STATE OF NEW JERSEY

Board of Public Utilities
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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 REGARDING MOTION TO MODIFY THE SCHEDULE
	)	DOCKET NO. TX07110873

(SERVICE LIST ATTACHED)

BY COMMISSIONER FREDERICK F. BUTLER:

By Order dated November 28, 2007, in response to a request from Verizon New Jersey, Inc. ("Verizon"), the Board initiated this proceeding to fully investigate and consider the question of whether incumbent local exchange carrier ("ILEC") provided mass market retail services should be declared competitive pursuant to criteria set out in N.J.S.A. 48:2.21-19(b), namely, ease of market entry, presence of other competitors and availability of like or substitute services in the relevant geographic area.

By letter dated February 4, 2008, Sprint Communications Company, L.P., Sprint Spectrum, L.P. and Nextel of New York, Inc. (collectively "Sprint Nextel") requested that the Board make what Sprint Nextel described as limited modifications to the procedural schedule in this matter. According to Sprint Nextel, the modifications are necessary to afford the parties opposing reclassification sufficient time to address matters raised by Verizon for the first time in its January 29th, 2008 rebuttal testimony of Paul Vasington and Patrick A. Garzillo ("Rebuttal Testimony"). Specifically, Sprint Nextel asks the Board to: (1) require Verizon to submit all analysis, studies and workpapers associated with the cross-subsidy analysis set forth in its Rebuttal Testimony at pages 55-57 by February 7, 2008; (2) allow parties opposing reclassification until February 15, 2008 to serve discovery on Verizon with regard to the cross-subsidy analysis discussed at pages 55-57 of its Rebuttal Testimony; and (3) allow parties opposing reclassification the opportunity to file rebuttal testimony by March 14,2008 while extending out the hearing dates to March 31, April 1 and April 2, 2008. These limited

modifications are necessary to afford due process to the parties and allow the Board to develop a full record via an inclusive and transparent process, according to Sprint Nextel.

In support of its request, Sprint Nextel argues, among other things:

1) Notwithstanding the obligations of the New Jersey statutes N.J.S.A. 48:2-21.18(c) and its own PAR-2, Verizon did not submit any cross-subsidy analysis in its Initial Testimony pursuant to the Board's procedural schedule. Instead, in its Rebuttal Testimony at pages55-57, Verizon for the first time submitted the "results" of a cross-subsidy analysis.

2) Even assuming arguendo Verizon was permitted to wait until its Rebuttal Testimony to submit its cross subsidy testimony, it was obligated by accepted practice and principles of fundamental fairness to submit its detailed studies and analyses along with the testimony, which it did not.

3) By not submitting the underlying data, Verizon has failed to comply with its existing obligations to respond to Interrogatories that Sprint Nextel served on Verizon almost two months ago, on December 13, 2007. Specifically, Sprint Nextel cites Interrogatories Sprint VNJ – 20 and 21.

4) Verizon's cross-subsidy analysis is a key aspect of this case and requires opposing parties the opportunity to review, analyze, seek discovery on, and rebut such testimony. Otherwise, the Board is given only one party's perspective on this matter. Verizon's act of inserting its results in rebuttal testimony, while withholding the underlying analyses and workpapers, insulates it from discovery.

5) In order for Sprint Nextel to adequately review and analyze the conclusions in Verizon's Rebuttal Testimony, it first requires the underlying analyses and studies. It then requires discovery on those materials. Finally, Sprint Nextel will require the opportunity to submit rebuttal testimony in order to provide the Board a balanced perspective of what the data referred to in the Rebuttal Testimony means.

On February 6, 2008, Rate Counsel joined in Sprint Nextel's request for a modification to the schedule. According to Rate Counsel, Verizon's introduction of the results of a cross-subsidy analysis in the rebuttal testimony is tantamount to "sandbagging" and inappropriate gamesmanship that causes prejudice to the opponents of Verizon's claims for reclassification of ILEC provided retail mass market services, and which, if allowed to stand without modification of the procedural schedule to permit the opponents the opportunity to discover the basis of those assertions and serve meaningful discovery once analyzed, results in violation of procedural due process. Rate Counsel concurs with the argument posited by Sprint Nextel, and agrees that modification of the procedural schedule is appropriate and is made necessary by Verizon's last minute injection of vital information without providing the underlying data.

However, Rate Counsel submits that the proposed adjusted dates submitted by Sprint Nextel are inconvenient for Rate Counsel's expert witness, and do not permit the time necessary for receipt of the data, analysis of the data and propounding of meaningful discovery on the data. Accordingly, Rate Counsel submits that the last day for discovery on the data underlying the cross-subsidy study should be set for 10 days after receipt of the data in order to permit proper analysis and refined questions, with responses due by close of business 10 calendar days later; that Surrebuttal Testimony should be allowed 28 days thereafter; and that the evidentiary

hearing dates should be moved from February 25 and 26, 2008. Rate Counsel's expert is not available on March 31, 2008, as recommended by Sprint Nextel, or during the week of April 21, 2008. Lastly, in an effort not to delay the process, Rate Counsel recommends that a meeting be convened by Board Staff for the purpose of discussing the viability of any adjustments to the procedural schedule contemplated as a result of this motion.

By letter dated February 8, 2008, Verizon opposed Sprint Nextel's February 4, 2008 letter motion which seeks to modify the Board's November 28, 2007 scheduling order and Rate Counsel's joinder thereto. The motion should be denied because the Board's scheduling order affords the Board and all parties sufficient time to address the relevant issues and to develop a substantial record regarding whether ILEC-provided mass-market retail services satisfy the statutory reclassification criteria, according to Verizon.

In support of its opposition, Verizon argues the following:

1) Rate Counsel previously moved to extend the schedule arguing for more time because, according to Rate Counsel, services cannot be reclassified unless a company submits "a full cost of service study of each service sought to be reclassified." In opposition to Rate Counsel's motion, Verizon argued that nothing requires cost studies to be filed in reclassification proceedings, and the Board agreed with Verizon.

2) Because New Jersey law does not require cost of service studies or a subsidy analysis to be submitted in a reclassification proceeding, Verizon did not include them in its initial testimony. However, Verizon did include a subsidy analysis in its rebuttal testimony to address Sprint Nextel's contentions that Verizon's competitive services are subsidized. Given that Verizon submitted the subsidy analysis to rebut allegations in reply testimony, that subsidy analysis is within the proper scope of rebuttal testimony, and allegations of "sandbagging" are wholly unfounded.

3) Sprint Nextel's and Rate Counsel's request to extend the discovery cutoff and the hearing dates lacks merit. The existing schedule contemplates that Sprint Nextel and Rate Counsel will seek discovery on Verizon's rebuttal testimony (including the subsidy analysis) on or before February 5, 2008. In fact, Verizon received discovery from Sprint Nextel and Rate Counsel on the subsidy analysis, and Verizon anticipates responding to that discovery on February 13, 2008 – the response date established in the Board's procedural schedule.

4) Sprint Nextel's and Rate Counsel's request that they be granted an additional round of testimony is baseless. The form of schedule in this case is typical of Board proceedings and in countless other dispute resolution contexts: the party seeking relief submits a petition and supporting testimony; other interested parties submit opposition testimony; and the petitioner is entitled to rebut the opposition testimony. To bring closure to the submission of pre-filed testimony, challenges to the rebuttal testimony are reserved for cross-examination of witnesses and post-hearing briefing.

By letter dated February 12, 2008, Sprint Nextel replied to Verizon's February 8, 2008 letter. Sprint Nextel argues that it did not cavalierly file its request with the Board. Sprint Nextel was compelled to file the motion only after Verizon acted to prejudice Sprint Nextel's ability to meaningfully participate in this case, and the Board's ability to develop a full and inclusive record. Verizon has introduced a new witness testifying to the "results" of multiple cost and revenue studies just three weeks before the hearings begin, while withholding production of the actual studies and work papers until after the discovery period has closed. In this manner, Verizon prevents discovery focused on studies which the parties have not even seen, and

prevents any other party from addressing their results in testimony. Against this backdrop, Verizon should not be heard to complain about the approximately one month extension proposed by Sprint Nextel. Moreover, since Verizon has asked to have settlement discussions and the Staff has set them for February 21, only two business days before hearings commence, there is an additional reason to grant the limited modification proposed by Sprint Nextel. It will be difficult if not impossible to have meaningful discussions and prepare for the hearings simultaneously.

In disputing Verizon's arguments, Sprint Nextel states the following:

> First, Verizon had an absolute obligation to supplement its discovery responses with the new studies and workpapers. Verizon's contention that Sprint Nextel's first set of interrogatories served on Verizon December 13, 2007 were directed only to "workpapers underlying Verizon's Initial Testimony" is a mischaracterization of the facts. In fact, Sprint Nextel propounded the Interrogatories before Verizon's Initial Testimony was even filed.
>
> Second, Sprint Nextel will not see the cost and revenue studies for the first time until February 13th, only 7 business days before the hearings begin, and will not have the ability to seek discovery to answer any questions about those studies. The current schedule leaves no way to effectively prepare for cross-examination on Verizon's subsidy analysis or underlying studies at the hearing.
>
> Finally, none of Verizon's arguments obviate the need for Sprint Nextel to file rebuttal testimony addressing Verizon's conclusions based on its cross-subsidy studies. Sprint Nextel does not need to further address Verizon's burden, as Petitioner seeking relief, to submit its studies in its Initial Testimony. Despite Verizon's argument, cross-examination does not solve the lack of responding witness testimony, which is an essential element of due process.

Finally, Sprint Nextel suggests an alternative. The Board could maintain the existing hearing dates for testimony on every area except the cost and revenue studies referenced on pages 55-57 of Verizon's Joint Rebuttal Testimony of Paul Vasington and Patrick Garzillo. The Board could schedule a later date to hear the testimony by Verizon and rebuttal testimony by other parties addressed to Verizon's cross-subsidy analysis and studies.

DISCUSSION

I have reviewed the motion to modify the schedule as well as the filings in support of and in opposition to the motion, and I am not persuaded that the schedule needs to be modified as requested. As I have articulated in a previous ruling regarding the inclusion (or exclusion) of Mr. Appleby's pre-filed testimony, N.J.S.A. 48:2.21-19(b) sets forth the three criteria that are the framework for this investigation, and each test must be met for a service to qualify for a competitive classification. A separate but ongoing obligation in the statutes prohibits competitive services from being subsidized by non-competitive services. However, a showing that competitive services are not being subsidized by non-competitive services is not a pre-requisite nor is it required for a declaration of competitive status.

In my prior ruling, portions of Mr. Appleby's testimony relating to the question of whether access charges are a barrier to entry into the ILEC mass market retail service arena, and whether there is cross subsidization were admitted into the record. My ruling went on to acknowledge that in fact, Verizon submitted Rebuttal Testimony *addressing the allegation of cross subsidization by Sprint Nextel and Rate Counsel.*

Verizon's filing is fully consistent with the schedule set forth by the full Board in both the November 28, 2007 Order that initiated this proceeding and the Order on Reconsideration dated December 21, 2007. The schedule was formulated and approved by the Board to allow ample opportunity for all parties to place evidence in the record, as well as ample opportunity to challenge the positions of parties that are contrary to their own. The inclusion of a cross-subsidy analysis by Verizon in its rebuttal testimony is therefore appropriate. Both Sprint Nextel and Rate Counsel, consistent with the schedule, have propounded discovery upon Verizon on its rebuttal testimony, including the cross-subsidy analysis. The schedule requires Verizon to respond by February 13, 2008. Therefore, the schedule contemplated and has permitted discovery on legitimate rebuttal testimony.

In conclusion, the cross-subsidy analysis submitted by Verizon on January 29, 2008, was properly included in its rebuttal testimony. The parties in opposition to reclassification have been afforded ample opportunity to seek discovery on the testimony, and will be given an opportunity to cross-examine the Verizon witnesses at the evidentiary hearings beginning on February 25, 2008. Therefore, the motion to modify the schedule is HEREBY DENIED.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 2-15-08

BOARD OF PUBLIC UTILITIES
BY:

Frederick F. Butler

FREDERICK F. BUTLER
COMMISSIONER

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

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