counsel's motion. VNJ supports the schedule as issued maintaining that it affords all parties sufficient time to address the relevant issues and develop a substantial record. The letter goes on to state the following arguments in opposition to the motion:

- 1) The schedule adopted in this proceeding actually provides somewhat more time than the schedule adopted in the CLEC Reclassification Proceeding, and there Rate Counsel filed hundreds of pages of pre-filed testimony, served hundreds of detailed discovery requests, engaged in motion practice, cross examined witnesses and filed post hearing briefs. Additionally, many of the issues and offers of proof in this case are likely to be similar to those developed in the CLEC Reclassification Proceeding.
- 2) Rate Counsel's contention that the schedule is too short because the outcome could "end over 80 years" of regulation has no merit. VNJ seeks reclassification of certain retail mass market services, not total deregulation. This is just another reclassification proceeding following the State's established policy that competitive services should be regulated differently than noncompetitive services.
- 3) Rate Counsel maintains that the schedule must be extended because first each ILEC must file a petition which makes a prima facie case that each service is competitive. There is no basis in the law for such a requirement as the Board has broad authority to determine whether a service is competitive after notice and hearing under N.J.S.A. 48:2-21.19(b).
- 4) Similarly without merit is Rate Counsel's request that the schedule be extended because each ILEC must submit a full cost of service study for each service for which it seeks reclassification. There is no statutory basis for this "requirement," which was rejected by the Board in the CLEC proceeding.
- 5) Rate Counsel also contends that the schedule must be changed because it varies from the timeframes for discovery established in the Uniform Administrative Procedure Rules. Rate Counsel fails to appreciate that the Board can establish its own time frames when it has decided to hear a case directly.
- 6) Rate Counsel's claim that the schedule is faulty because reclassification would terminate or modify PAR-2 is also baseless. Nothing in PAR-2 suggests that the plan terminates upon a reclassification of services. Services have regularly been reclassified as competitive without any effect on existing PAR requirements.
- 7) Rate Counsel suggests that the schedule should be extended because public hearings are required. Again, there is no legal requirement to conduct a separate public hearing.
- 8) Rate Counsel maintains that the matter should not proceed until the parties agree to a form of nondisclosure agreement. Since Rate Counsel and VNJ have often negotiated these in the past, if this was a matter of concern, Rate Counsel should have initiated a meeting to begin the process.
- 9) Equally without merit is Rate Counsel's claim that the complexity of the facts requires a longer schedule for investigation and review. The Board has routinely and properly limited the factual issues to those relevant to the statutory criteria for reclassification: ease of market entry, presence of competitors, and availability of like or substitute services.

- 10) Notwithstanding Rate Counsel's position to the contrary, review of access rates is also not a basis for delaying this proceeding as that is outside the task before the Board. Additionally, Rate Counsel will have ample opportunity to argue its position during the proceeding.
- 11) While VNJ recommends that the Board admit into the record of this proceeding the testimony that was admitted into evidence in the CLEC proceeding and VNJ's directory assistance service reclassification filing, VNJ opposes Rate Counsel's request for the wholesale inclusion of records from unrelated proceedings which will only result in confusion and delay without any corresponding benefit.

On December 14, 2007, Rate Counsel filed a reply to VNJ's opposition to its motion for reconsideration denying that Rate Counsel was merely seeking to delay the process, and maintaining that the schedule changes requested were necessary so that the schedule would adhere "to the tenets of due process." According to Rate Counsel, VNJ is attempting to shift the focus away from the possible effects of this proceeding which it sees as premature deregulation with an ending to PAR-2 and removal of regulatory review over retail services. Rate Counsel reiterated its concerns regarding the schedule adopted by the Board; the need for public hearings; and the need to develop the record in accord with the Uniform Administrative Procedure Rules which are based on the principal of due process.

No comments were received from any other parties.

DISCUSSION

After a careful and thorough review of the letter motion and the comments described above, the Board is satisfied that the schedule articulated in the November 28, 2007 Order with the modifications described below, is in fact sufficient to develop a full and complete record in this investigation, in a manner that affords appropriate due process to all parties. As recommended by Rate Counsel, the Board will add three public hearings to the schedule. Additionally, due to the intervening holiday, the time to respond to discovery on rebuttal testimony is HEREBY EXTENDED to February 13, 2008. As to the remaining requests of Rate Counsel, the Board HEREBY DENIES such requests for the reasons discussed below.

First, the November 28th Board Order states that ILECs seeking relief must affirmatively indicate their participation in this proceeding in order for their services to be included within the review and possibly qualify for a declaration of competitive status provided the requisite proofs are made. This requirement obviates the need for ILECs to file separate petitions for relief in this matter while achieving the same result. The schedule sets forth both a due date for intervention and a due date for initial testimony of parties supporting reclassification. Therefore, each carrier that seeks reclassification must provide evidence of ease of market entry, presence of other competitors, and the availability of like or substitute services in the relevant geographic area. This can be done in accordance with the current schedule.

With respect to Rate Counsel's suggestion that cost of service studies are required, we reiterate herein the Board's previous finding that the issue of cost of service has not been a consideration in past proceedings to determine whether a service should be reclassified as competitive. Most recently, the Board Order approving the reclassification of CLEC retail services¹, stated the following:

¹ I/M/O The Board Investigation Regarding the Reclassification of Competitive Local Exchange Carrier (CLEC) Services as Competitive; Docket No. TX06120841, dated 6/29/07 at 2. ("CLEC Reclassification

“Additionally, on the issue of the scope of the proceeding, Commissioner Butler found that the proceeding would be limited to review of the requirements pursuant to N.J.S.A. 48:2-21.19 for determining whether CLEC services may be reclassified as competitive, i.e. 1) ease of market entry; 2) presence of other competitors; and 3) availability of like or substitute services. Commissioner Butler specifically found that issues related to costs of service, profits, quality of customer service, and rate base/rate of return were outside the scope of this proceeding.”

The Board has already indicated that the review in the instant proceeding will be based upon the same statutory criteria contained in N.J.S.A. 48:2-21.19. The Board HEREBY FINDS that the above cited issues are similarly outside the scope of this proceeding.

Second, while this proceeding was initiated by the Board in response to a request from VNJ, it is an investigation regarding whether the reclassification of ILEC services as competitive is warranted. As such, the Board has flexibility in determining how to conduct this investigation, including not only the schedule, but whether or not to include a prehearing conference or rebuttal testimony. No statute defines what must be done to constitute an investigation. The Board, therefore, must determine what will be a review that is sufficient given the nature of the relief that may be granted. The schedule as proposed provides for extensive discovery, public notice and an opportunity to comment, as well as evidentiary hearings. As modified by this Order, it is the Board's conclusion that the proceeding as structured will sufficiently investigate the issue of whether ILEC provided retail mass market services should be reclassified as competitive. See, Frank v. Ivy, 120 N.J. 73, 97 (1990); I/M/O the Board of Examiners of Electrical Contractors, 356 N.J. Super. 42, 49 (App. Div. 2002).

The Board has conducted similar proceedings in the past utilizing similar timelines, most recently the CLEC investigation and, as stated previously, the Board is satisfied that with the modifications described herein, the schedule issued on November 28th is sufficient to develop a full and complete record in this matter. Commissioner Butler has the authority to change the schedule should he determine that actual developments in the proceeding provide a basis for such modifications.

Third, Rate Counsel argues that public hearings are necessary and required. While there is no statutory requirement for a public hearing in this matter, due to the potential number of consumers that this investigation could affect, the Board agrees with Rate Counsel that it would be prudent to hold three public hearings, the times and places to be determined by Commissioner Butler at a future date. Adequate notice will be provided so as to maximize the participation of interested members of the public.

Fourth, as stated above, this investigation will determine whether ILEC retail services are competitive pursuant to N.J.S.A. 48:2-21.19(b). Contrary to Rate Counsel's suggestion and as confirmed by VNJ in its comments, the VNJ Plan for Alternative Regulation will not end nor will it necessarily need to be modified if any (or all) retail mass market services are declared competitive. The Board has declared a number of VNJ services competitive during the pendency of both its original Plan for Alternative Regulation (PAR-1) and the current Plan (PAR-2) which did not result in the modification or termination of the PARs. Unless and until a request for a modification or elimination of PAR-2 is proposed, the Plan remains unaffected by the ultimate decision in this matter.

Order”). This and all other Commissioner Butler decisions made during the course of that proceeding were affirmed by the Board.

Fifth, Rate Counsel's request that a confidentiality agreement be signed by all parties before a schedule is set, is unnecessary. As in past cases before the Board, the parties have signed such agreements in the ordinary course of business in these matters. If an issue arises where a confidentiality agreement cannot be mutually agreed upon, Commissioner Butler, if requested, can determine the proper form of a confidentiality agreement.

Sixth, the request by Rate Counsel to include all testimony, discovery and/or filings from five other proceedings in this record does not appear to serve any purpose other than to unnecessarily complicate the Board's focused review. In the CLEC Reclassification Order the Board found that it is appropriate to separate the consideration of CLEC and ILEC competitiveness to avoid entangling the issues involved in the analysis of these different providers. Rate Counsel's request would not only bring those analyses back together, but Rate Counsel would also inject old, stale data and information from a merger review and a federal wholesale services review, neither of which is the subject of this investigation and neither of which is subject to the standards applicable in this proceeding. Additionally, Rate Counsel has failed to establish the relevancy of those proceedings to this case. Nothing in this Order precludes Rate Counsel, VNJ or any other party, from seeking to have admitted into evidence individual documents from these proceedings if relevancy can be demonstrated.

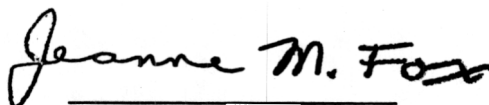
Finally, Rate Counsel is unconvincing when it suggests that the schedule fails to take into account the complexity of the issues in this investigation. The Board has identified the scope of this proceeding – whether or not ILEC mass market retail telecommunications services satisfy the statutory elements of ease of market entry, presence of other competitors, and the availability of like or substitute services in the relevant geographic area. The schedule is sufficient to develop a full and complete record that the Board can rely upon to make that determination. The issue of access charges will, if necessary, be addressed in a separate proceeding on the Board's own motion or in response to a legitimate request. While contending that there is insufficient time to develop a record, Rate Counsel has already filed what, in its own description, is voluminous testimony, and has propounded in excess of 130 discovery requests against three parties to this proceeding.

Therefore, based upon the above, the Board HEREBY ORDERS that the schedule will be modified to include three public hearings, with the times and places to be determined later. In addition, the last date for responses to discovery requests on rebuttal of parties supporting reclassification shall be moved from February 12, 2008, to February 13, 2008. All other requested modifications to the schedule are HEREBY DENIED. The schedule that was established by the Board and issued with the November 28, 2007 Board Order shall remain, unless the matter is revisited at a later date.

DATED: 12/21/07

BOARD OF PUBLIC UTILITIES

BY:



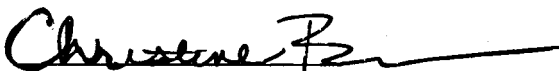
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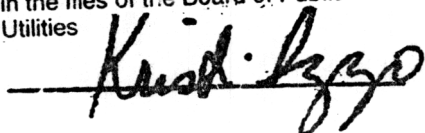
CHRISTINE V. BATOR
COMMISSIONER

ATTEST:



KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



**IN THE MATTER OF THE BOARD INVESTIGATION REGARDING THE
RECLASSIFICATION OF INCUMBENT LOCAL EXCHANGE CARRIER
(ILEC) SERVICES AS COMPETITIVE**

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