BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of VERIZON NORTHWEST INC. with COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN WASHINGTON Pursuant to 47 U.S.C. Section 252(b), and the *Triennial Review Order*.	))))))))))))))))	DOCKET NO. UT-043013 REPLY OF SPRINT COMMUNICATIONS COMPANY L.P. TO VERIZON'S OPPOSITION

REPLY OF SPRINT COMMUNICATIONS COMPANY L.P.

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April 13, 2004

I. Introduction

Sprint Communications Company, L.P. ("Sprint") submits this Reply to Verizon Northwest Inc.'s ("Verizon") Opposition to Sprint's Motion to Dismiss ("Opposition") pursuant to the Commission's Procedural Order No. 2, in this docket. In this case, Verizon made no attempts to negotiate the disputed issues with Sprint until just days before it filed its Petition for Arbitration.[1] Moreover, this attempt came nearly four months after Sprint made a counter-proposal and only five days before Sprint filed its Motion to Dismiss. These facts are undisputed.

Verizon's notion of what constitutes good faith negotiations, as set forth in its Opposition, would allow an ILEC to use its superior bargaining position and resources to force CLECs into arbitration time and again. This result is inconsistent with the requirement to negotiate in good faith set forth in the Act, the FCC's Local Competition Order, and the Triennial Review Order ("TRO").

II. The Appropriate Standard to Determine whether Verizon Failed to Negotiate in Good Faith is Set for the in the TRO

The appropriate standards for the conduct of good faith negotiation under the Act are clearly set forth in the TRO. Confirming that the duty to negotiate in good faith applies to changes in law resulting from the TRO, the FCC stated that "a party's refusal to negotiate (or actions that would otherwise delay unnecessarily the resolution of) any single issue may be deemed a violation of section 251(c)(1)."[2] Verizon's failure to negotiate, much less to do so in good faith, constitutes a violation of its duty.

There is therefore no need to rely in this instance on labor law principles to reach the conclusion that Verizon violated its duty. And regardless, Verizon mischaracterizes

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[1] See Attachment 1, March 11, 2004 Verizon Response.

[2] TRO, at ¶ 706.

the FCC's reliance on labor law in the *Local Competition Order*.[3] As Verizon notes in its Opposition, the FCC did reference labor law precedent in the *Local Competition Order*. However, the FCC did not do so to say that a party need not "agree to a proposal or make concessions" in negotiations, as Verizon suggests.[4] Rather, the FCC cites *National Labor Relations Board v. Truitt Mfg Co.*, 351 U.S. 149, 153 (1956) to support its conclusion that parties should be required to provide information necessary to reach agreement.[5]

III. Verizon's Failure to Negotiate Constitutes a Violation of its Duty to Negotiate in Good Faith

Verizon's argument that it can remain virtually silent as to the substance of the matters to be negotiated, send a response to Sprint's offer after four months, and say that it has satisfied its statutory duty to negotiate make meaningless the word "negotiate." Negotiation is the "process of submission and consideration of offers until acceptable offer is made and accepted."[6] Verizon did not provide any substantive reply to Sprint's October counter-proposal until it was too late, nor did it give Sprint any indication, prior to March 11, 2004, that it ever considered Sprint's counter-proposal. Therefore, Verizon failed to negotiate, much less in good faith, which resulted in an unreasonable delay in negotiations, contrary to the Act and the TRO.

Verizon argues in its Opposition that "Sprint should have concluded that, because Verizon did not agree to Sprint's revisions, they were rejected."[7] That argument is flawed. Sprint could have just as easily concluded that Verizon had not devoted sufficient resources to the task of negotiating, and therefore had merely failed to respond. Sprint could have likewise concluded that Verizon was purposefully trying

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[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996)("*Local Competition Order*").
[4] Opposition, at p. 3.
[5] *Local Competition Order*, at ¶ 155, footnote 292.
[6] Black's Law Dictionary, Sixth Edition.
[7] Opposition, at p. 3.

to stall negotiations with Sprint, in order to force multiple simultaneous arbitration proceedings where it could seek to impose its terms on every CLEC, in every state, all at one time. That Verizon had rejected Sprint's October counter-proposal is not the only conclusion that could be drawn from Verizon's silence and lack of diligence.

In addition, principles of contract formation provide that "a mere inquiry as to whether one proposing a contract will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection; and if the offer is not withdrawn, it may be accepted within a reasonable time."[8] Verizon, until very recently, did not even inquire as to whether Sprint would alter or modify its October counter-proposal. Therefore, Verizon's silence regarding Sprint's counter-proposal is not a rejection. Without some statement by Verizon that it had rejected Sprint's offer, Sprint had no way to know why Verizon was not negotiating the disputed issues.

Furthermore, GTE, Verizon's predecessor, has succeeded in other jurisdictions in advancing the same argument that Sprint makes in this case; that a failure to negotiate constitutes a failure to negotiate in good faith. In an Ohio arbitration filed by Brooks Fiber Communications of Ohio, Inc. ("Brooks"), GTE moved the commission to dismiss Brook's petition on the grounds that Brooks "failed to negotiate in good faith . . . GTE states that Brooks waited over three months from the date that it received GTE's initial proposal for an interconnection agreement before taking any action."[9]

Finding that Brooks failed to negotiate in good faith, the Ohio commission rejected the same argument Verizon makes in this proceeding; that "good faith negotiation is not measured by the number or length of discussions" and that the

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[8] 17A Am Jur 2d CONTRACTS § 91.

[9] *In the Matter of the Petition of Brooks Fiber Communications of Ohio, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Inc.*, 1998 Ohio PUC LEXIS 487, Case No. 98-528-TP-ARB, Ohio Public Utility Commission, at ¶ 4 (October 5, 1998)("*Ohio GTE Arbitration*").

parties had effectively reached impasse.[10] The Ohio commission granted GTE's motion to dismiss, finding that Brooks "requested interconnection and has merely waited until the last moment to file a petition for arbitration."[11]

Much like in the *Ohio GTE Arbitration,* Verizon in this case did not attempt meaningful negotiations with Sprint until the very last minute, nearly four months after Sprint made its interconnection proposal, and only five days before Sprint filed its Motion to Dismiss. Thus, Verizon's attempt to discredit the Affidavit of John Weyforth on the grounds that it submitted a late response to Sprint's October counter-proposal is unavailing.[12] Verizon's failure in this case constitutes a violation of the duty to negotiate in good faith and therefore the Commission should dismiss Verizon's Petition and order Verizon to now conduct negotiations with Sprint in good faith.

IV. Conclusion

According to Verizon's own Petition, Sprint responded to Verizon's October 2, 2003 proposed amendments, but the "point-by-point response" from Verizon was not provided until March 11, 2004 – well after Verizon filed the Petition for Arbitration on February 26, 2004, and only five days before Sprint filed its Motion to Dismiss on March 16, 2004. Simply put, that "point-by-point response" was a long overdue response to Sprint's October 29, 2003 proposed language and was submitted after Verizon filed the Petition for Arbitration; after Verizon knew that it had to defend against arguments that it prematurely sought arbitration.

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[10] *Id.*, at ¶ 6.

[11] *Id.*, at ¶ 11.

[12] Opposition, at p. 4. Verizon also attempts to discredit Mr. Weyforth's affidavit, asserting that it inaccurately states that Sprint did not receive a response from Verizon. However, this statement is not supported by affidavit, or any other facts proffered by Verizon, and therefore should be disregarded by the Commission.

Verizon never adequately justifies why the Washington Utilities and Transportation Commission and Sprint (as well as the other parties joined in this omnibus arbitration request) must expend time and resources to litigate positions that might have been, and should be, resolved via the negotiation process envisioned by Congress in the Act. Sprint therefore respectfully requests that the Commission dismiss Verizon's Petition for Arbitration as premature, or in the alternative dismiss Sprint from the petition, and order Verizon to negotiate in good faith.

Respectfully submitted this 13th day of April 2004.

By: ______________________

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Attachment 1

Hendricks, Tre E III [CC]

From: paul.a.rich@verizon.com
Sent: Thursday, March 11, 2004 5:52 PM
To: Cowin, Joseph P [CC]
Subject: RE: Verizon TRO Amendment

TRO Amend Response.doc

Mr. Cowin,

In our recent discussions, Sprint's representatives have asked for a more detailed explanation of why Verizon has declined to accept Sprint's proposed revisions to the draft TRO amendment. The explanation is attached. If you need more information on Verizon's positions, please call me.

On a related note, Verizon is planning to propose revisions to the draft TRO amendment to address the D.C. Circuit Court of Appeals' March 2, 2004 TRO decision.

Paul Rich

(See attached file: TRO Amend Response.doc)

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Verizon Response to Sprint TRO Amendment Issues

1. Section 2.14, "Local Switching." "Verizon switch (as identified in the LERG) that provides local circuit switching." Verizon does not understand how this change in language improves the clarity of Verizon's proposed language: "on a circuit switch in Verizon's network (as identified in the LERG)."

2. Section 2.16 (e). Addition of "[***State Commission TXT***] established multiline end user loop maximum." As a result of the D.C. Circuit Court of Appeals' recent TRO decision, inclusion of this language does not appear to be appropriate. The D.C. Circuit's decision, which vacates both the FCC's impairment finding as to Mass Market Switching and the FCC's delegation of non-impairment findings to the state commissions, means that the state commissions will not be establishing a multiline end user loop maximum. At this time, it is unknown whether on remand the FCC will establish a multiline end user loop maximum.

3. Section 2.16(e). Deletion of reference to the FCC's "Four-Line Carve Out Rule." Since the "Four-Line Carve Out Rule" is prescribed by the FCC's rules, deletion of this provision would not be appropriate.

4. Section 2.16. Deletion of "(g) the Feeder portion of a Loop." Retention of this language would appear appropriate in light of Section 3.1.3.4.

5. Section 2.16(j) and (k). Replacement of "use of" with "purchase of." Verizon does not understand why Sprint believes that this change is needed.

6. Section 2.16(j) and (k). Replacement of "Mass Market Switching" with "UNE Switching." This change is not appropriate. "UNE Switching" could include not only "Mass Market Switching," but also "Enterprise Switching." Verizon does not have a continuing obligation to provide "Enterprise Switching." Because of this, Verizon does not have a continuing obligation to provide "Databases" or "Signaling" for use with "Enterprise Switching," and "Databases" and "Signaling" for use with "Enterprise Switching" therefore are properly classified as "Nonconforming Facilities."

7. Section 2.18, "Qualifying Service." "Once a UNE has been provided subject to the provision of a qualifying service it is permissible to provide a non-qualifying service over the same facility pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51." The D.C. Circuit's decision has disapproved the FCC's distinction between "Qualifying Services" and "Non-Qualifying Services." Sprint's proposed sentence is therefore inappropriate. Verizon is considering deletion of this section from the TRO Amendment. Also, Sprint's concern on this point appears to be addressed by Section 1.2 of the TRO Amendment.

8. Section 2.19, "Route." Deletion of the phrase "within a LATA" at the end of the first sentence. This change is not appropriate. (See TRO, Paragraph 365 and Footnote 1111.)

9. Section 2.20, "Service Management Systems." Verizon is concerned that the proposed language, while adopting the text of the FCC's rule, may in actual practice be overly broad. In preparing the TRO Amendment, Verizon did not see a need to expressly address Service Management Systems. If there is a need to expressly address Service Management Systems, more narrowly tailored language should be used.

10. Section 2.20, "Signaling Networks." While the term proposed by Sprint, "Signaling Networks," is the term used in the FCC's rules, the more recent Verizon agreements with Sprint (NY, MA, MD, PA) generally do not use this term on a stand-alone basis. Rather, these agreements typically refer either to "signaling" or to the specific signaling arrangements and signaling networks that will be used by the parties. Thus, use of the term "Signaling," especially since the definition is that adopted by the FCC for "Signaling Networks," is appropriate.

11. Section 3.1.1.3. Verizon does not agree with the addition of the phrase "or at the end of any transition period set forth in the finding." As the term "Nonconforming Facility" is used in the amendment, a facility becomes a "Nonconforming Facility" at the time of a non-impairment determination, even if there is a transition period during which Verizon must continue to provide the facility.

12. Section 3.3.1.1.1. Verizon believes that this section should remain in the amendment. It is substantially the same as the language in Sprint's Massachusetts interconnection agreement on access to House and Riser Cable.

13. Section 3.3.1.2. Sprint has questioned the need for the Parties to "negotiate in good faith an amendment to the Amended Agreement memorializing the terms, conditions and rates under which Verizon will provide a single point of interconnection at a multiunit premises." Verizon believes this approach is necessary because of the potentially differing circumstances at each premises and the consequent difficulty of covering all installations through general language in the Amended Agreement and generally available rates.

14. Section 3.4.1. See 2, above.

15. Section 3.4.3. See 9 and 10, above.

16. Section 3.5.2.3. See 11, above.

17. Section 3.5.3.2. See 11, above.

18. Section 3.6.1, first sentence, third line, "... Verizon will not prohibit the commingling by Sprint of an unbundled Network Element ...". Verizon does not understand why Sprint believes this revision is needed.

19. Section 3.6.1, "but Verizon's performance will conform at parity with how it provisions like service to its own customers, itself, and to its affiliates." Verizon disagrees with the addition of this phrase. First, it is unclear what the term "parity" means. Second, if Verizon has some obligation under applicable law to provide service in a non-discriminatory manner, in light of the general "compliance with applicable law" provisions usually contained in interconnection agreements, there would not seem to be a need to have a special "parity" or "non-discrimination" provision in Section 3.6.1.

20. Section 3.6.2.7, "reimburse Verizon for the entire cost of the audit." Verizon believes that Sprint should bear the entire cost for an audit, since the audit would not have been necessary if Sprint had adhered to applicable FCC rules for use of EELs.

21. Section 3.6.2.7, final sentence. Sprint has questioned the need for it to retain records "for at least eighteen (18) months." Verizon believes this interval is reasonable given the "[o]nce per calendar year" timing of audits.

22. Section 3.7.1. Verizon believes that the language it has proposed accurately reflects the TRO.

23. Section 3.7.2. See 19, above.

24. Rates. The rates that Verizon has proposed are either existing effective state commission approved rates or rates that Verizon will substantiate in the applicable state commission arbitration proceedings.