



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 ON MOTION
TO COMPEL

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 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.

By letter dated January 10, 2008 the New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") filed a motion to compel and require Verizon to identify the sponsoring witness for each response given, and provide the full and complete data, information and documents requested by Rate Counsel in its third set of discovery requests, more specifically, the following: RC-VNJ-112, 113, 114, 116, 117, 118, 119, 120, 151, 157, 158, 165, 166, and 168.

In addition, Rate Counsel requested that, where applicable, discovery responses be provided in "EXCEL" spread sheet format. According to the motion, Verizon has provided "PDF" versions of their spreadsheets in response to certain data requests. Rate Counsel maintains that Verizon is frustrating development of a full and complete record by failing to comply with Rate Counsel's request for use of the EXCEL format, and has requested that the Board direct Verizon to provide the information to the parties in the requested format.

The following day, after further review of the responses provided by Verizon to Sprint Nextel, Rate Counsel amended its motion to compel, and withdrew requests for further response to RC-VNJ-112 through RC-VNJ-114, and RC-VNJ-117 through RC-VNJ-119.. The letter went on to request that witnesses be required to expand their responses to RC-VNJ-116 and RC-VNJ-120, and provide underlying analysis, including but not limited to copies of any analysis of trends reviewed to determine relevant market trends, so that Rate Counsel may determine what was and was not done.

In support of its amended Motion, Rate Counsel states, among other things, the following:

- 1) **RC-VNJ-116** - The phrase used by Verizon in its response to a question about whether various demographics were analyzed, "the demographic questions included in the survey are the same standard demographic questions used by TMR," is unresponsive.
- 2) **RC-VNJ-120** - The response is unresponsive to the question about competitors who are no longer offering service. The interrogatory by Rate Counsel is relevant in supporting or undermining Mr. Vasington's testimony.
- 3) **RC-VNJ-151** - Verizon objects on the basis that the request is overly broad and unduly burdensome, that Verizon does not possess information responsive to this request, and the TNS data is proprietary to TNS. According to Rate Counsel, Verizon cannot use TNS as a sword to support its testimony, and then shield such data from disclosure to both Rate Counsel and the Board when the underlying data is used by Verizon as support for the presence of competitors and the existence of like and substitute services. Verizon is the only party that has the ability to request this information from TNS. Rate Counsel asks that the Board compel Verizon to provide the information from TNS, and provide the information to the parties who have signed the confidentiality agreement. In the alternative, Rate Counsel asks that the Board strike that portion of Verizon's testimony from the record, if the underlying data is not provided.
- 4) **RC-VNJ-157 and RC-VNJ-158** - Verizon objects to both requests because it seeks information about Verizon Wireless, which is not a party to this proceeding. Rate Counsel notes that the information requested under both questions is relevant and directly bears on the presence of competitors for this service, and the presence of like and substitute services, and will assist in determining the degree of actual competition from wireless services. The information is needed because Verizon claims that wireless service is a substitute service. However, the claim that wireless is a substitute is undermined if Verizon customers subscribe to both.
- 5) **RC-VNJ-165 (b) and RC-VNJ-166** - Verizon objects on the basis that the information sought is not relevant, not likely to lead to the discovery of admissible evidence, and the requests seek information about competitive bundled services that are beyond the scope of this proceeding. Rate Counsel notes that the information requested under both questions is relevant and directly bears on the presence of competitors for this service, and assists in determining the actual competitiveness among the providers discussed by Verizon throughout its testimony. Verizon's testimony relies upon competitors' bundled services that provide competition to Verizon.

- 6) **RC-VNJ-168** - Verizon objects to the request because it seeks revenue information that Verizon claims is not relevant and not likely to lead to the discovery of admissible evidence. Rate Counsel's discovery request is calculated to lead to discoverable evidence as to whether DA is a competitive service. The requested revenue information supports or undermines Verizon's claim of the existence of a competitive market place for DA service.

VERIZON'S RESPONSE

By letter dated January 22, 2008, Verizon filed its opposition to the motion arguing that Rate Counsel's motion fails to overcome Verizon's valid objections, and ignores the substance of Verizon's responses. Rate Counsel's dissatisfaction with the scope of the proceeding and the substance of Verizon's answers is not a legitimate basis to compel the production of irrelevant or non-existent information. Thus Verizon contends that Rate Counsel's motion should be denied in its entirety.

In support of its opposition, Verizon states, among other things, the following:

- 1) **RC-VNJ-116**: Verizon responded that the only analyses undertaken by Mr. Newman are those set forth in his testimony. Mr. Newman undertook an analysis based on PAAD eligibility, but did not undertake an analysis based on the other demographic characteristics included in the survey. Mr. Newman analyzed the survey responses based on household income, but did not analyze the survey responses based on the other demographic characteristics. This is a complete response to Rate Counsel's discovery request.
- 2) **RC-VNJ-120**: Verizon's response makes clear that Mr. Vasington considered all relevant market trends, including market exit trends. This is a complete response to Rate Counsel's discovery request.¹
- 3) **RC-VNJ-151**: In its response, Verizon stated clearly that it does not possess information responsive to this request. Moreover, Verizon is prohibited by a licensing agreement from obtaining this information from TNS and forwarding it to Rate Counsel. If Rate Counsel wishes to obtain data directly from TNS, Rate Counsel can subscribe to TNS' services.
- 4) **RC-VNJ-157 and 158**: Verizon New Jersey does not possess information responsive to the request. If the request seeks information (which may or may not exist) from Verizon Wireless, the motion should be denied because Verizon Wireless is not a party to the case.
- 5) **RC-VNJ-165(b) and 155(b)**: This information is irrelevant because DA services offered as part of a bundled package are not at issue here. In the spirit of compromise however, Verizon has provided an amended response to these requests.

¹ In its January 11, 2008 amendment withdrawing various requests from the motion to compel, Rate Counsel asks for additional information not encompassed by RC-VNJ-116 and -120. According to Verizon, Rate Counsel's attempt to use an amendment to a motion to compel as a vehicle to propound additional requests that are out-of-time must be denied.

- 6) **RC-VNJ-168:** DA revenue information does not bear directly on the three reclassification criteria. In the spirit of compromise however, Verizon has provided an amended response to this request.
- 7) **Rate Counsel Requests for Excel Spreadsheets:** According to the Rate Counsel, Verizon is "frustrating development of a full and complete record by failing to comply with Rate Counsel's request for use of the EXCEL format in responding." Rate Counsel is wrong. Verizon properly responded to each valid data request by providing the specific information requested. As is common practice, Verizon provided PDF documents as a protective measure to maintain some level of security against accidental or improper manipulation. Thus, Verizon not only responded to every valid data request, but also acted reasonably in providing the documents in PDF format.
- 8) **Rate Counsel Requests for Sponsoring Witnesses:** Verizon knows of no rule that requires it to identify the sponsoring witness for each response. In any case, only two witnesses – Mr. Paul B. Vasington and Mr. William M. Newman – submitted direct testimony on behalf of Verizon, and Mr. Newman's testimony is limited to a presentation of "the results of a survey of awareness and use of directory assistance and substitute services by residential customers in New Jersey." Thus, it should be clear to Rate Counsel that questions related to issues other than the DA survey should be directed to Mr. Vasington.

RATE COUNSEL'S REPLY

By letter dated January 28, 2008, Rate Counsel replied to the opposition filed by Verizon, stating that Verizon has failed to demonstrate that Rate Counsel's requests for underlying data in support of Verizon's experts' opinions are inappropriate or that they are not reasonably calculated to lead to discovery of relevant evidence. Verizon's failure to provide the requested information frustrates the discovery process, and thwarts Rate Counsel's ability to develop its case and effectively gauge the accuracy of the testimony on the issues of barriers to market entry, consumer awareness of like and substitute services, and competition. Rate Counsel argues that Verizon should be directed and compelled to provide full and complete responses to the items at issue here.

In support of its arguments, Rate Counsel states the following:

- 1) **RC-VNJ-116** – Contrary to Verizon's characterization, its response is not complete or responsive. The request asked for Verizon to fully explain its rationale for the demographic characteristics reviewed by Mr. Newman, and further asked Verizon to provide the supporting work papers. The discovery request and information solicited stands at the core of the issues Verizon must prove in this case, *i.e.*, consumer awareness, the presence of competitors and whether consumers view the available options as substitutes. The Board should thus compel a full and complete response.
- 2) **RC-VNJ-120**, - Verizon argues that it has adequately responded by saying that Mr. Vasington considered all relevant market trends. However, Verizon refuses to provide Rate Counsel, and the Board, with the underlying and relevant market trends that Mr. Vasington relied on to formulate his opinion that there is ease of market entry, that there are substitute services, and thereby sufficient competition exists to deregulate ILEC services. The Board should compel a complete response to Rate Counsel's discovery request.

- 3) **RC-VNJ-151** – The information requested will permit Rate Counsel and the Board to gauge the accuracy of the TNS Telecoms Bill Harvesting ("TNS data") relied upon by Mr. Vasington in his testimony. Rate Counsel's motion in this proceeding relates to information in the possession of Verizon. The Board should require Verizon to seek permission of any third party to release the data that is in its possession to Rate Counsel and the Board. If Verizon cannot provide the underlying supporting information or continues to be unwilling to do so, those portions of its testimony should be stricken.
- 4) **RC-VNJ-157 and 158** – These questions go to the core of Verizon's testimony on the issues of presence of competitors, and availability and presence of like or substitute services. These are pivotal issues in this investigation, and the Board should not permit Verizon to avoid the production of all data supporting its testimony. If full and complete responses are not provided, as with each of the 5 questions at issue here, those portions of the testimony affected should be stricken.
- 5) **EXCEL Spreadsheet Format** – Rate Counsel urges the Board to require Verizon to produce responses in "EXCEL" spreadsheet format. Given the time constraints and Rate Counsel's limited staffing, it becomes overly burdensome for Rate Counsel to duplicate the information in "EXCEL" format. Verizon's continued resistance to provide applicable information in this format further frustrates and impedes the discovery process and Rate Counsel's ability to prepare its case.

DISCUSSION

Upon review of the filings in this motion, I will address separately each of the five (5) requests that remain in dispute.

- **RC-VNJ-116** – A combination of the initial response to this request and the explanation in Verizon's January 22 response appears to be responsive to a portion of the request. However, the reason the witness did not undertake an analysis of the demographic characteristics listed in this request remains unanswered. I HEREBY ORDER that Verizon expand its response to this question of why he did not undertake such an analysis, and, to the extent not already done, provide any documents that would support the response.
- **RC-VNJ-120** – The original response to this request does appear to answer the question that was posed. However, I do not find it unreasonable for Rate Counsel to seek more details regarding the specific trends that Mr. Vasington did rely upon to formulate the opinions he expresses in his testimony. Therefore, I HEREBY ORDER, to the extent not already done, that Mr. Vasington identify and provide all documents and market trend analyses utilized by him in support of his testimony.
- **RC-VNJ-151** – Mr. Vasington draws conclusions from the proprietary information contained on page 48 of his testimony. There appears to be a disagreement as to whether Verizon has possession of this data. This disagreement does not affect my ruling. If Mr. Vasington intends to rely on this study, then the underlying data should be made available to the parties who request it. Therefore, I HEREBY ORDER that Verizon make available, to the extent it exists, the average monthly spend by category, broken down by income level, from the TNS Telecoms Bell Harvesting referred to on page 48 of Mr. Vasington's testimony. If this information is not made available, I will entertain a request to strike the question and answer that begins on line 6 on page 48 of Mr. Vasington's testimony.

- **RC-VNJ-157 and 158** - Rate Counsel states that Verizon refuses to provide the underlying data to support Mr. Vasington's testimony regarding wireless substitution. I disagree. My review of the testimony cited by Rate Counsel (pp 18-19 and pp 53-58) indicates that Mr. Vasington cites several sources of information he relies upon, all of which are publicly available to Rate Counsel. The specific data requested in RC-VNJ-157 and - 158 are from one wireless carrier (who is not a party to this case), and is not specifically referenced or relied upon by Mr. Vasington to draw his conclusions. Therefore, I **HEREBY DENY** Rate Counsel's request to compel Verizon to respond to RC-VNJ-157 and - 158.
- **EXCEL Spreadsheets** - I am not persuaded by Rate Counsel's argument on this request. I know of no requirement of parties responding to valid discovery, to provide responses in a particular format. I agree with Verizon that the production of documents in PDF format is a common practice and for purposes of this request, I **HEREBY DENY** Rate Counsel's motion.

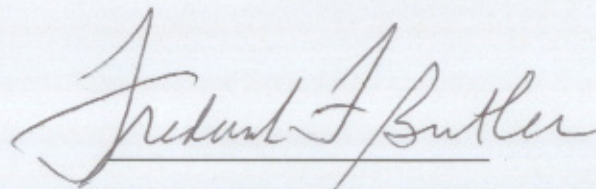
The above discussed requests fit within the traditional and appropriate scheme of discovery such that responses to the requests are appropriate and proper. As has been noted in any number of discovery orders, discovery before an agency such as the Board is guided by the Uniform Administrative Procedure Rules, specifically N.J.A.C. 1:1-10.1 et seq. The purpose of discovery, as set out by N.J.A.C. 1:1-10.1, is to provide litigants access to "facts which tend to support or undermine their position or that of their adversary." Likewise, discovery is appropriate "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence," N.J.A.C. 1:1-10.1(b), and the test for the judge in reviewing a discovery motion requires the judge to "weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness," N.J.A.C. 1:1-10.1(c).

I **HEREBY FIND** that the above discovery requests are reasonably calculated to lead to the discovery of admissible evidence such that response should be provided, and therefore the motion as to those questions are **HEREBY GRANTED**. Verizon shall provide responses to Rate Counsel no later than February 6, 2008.²

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

DATED: 1 - 30 - 08

BY:



FREDERICK F. BUTLER
COMMISSIONER

²VNJ also raises the issue of Rate Counsel's failure to abide by the "meet and confer" requirement of the rules for discovery issues. While there may or may not be merit to the allegations raised by VNJ, I have nevertheless ruled upon the motion. I would, however, ask all parties to consider the spirit of the "meet and confer" requirement in the future.

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

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