

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of: |) | |
| |) | |
| Verizon Telephone Companies |) | Transmittal No. 386 |
| Tariff FCC Nos. 1 & 20 |) | |
| |) | |

OPPOSITION OF THE VERIZON TELEPHONE COMPANIES¹

On December 2, 2003, the Verizon telephone companies (“Verizon”) filed under Transmittal 386, revisions to Tariff FCC Nos. 1 and 20, that introduce a new service called Metro Fractional UNI Port with Access Line Connection (“Metro Fractional UNI Port service”), scheduled to become effective on December 17, 2003. This new service allows a customer to connect to the Verizon frame relay network at data rates of 128 kbps and 256 kbps. This service utilizes High Bit-Rate Digital Subscriber Line (HDSL) technology to deliver traffic between the customer’s premises and the frame relay network at a Verizon serving wire center over a single copper pair.

On December 9, 2003, WorldCom, Inc. d/b/a/ MCI (“MCI”) filed Petition to Reject or, in the Alternative, Suspend and Investigate Transmittal No. 386.² MCI does not challenge the service itself – it merely argues that Verizon should be forced to offer additional options for this service, including a port-only service and unbundled special access line services at 128 kbps and 256 kbps speeds. Verizon intends to offer a port only option as soon as the systems work can be completed, currently scheduled for introduction in early May, 2004. However, Verizon is under

¹ The Verizon telephone companies (“Verizon”) are the affiliated local telephone companies of Verizon Communications Corp. These companies are listed in Attachment A.

² MCI Petition to Reject or, in the Alternative, Suspend and Investigate, Verizon Telephone Companies Tariff FCC Nos. 1 & 20, Transmittal No. 386 (filed December 9, 2003)(“*MCI Petition*”).

no obligation to offer special access service as a stand-alone service at speeds of 128 kbps and 256 kbps. Verizon's experience with such service, which is limited to the state of New York, shows that there is insufficient demand beyond frame relay service to justify the cost of developing it as a stand-alone service throughout the rest of Verizon East. In addition, the Commission's private line guidelines, which MCI cites in its petition, do not require the additional unbundling that MCI requests. Finally, the tariff cannot legally be rejected, because it is not patently unlawful on its face.

I. VERIZON'S METRO FRACTIONAL UNI PORT SERVICE STRUCTURE IS REASONABLE IN THE CIRCUMSTANCES OF THIS CASE AND THUS DOES NOT VIOLATE SECTION 201(b) OF THE ACT.

MCI first argues that competitors must have access separately to the access line portion of the Metro Fractional UNI Port service in order to be able to combine the access line with their own frame relay switches to offer a competing frame relay offering.³ This argument is false. First, competitors with frame relay switches have ample other options available to construct services that could effectively compete with Verizon's fractional frame relay port offering. For instance, competitors can purchase a T-1 channel termination from Verizon's special access tariffs, FCC Tariff Nos. 1 & 11, to connect customers to their frame relay services. In addition, competitors who want to take advantage of HDSL technology to offer a lower-priced alternative to T-1 channel terminations can do so by purchasing a UNE loop from Verizon and provisioning the service in the same way as Verizon. The market already has many competitors who offer xDSL services that can be combined with competitive frame relay services. Because of these alternatives, it is simply untrue that frame relay competition is undermined if Verizon does not

³ MCI Petition, at 4.

make the 128 kbps and 256 kbps fractional access lines available separately from the UNI port service.

Second, it is entirely reasonable that Verizon does not plan to offer those access lines as a stand-alone special access service, because Verizon's experience with such services shows that the potential demand is too small to justify the expense of making the service available apart from frame relay service. Currently, Verizon offers frame relay services in the state of New York associated with Enterprise Service with speeds that include 128, 256, 384, 516, and 768 kbps, including port only and separate access lines. Despite the fact that the access line services have been available for over 10 years, the demand has been declining⁴. For the 128 and 256 kbps port only services, there are only 6 customers with a total of 73 access lines. Therefore, the expense and effort of offering the 128 and 256 kbps access lines apart from the frame relay port in the rest of Verizon East cannot be economically justified in view of the likely demand. It is not reasonable to require Verizon to develop an access service for which there is insufficient demand, especially when competitors have other alternatives.

The Commission has long provided carriers the flexibility to structure their special access offerings in accordance with customer driven market considerations.⁵ In particular, the Commission has recognized that for advanced services such as frame relay, a packet switched service, it should allow technological and service innovation to exist with a minimum of regulation in order to promote competition and ensure that customers get the services they want

⁴ The demand for Fractional T1 channel terminations was only 306, 238 and 208 circuits for year-end 2001, year-end 2002 and November 2003, respectively.

⁵ See *Expanded Interconnection with Local Telephone Company Facilities*, Report And Order And Notice Of Proposed Rulemaking, 7 FCC Rcd 7369 (1992)(beginning the process of expanding rate structure flexibility for LECs' special access offerings). "Excessive constraints on LEC pricing and rate structure flexibility will deprive customers of the benefits of competition and give the new entrants false economic signals." *Id.* at ¶ 172.

and desire.⁶ As long as competitors have the ability to fashion their own competitive products in response, there is no valid policy reason for the Commission to step in to impose unnecessary regulations. In the instant case, given that competitors have adequate alternatives to design a competing service as described above, there is no justification for a finding that the Metro Fractional UNI Port service offered here is unjust or unreasonable in violation of Section 201(b).⁷

II. METRO FRACTIONAL UNI PORT SERVICE DOES NOT VIOLATE THE FCC’S PRIVATE LINE GUIDELINES.

MCI alleges that Verizon’s Metro Fractional UNI Port service violates the FCC’s Private Line Guidelines, codified at 47 C.F.R. § 61.40. Specifically, MCI alleges that Section 61.40 requires: (1) that rate structures be integrated; (2) that rate elements be consistent for comparable services; and (3) take into account market demand, pricing convenience for the carrier and customers, and cost characteristics.⁸ MCI, which failed to point out that the guidelines are not hard and fast rules, is incorrect that the instant service offering violates Section 61.40. In any event, Verizon plans to offer 128 and 256 kbps unbundled port options as soon as the systems work can be completed. This is consistent with its efforts in the last year to offer frame relay with either port-only or port-plus-access line. However, Verizon does not currently offer

⁶ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion And Order, And Notice Of Proposed Rulemaking, 13 FCC Rcd 24011, at ¶ 2 (1998)(“As the demand for high-speed, high-capacity advanced services increases, incumbent telecommunications companies and new entrants alike are deploying innovative new technologies to meet that demand. The role of the Commission is not to pick winners or losers, or select the “best” technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.”).

⁷ See *Ting v. AT&T*, 319 F3d 1126 (9th Cir. 2003)(“Thus, in contrast to 1934, when Congress enacted §§201(b) and 202(a) to protect customers for whom AT&T was the only option, the FCC now defers to the market unless the market is seriously flawed or not competitive.”).

⁸ MCI Petition, at 6-7.

unbundled access lines at all of the speeds available for frame relay ports, and the private line guidelines do not require it to break from that structure to offer the new fractional T-1 access line options that MCI requests.

At the outset, it is not at all clear that Section 61.40 of the Commission's rules even applies to Verizon's advanced special access services. Section 61.40 was adopted by the Commission back in 1984 before the current generation of advanced services, such as frame relay, was even offered.⁹ The rule itself applies to "private lines," which is never explicitly defined in the rule or in the *Private Line Guidelines Order* that adopted the rule.¹⁰ The rule was adopted at a time when AT&T's private line services were still regulated. The rule was intended to ensure that basic broadband connections were available to customers, and that the rates and rate structure were rational in accordance with the principles enunciated in the *Private Line Guidelines Order*. There is no indication that the Commission intended those guidelines to apply to the current generation of advanced services, and MCI offers no support for its claim.

In fact, in later orders dealing with advanced services, there is a marked lack of any reference to this vestige of archaic regulation. On the contrary, the advanced services orders make clear that the deployment of advanced services is best accomplished through deregulation, because deregulation enables carriers to better respond to market demands.¹¹ This makes sense from a policy perspective. In the 1996 Act, Congress established a "pro-competitive,

⁹ *Private Line Rate Structure and Volume Discount Practices*, Order, 97 FCC2d 923 (1984)(*"Private Line Guidelines Order"*); 47 C.F.R. § 61.40.

¹⁰ *See id.*

¹¹ *See e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999)(*"We are also committed to ensuring that incumbent LECs are able to make their decisions to invest in, and deploy, advanced telecommunications services based on market demand and their own strategic business plans, rather than on regulatory requirements. We intend to take deregulatory steps towards meeting this goal"*). *Id.* at ¶ 3.

deregulatory national policy framework” for telecommunications so as to make advanced telecommunications and information technologies and services available to all Americans.¹² Specifically, Section 706 of the Act mandates that the Commission take actions to promote the availability of advanced services. Therefore, applying artificial and archaic regulations that were never crafted with advanced services in mind undermines these Commission policies and is inconsistent with the aim of Section 706 of the Act.

Reading the guidelines as imposing regulatory requirements on advanced services providers is also inconsistent with the deregulatory policy considerations underlying the Commission’s decision to adopt the guidelines. A year after adopting the guidelines, the Commission explained,

The private line rate structure guidelines seek to codify general standards for private line tariffs in order to simplify the tariff review process for all concerned, to encourage competition and to provide reasonable flexibility for carriers ... we anticipated that by requiring a consistent, building block tariff the guidelines could greatly reduce the problems and burdens of regulatory review by shifting much of the discretion to assemble services to customers, *i.e.*, the marketplace. In the face of rapidly changing market conditions, the guidelines seek to establish a principled basis for review which facilitates rapid effectiveness of new service offerings and options, and gives clearer guidance so that AT&T will better understand the type of filings which will not require investigation or a finding of unlawfulness.¹³

In light of this history, MCI’s claim that Verizon’s Metro Fractional UNI Port service offering is subject to the “requirements” of Section 61.40 is clearly unfounded.

Moreover, as a practical matter, mandating the offering of stand-alone 128 and 256 kbps access lines would undermine the provision of advanced services by Verizon. Promotion of service innovation depends on allowing carriers the flexibility to structure their offerings in

¹² *See id.* at ¶ 13.

¹³ *See Investigation of Access and Divestiture Related Tariffs; AT&T Communications Private Line Services*, Memorandum Opinion and Order, 57 Rad. Reg. 2d (P & F) 1511 (1985).

reasonable ways to limit costs and encourage the provision of new services to customers. Requiring unbundling will discourage new offerings because there is insufficient demand to justify restructuring the service just to please one competitor, particularly since that competitor has other viable alternatives in the market to construct a competitive service. Unnecessary regulatory intrusion reduces innovation and interferes with market forces. Therefore, Section 61.40 should not be applied to Verizon's advanced services, such as the Metro Fractional UNI Port service.

What is more, the language of the rule demonstrates that it is inapplicable to the current special access offering. Section 61.40(a) states: "The carrier's burden of cost justification can be reduced when its private line rate structures comply with the following five guidelines." MCI has not even alleged that there is any cost justification problem with the instant offering. Indeed, the Commission has concluded that no cost justification is required for this offering.¹⁴ Therefore, the rule is simply inapplicable to this offering.

Even if Section 61.40 were viewed to be applicable, Verizon's tariff does not violate it. First, MCI has failed to demonstrate an inconsistency between rate structures for comparable services. Other than in New York, Verizon East has no other fractional T-1 frame relay services where it offers a fractional T-1 link separately. Rather, such separate provisioning only exists for full T-1 lines, or for simple two-wire pairs operating at 56 Kbps. Second, Transmittal 386 clearly takes into account subsection (a)(3)'s requirement that rate structures reflect market demand, pricing convenience of the carrier and customer and cost characteristics. As demonstrated above, not providing the access line portion of the service separately is reasonable given the current level of demand, is supported by pricing efficiency, is justified by relevant

¹⁴ See *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 39 (1999).

costs, and therefore, does not violate of Section 61.40(a)(3). Furthermore, contrary to MCI's claim, there is no unreasonable customer restriction in violation of Section 61.40(a)(3) because any customer may purchase the service as provided in the tariff. Also, the service does not undermine competition because, as demonstrated previously, there are adequate alternatives in the marketplace available to competitors.¹⁵ Third, Section 61.40(b) permits a carrier to justify a tariff as reasonable even if a tariff does not comply specifically with each of the guideline.¹⁶ As demonstrated above, Verizon has established that the service provided is reasonable.

In any event, Verizon is planning to offer options for unbundled 128 and 256 kbps frame relay ports in the near future, as soon as the systems work can be completed. This short time period is necessary so that information technology work can be done to ensure that billing and

¹⁵ See *AT&T Communications Revisions to Tariff FCC No. 9; Financial Communications Arrangement*, Order, 5 FCC Rcd 711 (1990)(denying NYNEX's petition to reject, suspend, or investigate AT&T's Tariff No. 9). NYNEX claimed that AT&T unlawfully bundled rate elements in violation of Section 61.40. *Id.* AT&T replied that its tariff did not violate Section 61.40 because the private line guidelines are merely regulatory review tools, not "rigid, formal requirements" and, in any event, NYNEX could obtain alternative elements for providing the same service from AT&T, LECs or other suppliers. *Id.*

¹⁶ As the Commission has stated:

The private line guidelines were designed for generic tariffs and accordingly are not likely to be useful in evaluating custom offerings. Even when those guidelines have been used for the intended purpose of evaluating generic private line tariffs, the Commission has the discretion to apply the private line guidelines flexibly in light of the facts of a particular proposal. They are, after all, guidelines rather than prescribed requirements. The guidelines themselves make this explicit, stating that "the carrier's burden of cost justification can be reduced when its private line rate structures comply with the following five guidelines." Failure to conform to the guidelines does not render a tariff unlawful, since the rules permit a carrier to justify its departure from the guidelines and to establish that the tariff is just, reasonable, and nondiscriminatory. Noncompliance may provide a flag alerting the Commission to the possibility of unlawful discrimination. However, the guidelines do not, standing alone, prescribe independent substantive standards that tariffs must meet to be lawful.

AT&T Communications Revisions to Tariff FCC No. 12, Memorandum Opinion and Order on Remand, 6 FCC Rcd 7039, at ¶ 76 (1991)(internal citations omitted).

the service order processing systems can accommodate the change. This is in line with Verizon's filings in the last year to unbundle frame relay service ports from the port-plus-access line structure that previously existed in the Verizon East states (South)¹⁷. In Transmittal No. 386, Verizon initially is rolling out the service as a bundled port plus access line, because experience shows that this is the option with the greatest potential demand. The next release period for updates to Verizon's billing and service ordering systems is scheduled for April, 2004. Accordingly, Verizon plans to include in those updates the offering of unbundled frame relay ports for 128 and 256 kbps service. This will allow Verizon to file tariffs for unbundled ports in early May, 2004. With this filing, Verizon will have the same rate structure for 128 and 256 kbps frame relay service – port-only or port-plus-access line – that it has for other frame relay services.

III. TRANSMITTAL 386 IS NOT PATENTLY UNLAWFUL ON ITS FACE AND THEREFORE CANNOT BE LAWFULLY REJECTED.

Even if there were some question as to the reasonableness of Metro Fractional UNI Port service, MCI has failed to demonstrate that there is a clear rule or statutory provision that has been patently violated on the face of Transmittal 386. Questions about the reasonableness of a tariff are ordinarily a question of fact that can only be decided through an investigation.¹⁸ Even the Private Line Guidelines are only guidelines and are not hard and fast rules.¹⁹ Therefore, MCI

¹⁷ Transmittal No. 360, filed on September 17, 2003.

¹⁸ *See Investigation of Access and Divestiture Related Tariffs; AT&T Communications Private Line Services*, Memorandum Opinion and Order, 57 Rad. Reg. 2d (P & F) 1511 (1985) (“The Commission can also reject tariffs which are unlawful on their face or in violation of a Commission rule or order, but this remedy is generally not available where a hearing is necessary to resolve factual issues such as the reasonableness of particular rates.”).

¹⁹ 47 C.F.R. § 61.40(b).

has failed to demonstrate that Transmittal 386 is patently defective on its face, and the FCC cannot reject the tariff filing outright.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny MCI's Petition to Reject, or in the Alternative, Suspend and Investigate.

Respectfully submitted,

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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.